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RULE 22.

All applications for rehearing shall be upon petition, printed or typewritten, upon paper, and in manner prescribed for transcripts in paragraphs one and two of Rule 27, presented within twenty days after the judgment or order made by the Court shall be placed on file, and no oral argument will be heard thereon. With the petition the applicant shall file three printed or typewritten copies thereof, for the use of the Justices of the Court.

but only one such order shall be made by the Court, or a Justice thereof, in any case, nor shall such extension in any case exceed thirty days: *Provided*, That the time during which the Trial Court, or Judge thereof, may hold a bill of exceptions, or statement, prior to the settlement and filing thereof; and the time during which the attorney for the respondent may retain the Transcript on appeal before certifying, or refusing to certify the same, shall be excluded in computing the time, either under this rule, or under Paragraph 8 of Rule 27, within which the Transcript on appeal shall be filed.

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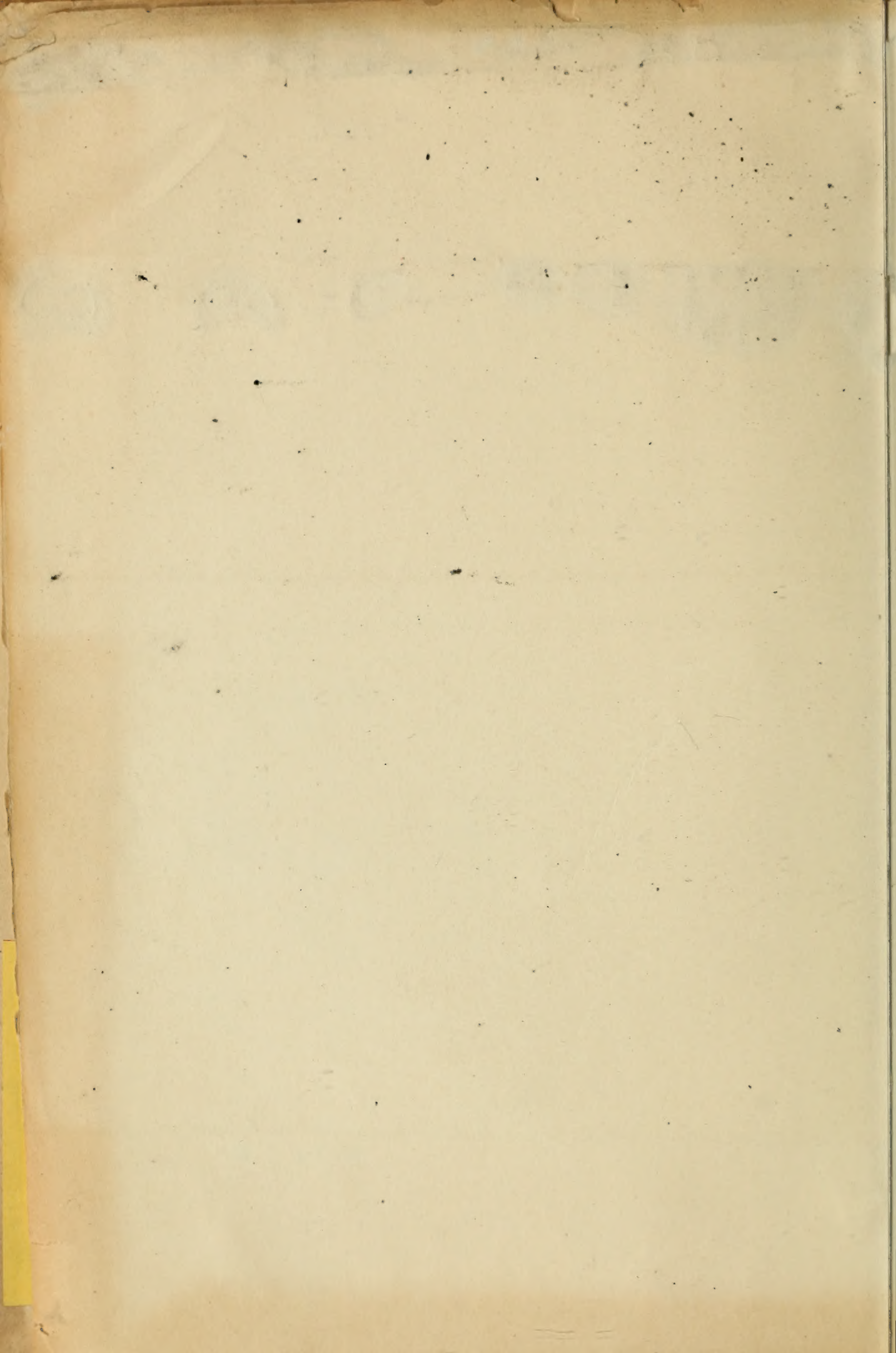
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RULE 13.

PARAGRAPH 1. *Extension of Time to File Transcript.*—The time limited in which a Transcript must be served and filed, as set forth in Paragraph 8 of Rule 27, may be extended by an order of the Court, or a Justice thereof, upon good cause shown by affidavit, or by stipulation of the parties filed with the Clerk, but only one such order shall be made by the Court, or a Justice thereof, in any case, nor shall such extension in any case exceed thirty days: *Provided*, That the time during which the Trial Court, or Judge thereof, may hold a bill of exceptions, or statement, prior to the settlement and filing thereof; and the time during which the attorney for the respondent may retain the Transcript on appeal before certifying, or refusing to certify the same, shall be excluded in computing the time, either under this rule, or under Paragraph 8 of Rule 27, within which the Transcript on appeal shall be filed.



IDAHO REPORTS

VOL. 2

REPORTS OF CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE TERRITORY OF
IDAHO AND THE SUPREME COURT
OF THE STATE OF IDAHO

REPORTED BY THE

EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

CONTAINING THE CASES DECIDED AT THE

SEPTEMBER TERMS . 1881, 1882	SEPTEMBER TERM . . . 1891
JANUARY TERMS . . 1884-1890	JANUARY TERM . . . 1892
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ST. PAUL, MINN.

WEST PUBLISHING CO.

1893

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PUBLISHERS' PREFACE.

This volume is prepared under authority of an Act of the Idaho Legislature, (Laws 1893, p. 69,) and published with the approval of the Supreme Court. Under this act the State has secured the full benefit of the unusual facilities of the publishers of the National Reporter System for accurate reporting and economical publication. The cases herein contained were all originally reported by the experienced editors of the Pacific Reporter, and published in that series with the decisions of the Supreme Courts of eleven other States and Territories. The headnotes have been carefully revised, abstracts of briefs of counsel have been added, with supplementary statements of facts where necessary; and the reports have all been submitted in proof to the Judges of the Supreme Court, and all corrections or changes which they have requested have been duly made. Thus the editorial work in this volume has been done by professional editors trained in the special business of reporting, and with the supervision of the Supreme Court, without any cost whatever to the State.

By using the compact typography of the National Reporter System we are enabled to put into a single volume what would easily make three volumes in the ordinary State Report style. The present volume contains 225 cases, some of them of unusual length; while the average volume of State or Territorial Reports in the West contains but from 50 to 100 cases. Again, since a large part of the expense of composition has been saved,—much of the type having been already set for the Pacific Reporter,—we are enabled to supply the State and citizens with such copies as they need at a price which would be far below the cost under ordinary circumstances.

Wishing to make the volume a complete repository of everything that might be looked for in it, the publishers have added numerous special features. Besides the customary tables of cases reported and cited, a special table is given of Idaho cases overruled, reversed, affirmed, etc., and in the index a full table of stat-

utes cited and construed. The volume contains lists of the Judges and Clerks of the State and Territorial Supreme Courts during the period covered by this volume; tables showing the present constitution of the Court; a list of the members of the Supreme Court Bar in active practice, January 1, 1893; the Act of Congress admitting Idaho to statehood; the State Constitution; and the Supreme Court Rules now in force. By numbering the columns instead of the pages throughout the text greater exactness of citation is made possible, with increased convenience of reference.

We desire to acknowledge our obligations to the Judges of the Supreme Court for their hearty co-operation in this work, and we wish to make particular recognition of the friendly assistance of Hon. Sol. Hasbrouck, Clerk of the Supreme Court, to whom we are indebted for most of the miscellaneous matter given in the preliminary pages of the volume.

WEST PUBLISHING CO.

ST. PAUL, AUGUST, 1893.

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- AINSLIE v. IDAHO WORLD PRINTING CO., 1 Idaho, 641. Followed in Black v. City of Lewiston, 2 Idaho, 259, 13 Pac. Rep. 82; Purdum v. Taylor, 2 Idaho, 154, 9 Pac. Rep. 608.
- ATKINS v. HENDREE, 1 Idaho, 95. Followed in Stem-Winder Min. Co. v. Emma & Last Chance Consolidated Min. Co., 2 Idaho, 428, 21 Pac. Rep. 1042.
- BLACK v. CITY OF LEWISTON, 2 Idaho, 254, 13 Pac. Rep. 80. Distinguished in Snyder v. Viola Mining & Smelting Co., 2 Idaho, 773, 26 Pac. Rep. 128.
- BRADBURY v. IDAHO & O. LAND IMP. CO., 2 Idaho, 221, 10 Pac. Rep. 620. Followed in Schultz v. Keeler, 2 Idaho, 306, 13 Pac. Rep. 481; United States v. Alexander, 2 Idaho, 357, 17 Pac. Rep. 747.
- CLARK v. LOWENBERG, 1 Idaho, 654. Distinguished in Salt Lake Brewing Co. v. Gillman, 2 Idaho, 182, 10 Pac. Rep. 33.
- CUNNINGHAM v. MOODY, 2 Idaho, 862, 28 Pac. Rep. 395. Followed in Guheen v. Curtis, 2 Idaho, 1153, 31 Pac. Rep. 806.
- EDDY v. VAN NESS, 2 Idaho, 93, 6 Pac. Rep. 115. Approved in Motherwell v. Taylor, 2 Idaho, 139, 9 Pac. Rep. 417. Followed in Cronin v. Bear Creek Gold Min. Co., 2 Idaho, 1147, 32 Pac. Rep. 53.
- EMERY v. LANGLEY, 1 Idaho, 694. Followed in Motherwell v. Taylor, 2 Idaho, 140, 9 Pac. Rep. 418.
- FOX v. WEST, 1 Idaho, 782. Approved in Guthrie v. Phelan, 2 Idaho, 91, 6 Pac. Rep. 109. Followed in Berry v. Alturas County, 2 Idaho, 274, 13 Pac. Rep. 234; Purdum v. Taylor, 2 Idaho, 154, 9 Pac. Rep. 608.
- GAMBLE v. DUNWELL, 1 Idaho, 268. Followed in Washington & I. R. Co. v. Osborne, 2 Idaho, 530, 21 Pac. Rep. 422.
- GOODMAN v. MINEAR MINING & MILLING CO., 1 Idaho, 131. Followed in Toulouse v. Burkett, 2 Idaho, 267, 13 Pac. Rep. 172.
- GRAHAM v. LINEHAN, 1 Idaho, 780. Followed in Purdum v. Taylor, 2 Idaho, 154, 9 Pac. Rep. 608.
- GRAY v. CEDERHOLM, 2 Idaho, 41, 3 Pac. Rep. 12. Followed in Durant v. Comegys, 2 Idaho, 811, 26 Pac. Rep. 756.
- GUTHRIE v. FISHER, 2 Idaho, 101, 6 Pac. Rep. 111. Followed in Berry v. Alturas County, 2 Idaho, 274, 13 Pac. Rep. 234; Purdum v. Taylor, 2 Idaho, 154, 9 Pac. Rep. 608.
- GUTHRIE v. PHELAN, 2 Idaho, 89, 6 Pac. Rep. 107. Followed in Berry v. Alturas County, 2 Idaho, 274, 13 Pac. Rep. 234; Purdum v. Taylor, 2 Idaho, 154, 9 Pac. Rep. 608; United States v. Alexander, 2 Idaho, 357, 17 Pac. Rep. 747.
- HAMPTON v. DILLEY, 2 Idaho, 1157, 31 Pac. Rep. 807. Distinguished in Ballentine v. Willey, 2 Idaho, 1218, 31 Pac. Rep. 997.
- HAZARD v. COLE, 1 Idaho, 276. Followed in Montandon v. Walker, 2 Idaho, 153, 9 Pac. Rep. 609; Toulouse v. Burkett, 2 Idaho, 267, 13 Pac. Rep. 172.
- HILLARD v. SHOSHONE CO., 2 Idaho, 843, 27 Pac. Rep. 678. Followed in Cunningham v. Moody, 2 Idaho, 863, 28 Pac. Rep. 396.
- HUSTON v. HEED, 1 Idaho, 404. Followed in United States v. Kuntze, 2 Idaho, 451, 21 Pac. Rep. 408.
- INNIS v. BOLTON, 2 Idaho, 407, 17 Pac. Rep. 264. Followed in Wooley v. Watkins, 2 Idaho, 566, 22 Pac. Rep. 106.

- KIRK v. BARTHOLOMEW, 2 Idaho, 1087, 29 Pac. Rep. 40. Approved in Geertson v. Barrack, 2 Idaho, 1068, 29 Pac. Rep. 43.
- LOWE v. TURNER, 1 Idaho, 107. Followed in Toulouse v. Burkett, 2 Idaho, 267, 13 Pac. Rep. 172.
- LUFKINS v. COLLINS, 2 Idaho, 135, 7 Pac. Rep. 96. Followed in Schultz v. Keeler, 2 Idaho, 310, 13 Pac. Rep. 483.
- MALAD VALLEY IRRIGATION CO. v. CAMPBELL, 2 Idaho, 378, 18 Pac. Rep. 52. Followed in Drake v. Earhart, 2 Idaho, 724, 23 Pac. Rep. 543.
- MATHISON v. LELAND, 1 Idaho, 712. Approved in Motherwell v. Taylor, 2 Idaho, 139, 9 Pac. Rep. 417. Followed in Cronin v. Bear Creek Gold Min. Co., 2 Idaho, 1147, 32 Pac. Rep. 53; Eddy v. Van Ness, 2 Idaho, 94, 6 Pac. Rep. 115.
- MILLER v. PINE MIN. CO., 2 Idaho, 1206, 31 Pac. Rep. 803. Followed in Swanholm v. Reeser, 2 Idaho, 1169, 31 Pac. Rep. 804.
- MOOTRY v. HAWLEY, 1 Idaho, 543. Followed in Black v. City of Lewiston, 2 Idaho, 259, 13 Pac. Rep. 82.
- PALMER v. UTAH & N. RY. CO., 2 Idaho, 350, 13 Pac. Rep. 429. Followed in Burke v. McDonald, 2 Idaho, 1028, 29 Pac. Rep. 100.
- PEOPLE v. AH CHOY, 1 Idaho, 317. Disapproved in People v. O'Callaghan, 2 Idaho, 145, 9 Pac. Rep. 415.
- PEOPLE v. BERNARD, 2 Idaho, 178, 10 Pac. Rep. 30. Followed in Hopkins v. Utah Northern Ry. Co., 2 Idaho, 281, 13 Pac. Rep. 345.
- PEOPLE v. BILES, 2 Idaho, 103, 6 Pac. Rep. 121. Followed in People v. O'Callaghan, 2 Idaho, 147, 9 Pac. Rep. 417.
- PEOPLE v. BUCHANAN, 1 Idaho, 688. Followed in Territory v. Bowen, 2 Idaho, 609, 23 Pac. Rep. 82.
- PEOPLE v. COZAD, 1 Idaho, 167. Followed in Territory v. Guthrie, 2 Idaho, 405, 17 Pac. Rep. 42.
- PEOPLE v. HUNT, 1 Idaho, 433. Approved in Guthrie v. Phelan, 2 Idaho, 91, 6 Pac. Rep. 109.
- PEOPLE v. HUNT, 1 Idaho, 371. Distinguished in Salt Lake Brewing Co. v. Gillman, 2 Idaho, 182, 10 Pac. Rep. 33.
- PEOPLE v. NASH, 1 Idaho, 206. Followed in People v. Stapleton, 2 Idaho, 52, 3 Pac. Rep. 8.
- PEOPLE v. O'CALLAGHAN, 2 Idaho, 143, 9 Pac. Rep. 414. Approved in Territory v. Evans, 2 Idaho, 395, 17 Pac. Rep. 140. Followed in Territory v. Guthrie, 2 Idaho, 405, 17 Pac. Rep. 42.
- PEOPLE v. O'CONNER, 1 Idaho, 759. Followed in Washington & I. R. Co. v. Osborne, 2 Idaho, 530, 21 Pac. Rep. 422.
- PIERCE v. LANGDON, 2 Idaho, 878, 28 Pac. Rep. 401. Followed in McConnell v. Langdon, 2 Idaho, 898, 28 Pac. Rep. 405.
- PURDUM v. TAYLOR, 2 Idaho, 153, 9 Pac. Rep. 607. Followed in Berry v. Alturas County, 2 Idaho, 274, 13 Pac. Rep. 234.
- PURDY v. STEEL, 1 Idaho, 216. Followed in Washington & I. R. Co. v. Osborne, 2 Idaho, 530, 21 Pac. Rep. 422.
- ROSENTHAL v. IVES, 2 Idaho, 244, 12 Pac. Rep. 904. Followed in Bohanon v. Howe, 2 Idaho, 420, 17 Pac. Rep. 584; Burke v. McDonald, 2 Idaho, 651, 33 Pac. Rep. 51.
- RUPERT v. BOARD OF COM'RS OF ALTURAS COUNTY, 2 Idaho, 21, 2 Pac. Rep. 718. Distinguished in Nez Perce County v. Latah County, 2 Idaho, 1134, 31 Pac. Rep. 800. Followed in Van Camp v. Board of Com'rs of Custer County, 2 Idaho, 36, 2 Pac. Rep. 722.
- SALT LAKE BREWING CO. v. GILLMAN, 2 Idaho, 180, 10 Pac. Rep. 32. Followed in Tootle v. French, 2 Idaho, 747, 25 Pac. Rep. 1092.
- SCHULTZ v. KEELER, 2 Idaho, 305, 13 Pac. Rep. 481. Approved in Schultz v. Keeler, 2 Idaho, 535, 21 Pac. Rep. 419. Followed in United States v. Alexander, 2 Idaho, 357, 17 Pac. Rep. 747.
- SETTLE v. WINTERS, 2 Idaho, 199, 10 Pac. Rep. 216. Approved in Durant v. Comegys, 2 Idaho, 945, 28 Pac. Rep. 428.
- SHISSLER v. CROOKS, 1 Idaho, 369. Distinguished in Salt Lake Brewing Co. v. Gillman, 2 Idaho, 182, 10 Pac. Rep. 33.
- STEMWINDER MIN. CO. v. EMMA & LAST CHANCE CONSOLIDATED MIN. CO., 2 Idaho, 421, 21 Pac. Rep. 1040. Ap-

proved in *Burke v. McDonald*, 2 Idaho, 649, 33 Pac. Rep. 50.

UNITED STATES v. CAMP, 2 Idaho, 215, 10 Pac. Rep. 226. Followed in *Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 281, 13 Pac. Rep. 345.

UNITED STATES v. GILSON, 1 Idaho, 364. Followed in *Rupert v. Board of Com'rs of Alturas County*, 2 Idaho, 22, 2 Pac. Rep. 719.

UNITED STATES v. KUNTZE, 2 Idaho, 446, 21 Pac. Rep. 407. Approved in *United States v. Langford*, 2 Idaho, 521, 21 Pac. Rep. 409.

UNITED STATES v. MAYS, 1 Idaho, 763. Followed in *United States v. Hailey*, 2 Idaho, 29, 3 Pac. Rep. 264.

WYATT v. WYATT, 2 Idaho, 219, 10 Pac. Rep. 228. Followed in *Schultz v. Keeler*, 2 Idaho, 307, 13 Pac. Rep. 482.

*

TERRITORIAL

JUSTICES OF THE SUPREME COURT

HOLDING OFFICE DURING THE PERIOD COVERED BY THIS VOLUME.

NAME.	Chief Justices.	WHEN APPOINTED.
JOHN T. MORGAN,	- - - - -	June 10, 1879.
JAMES B. HAYS, ¹	- - - - -	July 1, 1885.
H. W. WIER, ¹	- - - - -	1888.
JAMES H. BEATTY,	- - - - -	1889.

	Associate Justices.	
HENRY E. PRICKETT, ¹	- - - - -	January 19, 1876.
NORMAN BUCK,	- - - - -	January 27, 1880.
CASE BRODERICK,	- - - - -	March 4, 1884.
C. H. BERRY,	- - - - -	1888.
JOHN LEE LOGAN, ¹	- - - - -	1888.
WILLIS SWEET,	- - - - -	1889.

JUSTICES OF THE SUPREME COURT

SINCE ADMISSION AS A STATE.

ISAAC N. SULLIVAN, ²	- - - - -	Elected October 1, 1890.
JOSEPH W. HUSTON,	- - - - -	Elected October 1, 1890.
JOHN T. MORGAN,	- - - - -	Elected October 1, 1890.

¹Deceased.

²Re-elected November 8, 1892.

OFFICERS OF COURT

SERVING SINCE PUBLICATION OF VOLUME I,
IDAHO REPORTS.

Clerks.

NAME.				WHEN APPOINTED.
ALONZO L. RICHARDSON,	-	-	-	March 26, 1872.
SAMUEL H. HAYS,	-	-	-	January, 1889.
SOL HASBROUCK, ³	-	-	-	March 10, 1890.

Marshals.

FRED T. DUBOIS,	-	-	-	September 4, 1882.
EZRA BAIRD,	-	-	-	1887.

U. S. Attorneys.

WALLACE R. WHITE,	-	-	-	May 20, 1881.
JAMES H. HAWLEY,	-	-	-	1886.

State Officers: Attorney Generals.

GEORGE H. ROBERTS,	-	-	Elected October 1, 1890.
GEORGE M. PARSONS,	-	-	Elected November 8, 1892.

³ Reappointed by State Supreme Court, February 9, 1891.

ATTORNEYS AND COUNSELORS

ADMITTED SINCE THE PUBLICATION OF VOLUME I,
IDAHO REPORTS.

NAME.					DATE OF ADMISSION.
ANGEL, TEXAS,	-	-	-	-	January 12, 1885.
ALLEN, ALBERT, ¹	-	-	-	-	January 10, 1887.
AYERS, JOHN W.,	-	-	-	-	February 19, 1891.
ATHEY, M. C.,	-	-	-	-	November 11, 1891.
ASHTON, JAS. M., ¹	-	-	-	-	December 14, 1892.
AILSHIE, JAMES T.,	-	-	-	-	March 20, 1893.
BEATTY, JAMES H.,	-	-	-	-	January 23, 1884.
BREARLEY, E. C., ²	-	-	-	-	February 2, 1885.
BENNETT, H. M.,	-	-	-	-	January 11, 1886.
BROWN, ARTHUR, ¹	-	-	-	-	February 4, 1886.
BATTEN, ORLANDO B., ¹	-	-	-	-	February 24, 1886.
BRUNER, P. M.,	-	-	-	-	January 9, 1888.
BIERBOWER, VIC.,	-	-	-	-	January 11, 1888.
BRIZEE, GEORGE W.,	-	-	-	-	January 17, 1888.
BADGER, J. W.,	-	-	-	-	February 9, 1891.
BORAH, W. E.,	-	-	-	-	February 16, 1891.
BEALE, CHAS. W.,	-	-	-	-	September 7, 1891.
BLICKENSDERFER, E. P.,	-	-	-	-	November 18, 1891.
BORDEN, A. J.,	-	-	-	-	November 20, 1891.
BURGAN, FRED L.,	-	-	-	-	December 7, 1891.
BOWER, C. D., ¹	-	-	-	-	January 19, 1892.
BABB, JAMES E.,	-	-	-	-	October 10, 1892.
BAGLEY, JOHN A.,	-	-	-	-	October 10, 1892.
COSTELLO, FRANK, ¹	-	-	-	-	January 21, 1885.
CALDWELL, A. S., ¹	-	-	-	-	February 7, 1885.
CLAGGETT, WM. M., ¹	-	-	-	-	January 10, 1887.
COBB, CHARLES, ¹	-	-	-	-	January 24, 1887.
CURTIS, EDWARD L., ²	-	-	-	-	January 18, 1888.
CONNER, B. F.,	-	-	-	-	March 24, 1891.

¹ Out of state.

² Deceased.

NAME.					DATE OF ADMISSION.
DUNTON, HERBERT W.,	-	-	-	-	February 3, 1890.
DANIELS, J. W.,	-	-	-	-	February 9, 1891.
DIETRICH, F. S.,	-	-	-	-	January 19, 1892.
DENNING, STEWART S.,	-	-	-	-	October 10, 1892.
EDEN, J. W.,	-	-	-	-	January 27, 1892.
ESTABROOK, FRANK,	-	-	-	-	November 14, 1892.
FUNKHOUSER, A. M., ¹	-	-	-	-	February 26, 1886.
FREUND, J. A. C.,	-	-	-	-	March 17, 1891.
FORNEY, J. H.,	-	-	-	-	April 16, 1891.
FRASER, ALFRED A.,	-	-	-	-	November 21, 1891.
FRANCIS, WM. H., ¹	-	-	-	-	November 29, 1892.
FELTHAM, LOT L.,	-	-	-	-	February 27, 1893.
GALBRAITH, THOS. J., ¹	-	-	-	-	September 4, 1882.
GOSSMAN, GEORGE,	-	-	-	-	January 12, 1885.
GORMAN, GEO. H., ¹	-	-	-	-	September 7, 1891.
GRAY, GEORGE E.,	-	-	-	-	November 14, 1891.
GREEN, A. J.,	-	-	-	-	March 22, 1892.
HARRIS, J. H., ¹	-	-	-	-	September 4, 1882.
HEYBURN, WELDON B.,	-	-	-	-	January 10, 1887.
HAGAN, ALBERT,	-	-	-	-	January 30, 1888.
HAYS, SAMUEL H.,	-	-	-	-	March 18, 1889.
HOWIE, W. C.,	-	-	-	-	February 24, 1891.
HALL, W. C., ¹	-	-	-	-	February 23, 1891.
HOWE, JONATHAN M.,	-	-	-	-	April 16, 1891.
HAMPTON, S. H.,	-	-	-	-	January 19, 1892.
HYDE, S. C., ¹	-	-	-	-	January 29, 1892.
HEITMAN, CHARLES LEE,	-	-	-	-	January 20, 1893.
JOHNSON, E. P., ¹	-	-	-	-	January 23, 1884.
JOHNSON, HENRY Z.,	-	-	-	-	January 14, 1889.
JONES, T. J.,	-	-	-	-	February 16, 1891.
JACKSON, O. E.,	-	-	-	-	November 20, 1891.
JONES, WALTER A.,	-	-	-	-	March 21, 1892.
JOHNSON, RICHARD HARVEY,	-	-	-	-	November 29, 1892.
KINGSBURY, S. B.,	-	-	-	-	January 23, 1884.
KIRKPATRICK, M.,	-	-	-	-	January 23, 1884.
KING, GEORGE M., ¹	-	-	-	-	January 25, 1884.
KIMBALL, JAMES N., ¹	-	-	-	-	January 21, 1885.
KING, CHARLES D., ¹	-	-	-	-	January 15, 1887.
KING, HAWLEY S., ¹	-	-	-	-	January 15, 1887.

¹Out of state.

NAME.	DATE OF ADMISSION.
LAMB, JOHN M., - - - -	February 16, 1884.
LEMON, EDWARD BRUCE, - - - -	January 25, 1886.
LOCKWOOD, D. C., - - - -	November 17, 1891.
LONGHARY, L., - - - -	March 21, 1892.
MOODY, SILAS W., - - - -	February 6, 1885.
McKERN, W. T., - - - -	February 19, 1885.
MONTANDON, A. F., - - - -	January 12, 1886.
MAYHEW, A. E., - - - -	January 10, 1887.
McGOWMAN, ANDREW J., ² - - - -	January 16, 1890.
MORRISON, JOHN T., - - - -	February 16, 1891.
MUSGROVE, MARK W., - - - -	March 17, 1891.
MITCHELL, D. C., - - - -	April 13, 1891.
MINOR, WIRT, ¹ - - - -	November 10, 1891.
McDOUGALL, D. C., - - - -	November 19, 1891.
McELROY, H. E., - - - -	November 20, 1891.
MILLER, D. T., - - - -	December 8, 1891.
McFARLAND, ROBERT E., - - - -	January 14, 1892.
MILLER, JOSEPH B., - - - -	January 19, 1892.
MARTIN, FRANK, - - - -	November 26, 1892.
McCONNELL, BENJAMIN F., - - - -	March 22, 1893.
McNAMEE, CLAY, - - - -	March 22, 1893.
MORGAN, RALPH T., - - - -	May 2, 1893.
NEGLEY, JAMES S., Jr., ² - - - -	February 6, 1888.
O'NEIL, CHARLES W., - - - -	January 10, 1887.
O'NEILL, EUGENE, - - - -	April 15, 1891.
ORR, SAMPLE, - - - -	September 7, 1891.
ORR, SAMPLE H., - - - -	September 7, 1891.
PRIDE, D. P. B., - - - -	January 26, 1884.
PRATHER, L. H., - - - -	February 9, 1884.
PRICE, LYTTLETON, - - - -	January 14, 1884.
PARKER, J. W., ¹ - - - -	February 5, 1887.
PINKHAM, A. J., - - - -	January 28, 1888.
PICKETT, G. G., - - - -	February 9, 1891.
POE, JAMES W., - - - -	April 16, 1891.
PARSONS, GEORGE M., - - - -	October 11, 1892.
PUCKETT, WM. H., - - - -	February 28, 1893.
QUARLES, RALPH P., - - - -	September 7, 1891.
ROBERTSON, GEORGE B., ¹ - - - -	September 11, 1882.
ROBERTS, GEORGE H., - - - -	January 25, 1886.

¹Out of state.²Deceased.

NAME.	DATE OF ADMISSION.
RAWLINS, JOSEPH L., ¹ - - - -	January 22, 1889.
RICHARDS, J. H., - - - -	February 9, 1891.
RICE, JOHN C., - - - -	February 16, 1891.
RIED, JAMES W., - - - -	April 17, 1891.
REEVES, W. T., - - - -	November 27, 1891.
SMITH, H. W., ¹ - - - -	January 23, 1884.
STULL, HOMER, ² - - - -	February 1, 1884.
STEVENSON, CHARLES C. - - - -	January 16, 1886.
SPENCE, ROBERT S., - - - -	January 19, 1887.
SMITH, RANSFORD, ¹ - - - -	January 23, 1888.
SAVIDGE, W. H., - - - -	January 28, 1888.
SULLIVAN, ISAAC N., - - - -	January 22, 1889.
SWEET, WILLIS, - - - -	January 30, 1889.
STEWART, GEORGE H., - - - -	February 9, 1891.
STEWART, T. M., - - - -	February 28, 1891.
STOLL, WILLIAM T., ¹ - - - -	April 13, 1891.
STONE, C. F., - - - -	November 19, 1891.
SMITH, FRANK J., - - - -	December 13, 1892.
TILLINGHAST, PHILIP, - - - -	January 27, 1890.
TORRENCE, JOHN A., ¹ - - - -	February 13, 1891.
TIPTON, S. L., - - - -	September 8, 1891.
TERRELL, THOMAS F., - - - -	November 29, 1892.
VINEYARD, LYCURGUS, - - - -	January 23, 1884.
VARIAN, CHARLES S., - - - -	January 27, 1886.
WOOD, CHARLES A., ² - - - -	January 23, 1884.
WALSH, C. J., ¹ - - - -	January 26, 1884.
WHITEHEAD, ANDREW, ¹ - - - -	January 26, 1884.
WATERS, G. L., - - - -	January 12, 1885.
WILSON, EDGAR, - - - -	January 21, 1885.
WOODS, WM. W., - - - -	January 12, 1887.
WINSTON, PATRICK HENRY, ¹ - - - -	January 25, 1888.
WHITTIER, E. S., - - - -	February 15, 1889.
WYMAN, FRANK, - - - -	January 17, 1890.
WYMAN, HARRY C., - - - -	February 9, 1891.
WYMAN, GEORGE H., ² - - - -	March 7, 1891.
WALLACE, W. M., - - - -	January 18, 1892.
WINTERS, S. C., - - - -	January 28, 1892.
WORTHMAN, HARRY S., - - - -	December 5, 1892.
WARNER, CLARENCE A., - - - -	February 8, 1892.
WORKMAN, LOUIS E., - - - -	April 3, 1893.
WATTS, JAMES G., - - - -	April 3, 1893.

¹Out of state.²Deceased.

SUPREME COURT RULES.

[Adopted Feb. 14, 1893. Take effect May 1, 1893.]

RULE 1.

ATTORNEYS—

Who Admitted.

Testimonials Required.

Roll.

Oath.

Examination Prerequisites.

Examination, How Conducted.

PARAGRAPH 1. *Who Admitted.* No person shall be admitted to practice as an attorney or counselor in this court unless such person shall have been previously admitted in the supreme court of the United States or the highest court of a sister state or territory, or shall have passed a strict examination in open court as to his qualifications.

PARAGRAPH 2. *Testimonials Required.* Every person admitted to practice as an attorney or counselor in this court must produce satisfactory testimonials of good moral character; must be twenty-one years of age; must file with the clerk of this court satisfactory evidence that he has paid to the state treasurer the sum of twenty-five dollars for the use of the state library fund; and, if admitted upon the certificate of the highest court of another state or territory, must file with the clerk of this court an affidavit showing he is still in good standing in such court; and, in case he cannot produce his said certificate, he may be admitted upon his affidavit showing the name of the state, (or territory,) county, court, and time of such admission.

PARAGRAPH 3. *Oath and Roll.* Every person admitted to practice as an attorney and counselor of this court must sign the roll and take the following oath of office: "I, ———, do solemnly swear that I will support the constitution and laws of the United States and of this

state; that I will maintain the respect due to the courts of justice and to judicial officers; that I will be true to the court and to my client; that I will abstain from all offensive personality; and that I will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed."

PARAGRAPH 4. *Prerequisites for Examination.* Only bona fide residents of this state who intend to engage in the practice of the law as a business shall be eligible for examination as attorneys and counselors of this court, and a notice of intention to apply for admission shall so state, and must be filed with the clerk of this court previous to the day set apart for the examination. No applicant will be examined unless he shall have filed with the clerk of the court, on or before the first Saturday of the regular term at which he presents himself for examination, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such for at least four years next theretofore, stating in substance that they, and each of them, have carefully and diligently examined the applicant touching his qualifications in point of learning of the law to be admitted to practice; that it satisfactorily appeared to them, and each of them, upon examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study was prosecuted; that the applicant had during that time read certain books of law, which books shall be enumerated in the certificate; and stating any other facts tending to show the extent of the attainments of the applicant; and also that in their opinion the applicant possesses the requisite qualifications to entitle him to be admitted to practice.

PARAGRAPH 5. Examination, How Conducted. The first Saturday of every regular term of the court, or so much thereof as may be necessary, shall be set aside for the purpose of examining applicants for admission as attorneys and counselors of this court. The court shall prepare, or cause to be prepared, a series of questions embracing such subjects as the court may deem proper, and cause, upon the day before such examination, a sufficient number of such questions to be written or printed to furnish each applicant with one copy thereof. Such copies shall be deposited with the clerk of the court, who shall not communicate to the applicants, or to any other person, the substance of the questions asked, or the subjects treated, or give any information in regard thereto. At the time set for the examination each candidate for admission shall appear, and by the clerk, under direction of the court, shall be furnished with a copy of the questions so prepared, and shall then, in open court, and under the supervision of the court, and without reference to books or memoranda of any kind, and without consultation or conversation with each other or any other person, prepare written answers consecutively to the questions propounded, upon paper furnished them for that purpose. Six hours shall be allowed in which such answers may be prepared, and unless the answers are sooner prepared and placed in the hands of the clerk, no applicant will be allowed to leave the court room without permission of the court, and then only upon his promise given that he will not attempt to communicate with any one upon the subject-matter of any of the questions asked. At the end of six hours, unless all of the applicants have sooner finished, the written answers shall be surrendered to the court or the clerk, being first signed by the several applicants respectively. Thereupon, and at such time as the court may deem convenient, it shall admit such of the candidates as appear to the court to be duly qualified, satisfactory proof having been made of the good moral character of such applicants.

RULE 2.

APPEAL—When Dismissed.

Appeal, When May Be Dismissed. If the transcript of the record is not filed within the time prescribed by paragraph 3 of rule

27, the appeal or writ of error may be dismissed, on motion without notice, on the first Monday of the term during which the cause is subject to call. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party.

RULE 3.

APPEAL—What Showing Must Accompany Motion to Dismiss.

What Showing Must Accompany Motion to Dismiss. On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition; the fact and date of the filing of the notice of appeal or issuing the writ of error; the fact and date of the filing the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one.

RULE 4.

APPEARANCE—Failure of.

Appearance, Failure of. When a cause is reached on the calendar, and neither side has been submitted or is represented by counsel in court, the appeal will be dismissed. When it is so submitted or represented by counsel for the respondent or defendant in error, and not for the appellant or plaintiff in error, the judgment, order, or proceeding of the court below will be affirmed, of course without argument: provided, however, that the court may, in its discretion, examine the record and render its judgment on the merits.

RULE 5.

ARGUMENT—How Conducted.

Argument, How Conducted. No more than two counsel on a side will be heard upon the final argument, except in peculiar and important cases, upon leave of the court obtained before the argument is commenced; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant or plaintiff in error shall be entitled to open and close the argument. Each side will

be allowed the
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BRIEF—What
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PARAGRAPH 1.
In civil cases each
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title of this court
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and respondent,
county appealed
such brief, at not
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be allowed and tax
that the court may

discretion, order
that no costs shall be taxed for any brief
which does not comply with this rule, or
containing a miscitation of authorities,
unless corrected before the submission of
the case.

PARAGRAPH 2. Brief, How Printed.
Briefs shall be neatly and legibly printed,
with black ink, on white writing paper,
properly paged at the top, with a margin
on the outer edge of the page of two inches.
The printed page shall be seven inches
long and three and a half inches wide, and
the paper page shall be ten inches long

PARAGRAPH 6. Causes, when heard.—Civil causes
are entitled to be, and will be heard in the order they
appear on the calendar. There will be a peremptory
call of the calendar on the first day of the term and all
causes not then ready for hearing will be placed at the
foot of the calendar, or continued for the term.

n inches wide. Each brief shall
ed by counsel preparing it; and
fastened together in a paper or
er.

PARAGRAPH 3. Brief, When Served. The
appellant, or plaintiff in error,
served within ten days after the
transcript, and the respondent,
ant in error, has ten days after
ce in which to serve his brief up-
posite party.

PARAGRAPH 4. Brief, Copies Filed, When.
time of the calling of a cause
ent both parties shall file with
t least five copies of their briefs
ices of the court, the clerk, and
er; and when the cause is called
hall furnish a copy thereof to
justices.

PARAGRAPH 5. Brief, Submission of Cause
may be submitted on either
es, on printed briefs actually
time. But the court will or-
gument, on both sides, of all
ring to require it.

RULE 7.

3—

ide Up.

1 Causes May be Heard Out
er.

Causes Put on Calendar
Term.

Terms.

ms.

When Heard.

it on for Dismissal.

auses.

PARAGRAPH 1. Calendar, How Made Up.

ar of each term shall consist
any of those cases in which the transcript
shall have been filed, on or before the day
preceding the first day of the term, unless,
upon written consent of the parties, or
for good cause shown, it shall be other-
wise ordered by the court. The clerk
must number and enter causes upon the
calendar in the order of the date of filing
the transcript, statement on appeal, ap-
plication for writ of error, or application
for a writ in a special proceeding, and
number them consecutively, and such
number shall not be changed, except by
order of the court, and, if changed, the
calendar must show the original number.

PARAGRAPH 5. Examination, How Conducted. The first Saturday of every regular term of the court, or so much thereof as may be necessary, shall be set aside for the purpose of examining applicants for admission as attorneys and counselors of this court. The court shall prepare, or cause to be prepared, a series of questions embracing such subjects as the court may deem proper, and cause, upon the day before such examination, a sufficient number of such questions to be written or printed to furnish each applicant with one copy thereof. Such copies shall be deposited with the clerk of the court, who shall not communicate to the applicants, or to any other person, the substance of the questions asked, or the subjects treated, or give any information in regard thereto. At the time set for the examination each candidate for admission shall appear, and by the clerk, under direction of the court, shall be furnished with a copy of the questions so prepared, and shall then, in open court, and under the supervision of the court, and without reference to books or memoranda of any kind, and without consultation or conversation with each other or any other person, prepare written answers consecutively to the questions propounded, upon paper furnished them for that purpose. Six hours shall be allowed in which such answers may be prepared, and unless the answers are sooner prepared and placed in the hands of the clerk, no applicant will be allowed to leave the court room without permission of the court, and then only upon his promise given that he will not attempt to communicate with any one upon the subject-matter of any of the questions asked. At the end of six hours, unless all of the applicants have sooner finished, the written answers shall be surrendered to the court or the clerk, being first signed by the several applicants respectively. Thereupon, and at such time as the court may deem convenient, it shall admit such of the candidates as appear to the court to be duly qualified, satisfactory proof having been made of the good moral character of such applicants.

RULE 2.

APPEAL—When Dismissed.

Appeal, When May Be Dismissed. If the transcript of the record is not filed within the time prescribed by paragraph 3 of rule

27, the appeal or writ of error may be dismissed, on motion without notice, on the first Monday of the term during which the cause is subject to call. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party.

RULE 3.

APPEAL—What Showing Must Accompany Motion to Dismiss.

What Showing Must Accompany Motion to Dismiss. On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition; the fact and date of the filing of the notice of appeal or issuing the writ of error; the fact and date of the filing the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one.

RULE 4.

APPEARANCE—Failure of.

Appearance, Failure of. When a cause is reached on the calendar, and neither side has been submitted or is represented by counsel in court, the appeal will be dismissed. When it is so submitted or represented by counsel for the respondent or defendant in error, and not for the appellant or plaintiff in error, the judgment, order, or proceeding of the court below will be affirmed, of course without argument: provided, however, that the court may, in its discretion, examine the record and render its judgment on the merits.

RULE 5.

ARGUMENT—How Conducted.

Argument, How Conducted. No more than two counsel on a side will be heard upon the final argument, except in peculiar and important cases, upon leave of the court obtained before the argument is commenced; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant or plaintiff in error shall be entitled to open and close the argument. Each side will

be allowed two hours, including the reading of papers, and each defendant who has appeared separately in the court below will be allowed two hours: provided, that for good cause shown, the court may give further time for the argument, and each party shall also have the privilege of filing a printed brief or argument. Upon the argument of preliminary motions no more than one counsel on a side will be heard, and only one hour to each counsel will be allowed.

RULE 6.

BRIEF—What to Contain.

How Printed.

When Served.

When Filed.

Submission on.

PARAGRAPH 1. *Brief, What to Contain.* In civil cases each party shall prepare and have printed an argument or brief of the points and authorities relied on. In citing cases from published reports, the names of the parties as they appear in the title of the case, as well as the book and page, shall be given. Briefs on both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the transcript by folios. The brief of the appellant and plaintiff in error shall also contain a distinct enumeration of the several errors relied on. On the cover and first page shall be stated the title of this court, the title of the cause, and the names of counsel for appellant and respondent, and the district and county appealed from. The expense of such brief, at not exceeding one dollar per page of 7x3½ inches printed matter, and for not exceeding forty pages, shall be allowed and taxed as costs: provided, that the court may, in its discretion, order that no costs shall be taxed for any brief which does not comply with this rule, or containing a miscitation of authorities, unless corrected before the submission of the case.

PARAGRAPH 2. *Brief, How Printed.* Briefs shall be neatly and legibly printed, with black ink, on white writing paper, properly paged at the top, with a margin on the outer edge of the page of two inches. The printed page shall be seven inches long and three and a half inches wide, and the paper page shall be ten inches long

and seven inches wide. Each brief shall be signed by counsel preparing it; and shall be fastened together in a paper or cloth cover.

PARAGRAPH 3. *Brief, When Served.* The brief of appellant, or plaintiff in error, must be served within ten days after the filing of transcript, and the respondent, or defendant in error, has ten days after such service in which to serve his brief upon the opposite party.

PARAGRAPH 4. *Brief, Copies Filed, When.* Before the time of the calling of a cause for argument both parties shall file with the clerk at least five copies of their briefs for the justices of the court, the clerk, and the reporter; and when the cause is called the clerk shall furnish a copy thereof to each of the justices.

PARAGRAPH 5. *Brief, Submission of Cause on.* Causes may be submitted on either or both sides, on printed briefs actually filed at the time. But the court will order an argument, on both sides, of all cases appearing to require it.

RULE 7.

CALENDAR—

How Made Up.

Criminal Causes May be Heard Out of Order.

Criminal Causes Put on Calendar During Term.

Lewiston Terms.

Boise Terms.

Causes, When Heard.

Causes Put on for Dismissal.

Title of Causes.

PARAGRAPH 1. *Calendar, How Made Up.* The calendar of each term shall consist only of those cases in which the transcript shall have been filed, on or before the day preceding the first day of the term, unless, upon written consent of the parties, or for good cause shown, it shall be otherwise ordered by the court. The clerk must number and enter causes upon the calendar in the order of the date of filing the transcript, statement on appeal, application for writ of error, or application for a writ in a special proceeding, and number them consecutively, and such number shall not be changed, except by order of the court, and, if changed, the calendar must show the original number.

The calendar must show the county and judicial district from which the cause is appealed. In all cases in which the appeal is perfected or writ of error issued, as provided in rule 27, paragraph 8, and the transcript is not filed as by said rule prescribed, the case may be placed upon the calendar upon motion of the respondent or defendant in error, for the purpose of being dismissed, upon the certificate of the clerk, as provided by rules 2 and 3, or for the purpose of the case being heard upon its merits, or for the purpose of having the judgment affirmed with or without damages upon the filing of the transcript.

PARAGRAPH 2. *Criminal Causes.* The court may order the hearing of any criminal cause at any term of the court, wherever it may be held, and may order the hearing in advance of any or all civil causes, regardless of its number on the calendar.

PARAGRAPH 3. *Criminal Causes Put on Calendar During Term.* When the transcript in a criminal cause is filed, it may be placed on the calendar at any time by consent, or on motion of the defendant.

PARAGRAPH 4. *Calendar for Terms at Lewiston.* The calendar for the terms held at Lewiston shall consist only of those causes appealed from or arising in the territory comprising the counties of Shoshone, Kootenai, Latah, Nez Perce, or Idaho, and such causes will be heard there, unless the parties file a stipulation in writing to hear them at a term to be held at Boise City.

PARAGRAPH 5. *Calendar for Terms at Boise City.* The calendar for the terms held at Boise City shall consist of all causes appealed from or arising in the territory comprising the counties not named in paragraph 4 (together with all causes transferred by stipulation from the Lewiston calendar,) and will be heard at Boise City.

PARAGRAPH 6. *Causes, When Heard.* Civil causes are entitled to be, and will be, heard in the order they appear on the calendar. There will be a peremptory call of the calendar on the second Monday of the term, and all causes (not before disposed of or set for hearing) not then ready for hearing will be placed at the foot of the calendar, or continued for the term.

PARAGRAPH 7. *Causes Put on the Calendar for Dismissal.* On motion of re-

spondent the court may order a cause placed on the calendar at any time for dismissal under the provisions of rule 2.

PARAGRAPH 8. *Title of Causes.* The original title, with the names of the parties in the same order, shall be retained in this court, substituting for the words "plaintiff" or "defendant," "appellant" or "respondent," as the appeal papers shall designate. In special proceedings wherein this court has original jurisdiction the party prosecuting shall be called plaintiff and the adverse party defendant.

RULE 8.

COSTS—

Who First Liable for.

When Paid, and Amount.

Paid Before Remittitur Sent Down.
For Printing Transcripts and Briefs.

PARAGRAPH 1. *Liability for Costs.* When causes are placed upon the calendar parties shall be primarily liable for costs, as follows:

First. If by the appellant or plaintiff in error, he shall be first liable.

Second. If by the respondent or defendant in error, then both parties.

Third. To entitle a transcript on appeal or on error to be filed in this court, an advance fee, to cover costs in the case, in the sum of \$15, shall be deposited with the clerk, and for a like purpose the respondent, or adverse party, upon filing their brief, shall deposit the sum of \$5. In any matter or proceeding in which the court has original jurisdiction, the party instituting the proceeding shall deposit the sum of \$10, and the adverse party the sum of \$2.50.

Fourth. In causes placed on the calendar for the purpose of dismissal under the provisions of rules 2 and 3, the respondent must deposit an advance fee of \$5 before making the motion.

PARAGRAPH 2. *All Costs to be Paid Before Remittitur Sent Down.* In no civil case shall the clerk be required to remit the final papers until the costs are paid.

PARAGRAPH 3. *Cost of Printing.* The expense of printing transcripts on appeal in civil causes, and the pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this court, shall be allowed as costs and taxed in bills of cost in the usual mode.

RULE 9.

DAMAGES—When Appeal for Delay.

Damages, Appeal for Delay. In all cases where an appeal or writ of error is manifestly for delay, damages may be allowed at the rate of not exceeding twelve per cent. upon the amount of the judgment in the discretion of the court.

RULE 10.

DEFAULT—Of Appellant.

Default of Appellant. On a call of the calendar in its order, if no counsel appear for the appellant or plaintiff in error, and no brief or statement of points and authorities on behalf of appellant or plaintiff in error be on file, the appeal or writ of error will be dismissed, or judgment affirmed, in the discretion of the court, on motion of respondent or defendant in error.

RULE 11.

DIMINUTION—Of Record.

Diminution of the Record. For the purpose of correcting any error or defect in the transcript from the court below either party may suggest the same, in writing, to this court, and upon good cause shown obtain an order that the proper clerk certify to the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE 12.

EXCEPTIONS—

When Judge Below Refuses, How Proved.

When Judge Dies, etc., How Settled.

PARAGRAPH 1. *Exception, When Refused, May be Proved.* If any judge or referee before whom a case has been tried neglects or refuses to settle and allow a bill of exceptions or statement in accordance with the facts, within thirty days after the same is finally submitted to him, the party aggrieved may apply by petition to

this court, or one of the justices thereof, to prove the same. The petition must be filed with the clerk of this court within thirty days after such refusal, and a copy of the petition served upon the adverse party. The facts may be presented by certified copies of the record, stenographers' notes, duly verified, or affidavits, and, if necessary, oral testimony.

PARAGRAPH 2. *Proceeding if Judge Dies or is Disqualified.* When a judge or judicial officer, before whom a case has been tried, dies, becomes disqualified, or is absent from the state, or when from any other reason there is no mode provided by law for the settlement of a statement or motion for new trial or bill of exceptions, the successor in office of such judge or judicial officer, or the judge of an adjoining district, may settle and sign such statement or bill of exceptions; and in settling either such judge or officer may, in his discretion, permit affidavits to be read, to assist him in settling disputed points.

RULE 13.

EXTENSION OF TIME—

To File Transcript.

Generally.

PARAGRAPH 1. *Extension of Time to File Transcript.* The time limited in which a transcript must be served and filed, as set forth in paragraph 8 of rule 27, may be extended by the court, or a justice thereof, upon good cause shown, or by stipulation of the parties filed with the clerk, but such extension shall not exceed thirty days.

PARAGRAPH 2. *Extension of Time Generally.* The time prescribed by these rules, for any act, except for making a motion for rehearing, may be enlarged by the court, or a justice thereof, for cause, on motion.

RULE 14.

HABEAS CORPUS—When Issued.
How Served.

PARAGRAPH 1. *Writ of Habeas Corpus, When Issued.* The writ of habeas corpus will be issued only upon order of the court made and entered of record while in session. The application must be by petition, duly verified, which must set forth, in addition to the necessary matter required by law, the circumstances which, in the opinion of the applicant, render it indis-

pensable that the writ should issue from this court, the sufficiency of which circumstances so set forth will be determined by the court in awarding or refusing the application.

PARAGRAPH 2. *Writ of Habeas Corpus, How Served.* When the writ is directed to any ministerial officer of this court, it must be delivered by the clerk to such officer. If it is directed to any other officer or person, it must be delivered to the crier or bailiff of this court, and be by him served upon such officer or person.

RULE 15.

MOTIONS—When Heard.

Motions, Preliminary, When Heard. All preliminary motions will be heard each morning before proceeding with the regular call of the calendar.

MANDATE—See Rule 28.

RULE 16.

NOTICE—Time for, When Allowed.

Notice of Motion. When notice of motion is necessary, and except when adverse counsel are present, the notices shall, except when a different time is prescribed by statute or by these rules, be three days, unless, for good cause shown, the time is shortened by order of the court, or of one of the justices; and when served away from the place of holding court, one day in addition for every twenty-five miles distance.

RULE 17.

OBJECTIONS—To Record, When Taken.

Objections to the Record, When Taken. Objections to the transcript, statement, the bond or undertaking on appeal or writ of error, the notice of appeal, or to its service, or any objection to the record affecting the rights of the appellant or plaintiff in error, to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the court before argument on the merits.

RULE 18.

OPINIONS—Copy of, When to Accompany Remittitur.

Opinion, Copy of, When Sent with Remittitur. When a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted with the remittitur to the court below.

RULE 19.

PAPERS—Original, How Brought Up.

Original Papers, How Brought Up. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district, that original papers or exhibits of any kind should be inspected in this court, such judge may make such order for the safe-keeping, transporting, and return of such papers or exhibits as to him may seem proper, and this court will receive and consider such papers or exhibits in connection with the transcript of the proceedings.

RULE 20.

PAPERS—How Taken from Clerk's Office.

Papers Not to be Taken from Clerk's Office. No papers filed in a cause shall be taken from the court room or clerk's office, except by order of the court or one of the justices.

RULE 21.

PRACTICE—Where no Provision is Made.

Practice Heretofore Existing. In cases where no provision is made by statute or by these rules, proceedings in this court shall be in accordance with the practice heretofore existing.

RULE 22.

REHEARING—How Made.

Rehearings, Application, How Made. All motions for a rehearing shall be upon petition in writing, presented within ten days after the judgment or order made by the court shall be placed on file, and no oral argument will be heard thereon.

RULE 23.**RULES—When to Take Effect.**

Rules to Take Effect. These rules shall take effect on the first day of May, 1893. And thereupon all former rules of practice in this court, heretofore adopted, shall cease to be in force, in pursuance of the following order, done in open court, and entered of record on the 14th day of February, 1893: "Ordered, that the revised rules prepared by this court be, and the same are hereby, adopted as the rules of this court, and that they be in effect on and after May 1st, 1893, and that thereafter all former rules shall cease to be in force."

RULE 24.**REMITTITUR—When to Issue.**

Remittitur, When to Issue. No remittitur to the court below shall be issued until after the expiration of ten days from the entry of judgment.

REVIEW—Writ of, see Rule 28.**RULE 25.****SUBSTITUTION OF REPRESENTATIVE—Effect of.**

Substitution of Representative. Upon the death or other disability of the party, pending an appeal or writ of error, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or of any party to the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE 26.**TERMS OF COURT—**

Adjourned and Special.
Regular.

PARAGRAPH 1. *Adjourned and Special Terms of the Supreme Court.* Adjourned and special terms shall be held as the court or two of the justices may order; and the court shall cause to be entered of record from time to time when the adjourned and special terms will be held.

PARAGRAPH 2. *Regular Terms.* The regular terms of the court will be fixed at the January term of each year.

RULE 27.**TRANSCRIPT—**

How Printed.

In Criminal Causes.

Arrangement and Index.

Papers Must be Inserted Chronologically.

Must Have Alphabetical Index.

When will not be Filed.

What to Contain.

Attorney to Direct Clerk in Writing what to Put in.

Maps, how to Form Part of.

Appeal may be Dismissed if Rule not Complied with.

Filing and Service of.

Certificate to, How Obtained.

When Clerk to Print and Certify.

How Authenticated and where Filed.

Number of Copies to be Filed.

How Distributed.

PARAGRAPH 1. *Transcript, How Printed.* All transcripts of record in civil causes shall be printed on unruled white writing paper ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. Small pica solid is the smallest letter and most compact mode of composition allowed.

PARAGRAPH 2. *Transcripts in Criminal Causes.* Transcripts in criminal causes may be printed the same as in civil causes, but when not printed they must be plainly written with a typewriter on one side of white typewriter paper, eight inches wide and thirteen inches long, leaving a margin of one and one half inches on the left hand side of the page, and securely fastened at the top.

PARAGRAPH 3. *Arrangement of Transcript and Index.* On the first page and

cover of all transcripts must be stated the title of this court, the title of the cause in the court below, (substituting for the words "plaintiff" or "defendant" the words "appellant" or "respondent," as the case may require,) the names of counsel for appellant and respondent, and the words "transcript on appeal," followed by stating the district and county from which the appeal is taken. The first paper in all transcripts must state the title of the court and cause in the court below, but from all the following papers, orders, or proceedings it must be omitted, and the name of the paper, order, or proceeding simply given; the indorsements on the back of papers and the verifications must be omitted, except the date of filing, which must be added at the end of each paper, and if the paper is verified, say "Duly verified." If some error is assigned, or some fact is necessary to be shown as to the form, sufficiency, or substance of the title, indorsements, or verification, they must be transcribed in full. In all transcripts the papers and record entries making up the same must be inserted chronologically, as indicated by the date of the filing or recording; that is, the paper or record bearing the oldest filing or recording date, which is necessary to be inserted in the transcript, must be first inserted, and follow in regular order of such dates. Each transcript must be paged at the top, and each ten lines must be numbered on the left margin of the page from the commencement to the end.

Each transcript must be prefaced with an alphabetical index referring to the page on which each separate paper, order, proceeding, and testimony of each witness commences, and specifying the first and last number on the left margin of the page embracing such paper, order, proceeding, or testimony of witness, thus:

	Page.	Folio.
Answer	9	54 to 60
Complaint	4	9 to 20
Doe, John, Testimony of...	26	60 to 75

PARAGRAPH 4. *When Transcript not to be Filed.* Any transcript which fails to conform to the requirements of paragraphs Nos. 1, 2, and 3 of this rule shall not be filed by the clerk, except by order of the court, or one of the justices thereof.

PARAGRAPH 5. *Contents of Transcript.* When there has been a general appearance in the action by all the defendants, or when the summons is not made a part

of the judgment roll by section 4456 of the Revised Statutes, the summons must not be inserted in the transcript, unless upon an exception saved thereto it is made a part of a bill of exceptions; and no paper or proceeding shall be inserted in the transcript as a part of a judgment roll unless it is made part thereof by said section. The stenographic reports, notes, or other statement of the evidence in the form of questions and answers must not be inserted in the transcript either by bill of exceptions or statement; except, when necessary to elucidate a point made or an exception saved, the questions must be omitted, and the evidence stated in a concise narrative form, avoiding all unnecessary tautology and repetitions by the same witness. When there is no question as to the weight or sufficiency of the evidence, the facts may be stated in the nature of a special verdict, or it is sufficient to state that the plaintiff or defendant introduced evidence tending to prove the issue on his part, or tending to prove certain facts, naming them. Pleadings, motions, orders, findings, instructions, files, or other papers, when once inserted in the transcript, must not be repeated unless the adverse party claims that they are incorrectly stated as first inserted; but, when found a second time in any bill of exceptions, statement, or other part of the record, it is sufficient to refer to them as having been already inserted in the transcript. The appellant or his attorney must by præcipe indicate to the clerk what of the files and records of the cause shall be inserted in the transcript.

PARAGRAPH 6. *Maps.* Whenever a map or survey forms part of a transcript it shall be necessary to furnish five copies thereof, one of which shall be attached to each of the five copies of the transcript filed with the clerk.

PARAGRAPH 7. *Compliance Enforced.* A strict compliance with the foregoing requirements of this rule will be exacted of the appellant, or plaintiff in error, in all cases by the court, whether objection be made by the opposite party or not; and for any violation or neglect in these respects which is found to obstruct the examination of the record the appeal may be dismissed, or the court may order the offending party to pay the costs of such transcript, or any part thereof, unless the matter objected to is inserted by order of the court or judge below.

PARAGRAPH 8. *Filing and Service of Transcript.* In all cases where an appeal is perfected, or a writ of error issued, transcripts of the record (showing the date of filing the undertaking on appeal) must be served upon the adverse party, and filed in this court, within sixty days after the appeal is perfected or writ of error issued, and the same must be certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken. Written evidence of the service of the transcript upon the adverse party shall be filed therewith.

PARAGRAPH 9. *Service and Certificate of Transcript.* After the transcript is printed, a copy thereof shall be served upon the adverse party or his attorney, and, if there be more than one adverse party, appearing by different attorneys, on each party or the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if it be incorrect, shall neglect or refuse for the same time to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the cost of procuring a certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses.

PARAGRAPH 10. *Clerks May Print Transcripts and Certify to Same.* In case a written transcript authenticated in the mode prescribed by paragraph 9, together with sufficient funds to pay the expenses of printing the same, is transmitted to the clerk of this court, the clerk, upon the receipt thereof, shall file the same, and cause the transcript to be printed, and to the printed copy shall annex his certificate that said printed transcript is a full and correct copy of the transcript furnished him by the party, and the said certificate shall be prima facie evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file. Printed copies

thereof shall be furnished as provided by paragraph 12 of this rule, and the clerk shall also immediately transmit by mail or express copies to the attorney of the adverse parties, and note such service on the original.

PARAGRAPH 11. *Authenticated and Filed.* The copy of the transcript filed with the clerk of this court shall be certified by the clerk of the court from which the appeal is taken, in the manner provided by law, or, in lieu thereof, may be stipulated in writing on said transcript by the attorneys of record in the case to be a correct transcript of such matters as are contained in it. The transcript, when properly certified and authenticated as above, shall be filed with the clerk of the supreme court.

PARAGRAPH 12. *Five Copies of Transcript to be Filed.* In all causes five copies of the transcript must be filed: provided, that in criminal causes, where the transcript is typewritten, four copies must be filed, three of which may be carbon copies. When the cause is called for hearing the clerk shall deliver a copy to each of the justices.

RULE 28.

WRITS, SPECIAL—

How Issued.

How Presented.

How Numbered.

When Heard.

When an Issue of Fact is Raised,
How Tried.

What Affidavit Must Show.

How Served, and Upon Whom.

PARAGRAPH 1. *Writs, How Issued.* Writs of review, mandate, and prohibition will be issued only upon the order of the court made and entered in the minutes while the court is in session.

PARAGRAPH 2. *Applications, How Presented.* All applications for writs of review, mandate, and prohibition must be upon affidavit of the party beneficially interested. The applicant must file four typewritten copies of the affidavit, three of which may be carbon copies. The same must be on white typewritten paper, eight inches wide by thirteen inches long, leaving a margin of one and one half inches on the left side of the page. The pages must be numbered, and securely fastened

at the top. The answer or return must be prepared in the same manner, and the same number of copies. On the first page must be stated the title of this court, the title of the cause, the name of the proceeding, and counsel.

PARAGRAPH 3. *How Numbered and Heard.* These causes must be numbered the same as other causes, and placed on the calendar in the same manner, and heard in their regular order: provided, upon good cause shown, they may be heard out of their order.

PARAGRAPH 4. *When an Issue of Fact is Raised.* If in such proceedings an answer be filed which raises an issue of fact essential to the determination of the application, the question of fact may, in the discretion of the court, be directed to be tried by a jury, before some district court to be designated in the order, or, when the parties agree, before a referee, and the argument will be postponed until the verdict or finding upon such issue of fact shall be duly certified to this court.

PARAGRAPH 5. *Application Must Show Real Parties in Interest.* The application for the issuance of any of the above writs must set forth, in addition to the other requisite matters, the reasons which render it indispensable the writ should issue originally from this court, and the sufficiency or insufficiency of the reasons so set forth will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the affidavit as defendant, such affidavit must disclose the name or names of the real party in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining the order to serve or cause to be served upon such party or parties in interest a certified copy of the affidavit and writ issued thereon in the same manner as upon the defendant named in the affidavit, and to produce and file in the office of the clerk of this court the same evidence of service.

RULES OF THE STATE LIBRARY.

Adopted by the Justices of the Supreme Court, November 25, 1892.

Rule 1. The librarian shall allow no book to be taken from the library except upon the person so taking said book delivering to the librarian his receipt therefor.

Rule 2. No book shall be kept out of the library by any person for more than twenty-four hours, except upon an order of one of the justices of the supreme court; and no digest, code, statute, or text-book shall be taken from the Capitol building, except upon such order.

Rule 3. The librarian shall keep a complete catalogue of all books in each case in the library posted on such case.

Rule 4. No person other than the librarian or his assistants shall be allowed to return any book to the shelves, but such books shall be left on the table where used.

Rule 5. No loud or general conversation shall be allowed in the library room.

Rule 6. The librarian must keep the library open every day, except nonjudicial days, from 9 o'clock A. M. until 12 M., and from 1 P. M. until 4 P. M., and during the sessions of the legislature, or supreme court, from 6 P. M. until 9 P. M.

Rule 7. The librarian shall keep a register of all books taken from the library room by any person, in a book kept for that purpose, and shall note in said register the date when any book is returned, which book shall be open to public inspection.

Rule 8. That any person taking a book from the library shall be subject to the order of the supreme court or of any of the justices thereof, relative to the return of said book, which order may be enforced as orders of the court.

These rules will be strictly enforced.

CONSTITUTION OF THE STATE OF IDAHO.

UNDER AUTHORITY OF HOUSE JOINT RESOLUTION No. 3.

DEPARTMENT OF STATE—SECRETARY'S OFFICE.

I, A. J. Pinkham, secretary of state of the state of Idaho, do hereby certify the following to be true and correct copies of the constitution of the state of Idaho, adopted in convention, August 6, 1889, and the act of congress admitting the state of Idaho into the Union of states, approved July 3, 1890, as appear of record in my office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the state. Done at the city of Boise, the capital of Idaho, this nineteenth day of February, in the year of our Lord one thousand eight hundred and ninety-one, and of the independence of the United States of America the one hundred and fifteenth.

[Seal.]

A. J. PINKHAM, Secretary of State.

CONSTITUTION

ADOPTED BY A CONSTITUTIONAL CONVENTION HELD AT BOISE CITY, IN THE
TERRITORY OF IDAHO, AUGUST 6, 1889.

PREAMBLE.

We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution.

ARTICLE I.

DECLARATION OF RIGHTS.

Section 1. All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty, acquiring, possessing, and protecting property, pursuing happiness, and securing safety.

Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish

the same whenever they may deem it necessary, and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

Sec. 3. The state of Idaho is an inseparable part of the American Union, and the constitution of the United States is the supreme law of the land.

Sec. 4. The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness, or justify polygamous or other pernicious practices, inconsistent with mo-

rality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise, any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.

Sec. 5. The privilege of the writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law.

Sec. 6. All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Sec. 7. The right of trial by jury shall remain inviolate; but in civil actions three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

Sec. 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service, in time of war or public danger: provided, that a grand jury may be summoned upon the order of the district court in the manner

provided by law: and provided, further, that, after a charge has been ignored by a grand jury, no person shall be held to answer or for trial therefor upon information of the public prosecutor.

Sec. 9. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty.

Sec. 10. The people shall have the right to assemble in a peaceable manner to consult for their common good, to instruct their representatives, and to petition the legislature for the redress of grievances.

Sec. 11. The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law.

Sec. 12. The military shall be subordinate to the civil power; and no soldier, in time of peace, shall be quartered in any house without the consent of its owner, nor in time of war, except in the manner prescribed by law.

Sec. 13. In all criminal prosecutions, the party accused shall have the right to a speedy and public trial, to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Sec. 14. The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, to convey water to the place of use, for any useful, beneficial, or necessary purpose, or for drainage, or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public

use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.

Sec. 15. There shall be no imprisonment for debt in this state except in cases of fraud.

Sec. 16. No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.

Sec. 17. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause, shown by affidavit, particularly describing the place to be searched, and the person or thing to be seized.

Sec. 18. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

Sec. 19. No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage.

Sec. 20. No property qualification shall ever be required for any person to vote or hold office, except in school elections or elections creating indebtedness.

Sec. 21. This enumeration of rights shall not be construed to impair or deny other rights retained by the people.

ARTICLE II.

DISTRIBUTION OF POWERS.

Section 1. The powers of the government of this state are divided into three distinct departments,—the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE III.

LEGISLATIVE DEPARTMENT.

Section 1. The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of

every bill shall be as follows: "Be it enacted by the legislature of the state of Idaho."

Sec. 2. The senate shall consist of eighteen members, and the house of representatives of thirty-six members. The legislature may increase the number of senators and representatives: provided, the number of senators shall never exceed twenty-four, and the house of representatives shall never exceed sixty, members. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may from time to time be divided by law.

Sec. 3. The senators and representatives shall be elected for the term of two years, from and after the first day of December next following the general election.

Sec. 4. The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to congress, and thereafter to be apportioned as may be provided by law: provided, each county shall be entitled to one representative.

Sec. 5. A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

Sec. 6. No person shall be a senator or representative who at the time of his election is not a citizen of the United States and an elector of this state, nor any one who has not been for one year next preceding his election an elector of the county or district whence he may be chosen.

Sec. 7. Senators and representatives, in all cases except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place.

Sec. 8. The sessions of the legislature shall, after the first session thereof, be held biennially, at the capital of the state, commencing on the first Monday after the first day

of January, and every second year thereafter, unless a different day shall have been appointed by law, and at other times when convened by the governor.

Sec. 9. Each house, when assembled, shall choose its own officers, judge of the election, qualifications, and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

Sec. 10. A majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as such house may provide. A quorum being in attendance, if either house fail to effect an organization within the first four days thereafter, the members of the house so failing shall be entitled to no compensation from the end of the said four days until an organization shall have been effected.

Sec. 11. Each house may, for good cause shown, with the concurrence of two-thirds of all the members, expel a member.

Sec. 12. The business of each house, and of the committee of the whole, shall be transacted openly, and not in secret session.

Sec. 13. Each house shall keep a journal of its proceedings; and the yeas and nays of the members of either house on any question shall, at the request of any three members present, be entered on the journal.

Sec. 14. Bills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.

Sec. 15. No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: provided, in case of urgency, two-thirds of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final pas-

sage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present.

Sec. 16. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but, if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

Sec. 17. Every act or joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms.

Sec. 18. No act shall be revised or amended by mere reference to its title, but the section, as amended, shall be set forth and published at full length.

Sec. 19. The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the jurisdiction and duties of justices of the peace and constables.

For the punishment of crimes and misdemeanors.

Regulating the practice of the courts of justice.

Providing for a change of venue in civil or criminal actions.

Granting divorces.

Changing the names of persons or places.

Authorizing the laying out, opening, altering, maintaining, working on, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, or any public grounds not owned by the state.

Summoning and impaneling grand and trial juries, and providing for their compensation.

Regulating county and township business, or the election of county and township officers.

For the assessment and collection of taxes.

Providing for and conducting elections, or designating the place of voting.

Affecting estates of deceased persons, minors, or other persons under legal disabilities.

Extending the time for collection of taxes.

Giving effect to invalid deeds, leases, or other instruments.

Refunding money paid into the state treasury.

Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any person or corporation in this state, or any municipal corporation therein.

Declaring any person of age, or authorizing any minor to sell, lease, or incumber his or her property.

Legalizing, as against the state, the unauthorized or invalid act of any officer.

Exempting property from taxation.

Changing county seats, unless the law authorizing the change shall require that two-thirds of the legal votes cast at a general or special election shall designate the place to which the county seat shall be changed: provided, that the power to pass a special law shall cease as long as the legislature shall provide for such change by general law: provided, further, that no special law shall be passed for any one county oftener than once in six years.

Restoring to citizenship persons convicted of infamous crimes.

Regulating the interest on money.

Authorizing the creation, extension, or impairing of liens.

Chartering or licensing ferries, bridges, or roads.

Remitting fines, penalties, or forfeitures.

Providing for the management of common schools.

Creating offices, or prescribing the powers and duties of officers, in counties, cities, townships, election districts, or school districts, except as in this constitution otherwise provided.

Changing the law of descent or succession.

Authorizing the adoption or legitimization of children.

For limitation of civil or criminal actions.

Creating any corporation.

Creating, increasing, or decreasing fees, percentages, or allowances of public officers during the term for which said officers are elected or appointed.

Sec. 20. The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever.

Sec. 21. All bills or joint resolutions passed

shall be signed by the presiding officers of the respective houses.

Sec. 22. No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.

Sec. 23. Each member of the legislature shall receive for his services a sum not exceeding five dollars per day from the commencement of the session, but such pay shall not exceed for each member, except the presiding officers, in the aggregate, three hundred dollars for per diem allowances for any one session; and shall receive each the sum of ten cents per mile each way by the usual traveled route.

When convened in extra session by the governor, they shall each receive five dollars per day; but no extra session shall continue for a longer period than twenty days, except in case of the first session of the legislature. They shall receive such mileage as is allowed for regular sessions. The presiding officers of the legislature shall each, in virtue of his office, receive an additional compensation equal to one-half his per diem allowance as a member: provided, that, whenever any member of the legislature shall travel on a free pass in coming to or returning from the session of the legislature, the number of miles actually traveled on such pass shall be deducted from the mileage of such member.

Sec. 24. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well-directed efforts for the promotion of temperance and morality.

Sec. 25. The members of the legislature shall, before they enter upon the duties of their respective offices, take or subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of Idaho, and that I will faithfully discharge the duties of senator (or representative, as the case may be) according to the best of my ability." And such oath may be administered by the governor, secretary of

state, or judge of the supreme court, or presiding officer of either house.

ARTICLE IV.

EXECUTIVE DEPARTMENT.

Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold his office for two years, beginning on the first Monday in January next after his election, except as otherwise provided in this constitution. The officers of the executive department, excepting the lieutenant governor, shall, during their terms of office, reside at the seat of government, where they shall keep the public records, books, and papers. They shall perform such duties as are prescribed by this constitution, and as may be prescribed by law.

Sec. 2. The officers named in section one of this article shall be elected by the qualified electors of the state at the time and places of voting for members of the legislature, and the persons, respectively, having the highest number of votes for the office voted for shall be elected; but, if two or more shall have an equal and the highest number of votes for any one of said offices, the two houses of the legislature, at its next regular session, shall forthwith, by joint ballot, elect one of such persons for said office. The returns of election for the officers named in section one shall be made in such manner as may be prescribed by law, and all contested elections of the same, other than provided for in this section, shall be determined as may be prescribed by law.

Sec. 3. No person shall be eligible to the office of governor or lieutenant governor unless he shall have attained the age of thirty years at the time of his election; nor to the office of secretary of state, state auditor, superintendent of public instruction, or state treasurer, unless he shall have attained the age of twenty-five years; nor to the office of attorney general unless he shall have attained the age of thirty years, and have been admitted to practice in the supreme court of the state or territory of Idaho, and be in good standing at the time of his election. In addition to the qualifications above

described, each of the officers named shall be a citizen of the United States, and shall have resided within the state or territory two years next preceding his election.

Sec. 4. The governor shall be commander in chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.

Sec. 5. The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

Sec. 6. The governor shall nominate, and, by and with the consent of the senate, appoint, all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If, during the recess of the senate, a vacancy occurs in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of a justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction shall be vacated by death, resignation, or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified, in such manner as may be provided by law.

Sec. 7. The governor, secretary of state, and attorney general shall constitute a board to be known as the "Board of Pardons." Said board, or a majority thereof, shall have power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose, in all cases of offenses against the state, except treason or conviction on impeachment. The legislature shall by law prescribe the sessions of said board, and the manner in which application shall be made, and regulate the proceedings thereon; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except

by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing, and, with their reasons for their action in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state.

The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense, as herein provided. In cases of conviction for treason the governor shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the legislature, at each regular session, each case of remission of fine or forfeiture, reprieve, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of remission, commutation, pardon, or reprieve, with the reasons for granting the same, and the objections, if any, of any member of the board made thereto.

Sec. 8. The governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required. He may also require information in writing, at any time, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management, and expenses of their respective offices and insti-

tutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution. The governor shall at the commencement of each session, and from time to time, by message, give to the legislature information of the condition of the state, and shall recommend such measures as he shall deem expedient. He shall also send to the legislature a statement, with vouchers, of the expenditures of all moneys belonging to the state and paid out by him. He shall also, at the commencement of each session, present estimates of the amount of money required to be raised by taxation for all purposes of the state.

Sec. 9. The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but, when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Sec. 10. Every bill passed by the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but, if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals, and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and, if approved by two-thirds of the members present in that house, it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered on the journal. Any bill which shall not be returned by the governor to the legislature within five days (Sundays excepted) after it shall have been presented to him shall become a law in like manner as if he had signed it, unless the legislature

shall, by adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the secretary of state, within ten days after such adjournment, (Sundays excepted,) or become a law.

Sec. 11. The governor shall have power to disapprove of any item or items of any bill making appropriations of money embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void, unless enacted in the manner following: If the legislature be in session, he shall within five days transmit to the house within which the bill originated a copy of the item or items thereof disapproved, together with his objections thereto, and the items objected to shall be separately reconsidered, and each item shall then take the same course as is prescribed for the passage of bills over the executive veto.

Sec. 12. In case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties, and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor.

Sec. 13. The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

Sec. 14. In case of the failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of treason, felony, or other infamous crime, or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until such disqualification of either the governor or lieutenant governor be removed, or the vacancy filled; and if the president of the senate, for any of the above-named causes,

shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house.

Sec. 15. There shall be a seal of this state, which shall be kept by the secretary of state, and used by him officially, and shall be called "The Great Seal of the State of Idaho." The seal of the territory of Idaho, as now used, shall be the seal of the state until otherwise provided by law.

Sec. 16. All grants and permissions shall be in the name and by the authority of the state of Idaho, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

Sec. 17. An account shall be kept by the officers of the executive department and of all public institutions of the state of all moneys received by them severally, from all sources, and for every service performed, and of all moneys disbursed by them severally, and a semiannual report thereof shall be made to the governor, under oath; they shall also, at least twenty days preceding each regular session of the legislature, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislature.

Sec. 18. The governor, secretary of state, and attorney general shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prison as may be prescribed by law. They shall also constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law: and no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board.

Sec. 19. The governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction shall, quarterly, as due, during their continuance in office, receive for their services compensation, which, for the term next ensuing after the adoption of this constitution, is fixed as follows: Governor, three thousand dollars per annum; secretary of state, one thousand eight hundred dollars

per annum; state auditor, one thousand eight hundred dollars per annum; state treasurer, one thousand dollars per annum; attorney general, two thousand dollars per annum; and superintendent of public instruction, one thousand five hundred dollars per annum. The lieutenant governor shall receive the same per diem as may be provided by law for the speaker of the house of representatives, to be allowed only during the session of the legislature. The compensations enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office.

No officer named in this section shall receive for the performance of any official duty any fee for his own use, but all fees fixed by law for the performance by either of them of any official duty shall be collected in advance, and deposited with the state treasurer quarterly to the credit of the state. The legislature may, by law, diminish or increase the compensation of any or all of the officers named in this section, but no such diminution or increase shall affect the salaries of the officers then in office during their term: provided, however, the legislature may provide for the payment of actual and necessary expenses to the governor lieutenant governor, secretary of state, attorney general, and superintendent of public instruction, while traveling within the state in the performance of official duty.

ARTICLE V.

JUDICIAL DEPARTMENT.

Section 1. The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a "civil action;" and every action prosecuted by the people of the state as a party against a person charged with a public offense for the punishment of the same shall be termed a "criminal action."

Feigned issues are prohibited, and the fact

at issue shall be tried by order of court before a jury.

Sec. 2. The judicial power of the state shall be vested in a court for the trial of impeachments, a supreme court, district courts, probate courts, courts of justices of the peace, and such other courts inferior to the supreme court as may be established by law for any incorporated city or town.

Sec. 3. The court for the trial of impeachments shall be the senate. A majority of the members elected shall be necessary to a quorum, and the judgment shall not extend beyond removal from, and disqualification to hold office in, this state; but the party shall be liable to indictment and punishment according to law.

Sec. 4. The house of representatives solely shall have the power of impeachment. No person shall be convicted without the concurrence of two-thirds of the senators elected. When the governor is impeached, the chief justice shall preside.

Sec. 5. Treason against the state shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture of estate.

Sec. 6. The supreme court shall consist of three justices, a majority of whom shall be necessary to make a quorum or pronounce a decision. The justices of the supreme court shall be elected by the electors of the state at large. The terms of office of the justices of the supreme court, except as in this article otherwise provided, shall be six years. The justices of the supreme court shall, immediately after the first election under this constitution, be selected by lot, so that one shall hold his office for the term of two years, one for the term of four years, and one for the term of six years. The lots shall be drawn by the justices of the supreme court, who shall, for that purpose, assemble at the seat of government, and they shall cause the result thereof to be certified to by the secretary of state, and filed in his office. The justice having the shortest term to serve, not holding his office

by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all terms of the supreme court, and, in case of his absence, the justice having in like manner the next shortest term to serve shall preside in his stead.

Sec. 7. No justice of the supreme court shall be eligible to any other office of trust or profit under the laws of this state during the term for which he was elected.

Sec. 8. At least four terms of the supreme court shall be held annually; two terms at the seat of state government, and two terms at the city of Lewiston, in Nez Perce county. In case of epidemic, pestilence, or destruction of courthouses, the justices may hold the terms of the supreme court provided by this section at other convenient places, to be fixed by a majority of said justices. After six years the legislature may alter the provisions of this section.

Sec. 9. The supreme court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof. The supreme court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.

Sec. 10. The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory. No process in the nature of execution shall issue thereon. They shall be reported to the next session of the legislature for its action.

Sec. 11. The state shall be divided into five judicial districts, for each of which a judge shall be chosen by the qualified electors thereof, whose term of office shall be four years; and there shall be held a district court in each county, at least twice in each year, to continue for such time in each county as may be prescribed by law; but the legislature may reduce or increase the number of districts, district judges, and district attorneys. This section shall not be construed to prevent the holding of special terms under such regulations as may be provided by law.

Sec. 12. Every judge of the district court shall reside in the district for which he is

elected. A judge of any district court may hold a district court in any county at the request of the judge of the district court thereof, and, upon the request of the governor, it shall be his duty to do so; but a cause in the district court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, and sworn to try the cause.

Sec. 13. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the supreme court, so far as the same may be done without conflict with this constitution.

Sec. 14. The legislature may provide for the establishment of special courts for the trial of misdemeanors in incorporated cities and towns, where the same may be necessary.

Sec. 15. The clerk of the supreme court shall be appointed by the court, and shall hold his office during the pleasure of the court. He shall receive such compensation for his services as may be provided by law.

Sec. 16. A clerk of the district court for each county shall be elected by the qualified voters thereof at the time and in the manner prescribed by law for the election of members of the legislature, and shall hold his office for the term of four years.

Sec. 17. The salary of the justices of the supreme court, until otherwise provided by the legislature, shall be three thousand dollars each per annum, and the salary of the judges of the district court, until otherwise provided by the legislature, shall be three thousand dollars each per annum, and no justice of the supreme court, or judge of the district court, shall be paid his salary, or any part thereof, unless he shall have first taken and subscribed an oath that there is not in his hands any matter in controversy not decided by him which had been finally submitted for his consideration and determination thirty days prior to the taking and subscribing such oath.

Sec. 18. A district attorney shall be elected for each judicial district by the qualified electors thereof, who shall hold office for the term of four years, and perform such duties as may be prescribed by law. He shall be a practicing attorney at law, and a resident and elector of the district. He shall receive as compensation for his services twenty-five hundred dollars per annum.

Sec. 19. All vacancies occurring in the offices provided for by this article of the constitution shall be filled as provided by law.

Sec. 20. The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.

Sec. 21. The probate courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians; also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases.

Sec. 22. In each county of this state there shall be elected justices of the peace as prescribed by law. Justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of the property or the amount in controversy exceeds the sum of three hundred dollars, exclusive of interest, nor where the boundaries or title to any real property shall be called in question.

Sec. 23. No person shall be eligible to the office of district judge unless he be learned in the law, thirty years of age, and a citizen of the United States, and shall have resided in the state or territory at least two years next preceding his election, nor unless he shall have been at the time of his election an elector in the judicial district for which he is elected.

Sec. 24. Until otherwise provided by law, the judicial districts shall be five in number, and constituted of the following counties, viz.: First district, Shoshone and Kootenai; second district, Latah, Nez Perce, and Idaho; third district, Washington, Ada, Boise, and Owyhee; fourth district, Cassia,

Elmore, Logan, and Alturas; fifth district, Bear Lake, Bingham, Oneida, Lemhi, and Custer.

Sec. 25. The judges of the district courts shall, on or before the first day of July in each year, report, in writing, to the justices of the supreme court, such defects or omissions in the laws as their knowledge and experience may suggest; and the justices of the supreme court shall, on or before the first day of December of each year, report, in writing, to the governor, to be by him transmitted to the legislature, together with his message, such defects and omissions in the constitution and laws as they may find to exist.

Sec. 26. All laws relating to courts shall be general and of uniform operation throughout the state, and the organized judicial powers, proceedings, and practices of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform.

Sec. 27. The legislature may by law diminish or increase the compensation of any or all the following officers, to wit: Governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, commissioner of immigration and labor, justices of the supreme court, and judges of the district courts and district attorneys; but no diminution or increase shall affect the compensation of the officer then in office during his term: provided, however, that the legislature may provide for the payment of actual and necessary expenses of the governor, secretary of state, attorney general, and superintendent of public instruction incurred while in performance of official duty.

ARTICLE VI.

SUFFRAGE AND ELECTIONS.

Section 1. All elections by the people must be by ballot. An absolutely secret ballot is hereby guarantied, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.

Sec. 2. Except as in this article otherwise provided, every male citizen of the United States, twenty-one years old, who has ac-

usually resided in this state or territory for six months, and in the county where he offers to vote thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; and, until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Sec. 3. No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, idiotic, or insane; or who has, at any place, been convicted of treason, felony, embezzlement of the public funds, bartering or selling, or offering to barter or sell, his vote, or purchasing or offering to purchase the vote of another, or other infamous crime, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense; or who is a bigamist or polygamist, or is living in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime; or who in any manner teaches, advises, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; or who is a member of or contributes to the support, aid, or encouragement of any order, organization, association, corporation, or society which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy or such patriarchal or plural marriage, or which teaches or advises that the laws of this state prescribing rules of civil conduct are not the supreme law of the state; nor shall Chinese, or persons of Mongolian descent, not born in the United States, nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, either vote, serve as jurors, or hold any civil office.

Sec. 4. The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained.

Sec. 5. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of this state, or of the United States, nor while engaged in the navigation of the waters of this state or of the United States, nor while a student of any institution of learning, nor while kept at any almshouse or other asylum at the public expense.

ARTICLE VII.

FINANCE AND REVENUE.

Section 1. The fiscal year shall commence on the second Monday of January in each year, unless otherwise provided by law.

Sec. 2. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state;) also a per capita tax: provided, the legislature may exempt a limited amount of improvements upon land from taxation.

Sec. 3. The word "property," as herein used, shall be defined and classified by law.

Sec. 4. The property of the United States, the state, counties, towns, cities, and other municipal corporations, and public libraries, shall be exempt from taxation.

Sec. 5. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory shall continue until changed by the legislature of the state: provided, further, that duplicate taxation of property for the same purpose during the same year is hereby prohibited.

Sec. 6. The legislature shall not impose

taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

Sec. 7. All taxes levied for state purposes shall be paid into the state treasury, and no county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes.

Sec. 8. The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on real and personal property owned or used by them, and not by this constitution exempted from taxation within the territorial limits of the authority levying the tax.

Sec. 9. The rate of taxation of real and personal property for state purposes shall never exceed ten (10) mills on each dollar of assessed valuation; and, if the taxable property in the state shall amount to fifty million (50,000,000) dollars, the rate shall not exceed five (5) mills on each dollar of valuation; and, whenever the taxable property in the state shall amount to one hundred million (100,000,000) dollars, the rate shall not exceed three (3) mills on each dollar of valuation; and, whenever the taxable property in the state shall amount to three hundred million (300,000,000) dollars, the rate shall never thereafter exceed one and one-half (1½) mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it at such election.

Sec. 10. The making of profit, directly or indirectly, out of state, county, city, town, township, or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be

deemed a felony, and shall be punished as provided by law.

Sec. 11. No appropriation shall be made, nor any expenditure authorized, by the legislature, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine (9) of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war.

Sec. 12. There shall be a state board of equalization, consisting of the governor, secretary of state, attorney general, state auditor, and state treasurer, whose duties shall be prescribed by law. The board of county commissioners for the several counties of the state shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county, under such rules and regulations as shall be prescribed by law.

Sec. 13. No money shall be drawn from the treasury but in pursuance of appropriations made by law.

Sec. 14. No money shall be drawn from the county treasuries except upon the warrant of a duly-authorized officer, in such manner and form as shall be prescribed by the legislature.

Sec. 15. The legislature shall provide by law such a system of county finance as shall cause the business of the several counties to be conducted on a cash basis. It shall also provide that whenever any county shall have any warrants outstanding and unpaid, for the payment of which there are no funds in the county treasury, the county commissioners, in addition to other taxes provided by law, shall levy a special tax, not to exceed ten (10) mills on the dollar, of taxable property, as shown by the last preceding assessment, for the creation of a special fund for the redemption of said warrants; and, after the levy of such special tax, all warrants issued before such levy

shall be paid exclusively out of said fund. All moneys in the county treasury at the end of each fiscal year not needed for current expenses shall be transferred to said redemption fund.

Sec. 16. The legislature shall pass all laws necessary to carry out the provisions of this article.

ARTICLE VIII.

PUBLIC INDEBTEDNESS AND SUBSIDIES.

Section 1. The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, exceed the sum of one and one-half per centum upon the assessed value of the taxable property in the state, except in case of war, to repel an invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability, as it falls due; and also for the payment and discharge of the principal of such debt or liability, within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by the authority of such law shall be applied only to the specified object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people. The legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same.

Sec. 2. The credit of the state shall not in any manner be given, or loaned to, or in aid of, any individual, association, municipality, or corporation; nor shall the state,

directly or indirectly, become a stockholder in any association or corporation.

Sec. 3. No county, city, town, township, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.

Sec. 4. No county, city, town, township, board of education, or school district, or other subdivision, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner, to, or in aid of, any individual, association, or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract, or liability of any individual, association, or corporation in or out of this state.

ARTICLE IX.

EDUCATION AND SCHOOL LANDS.

Section 1. The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform, and thorough system of public, free common schools.

Sec. 2. The general supervision of the public schools of the state shall be vested in a board of education, whose powers and duties shall be prescribed by law. The superintendent of public instruction, the secretary of state, and attorney general shall constitute the board, of which the superintendent of public instruction shall be president.

Sec. 3. The public school fund of the state shall forever remain inviolate and intact. The interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur.

Sec. 4. The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as "school lands," and those granted in lieu of such; lands acquired by gift or grant from any person or corporation, under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state; and all other grants, gifts, devises, or bequests made to the state for general educational purposes.

Sec. 5. Neither the legislature, nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money, or other personal property, ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose.

Sec. 6. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts, or documents of a political, sectarian, or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

Sec. 7. The governor, superintendent of public instruction, secretary of state, and attorney general shall constitute the state board of land commissioners, who shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law.

Sec. 8. It shall be the duty of the state board of land commissioners to provide for the location, protection, sale, or rental of all the lands heretofore, or which may hereafter be, granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor: provided, that no school lands shall be sold for less than ten (10) dollars per acre. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale or other disposition of such lands shall be diminished, directly or indirectly. The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective objects for which said

grants of land were made; and the legislature shall provide for the sale of said lands from time to time, and for the sale of timber on all state lands, and for the faithful application of the proceeds thereof in accordance with the terms of said grants: provided, that not to exceed twenty-five sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company, or corporation.

Sec. 9. The legislature may require by law that every child of sufficient mental and physical ability shall attend the public school, throughout the period between the ages of six and eighteen years, for a time equivalent to three years, unless educated by other means.

Sec. 10. The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents have the general supervision of the university and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company, or corporation.

Sec. 11. The permanent educational funds, other than funds arising from the disposition of university lands belonging to the state, shall be loaned on first mortgage on improved farm lands within the state, or on state or United States bonds, under such regulations as the legislature may provide: provided, that no loan shall be made of any amount of money exceeding one-third of the market value of the lands at the time of the loan, exclusive of buildings.

ARTICLE X.

PUBLIC INSTITUTIONS.

Section 1. Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf, and dumb, and

such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law.

Sec. 2. The seat of government of the state of Idaho shall be located at Boise City for twenty years from the admission of the state, after which time the legislature may provide for its relocation, by submitting the question to a vote of the electors of the state at some general election.

Sec. 3. The legislature may submit the question of the location of the seat of government to the qualified voters of the state at the general election then next ensuing, and a majority of all the votes upon said question cast at said election shall be necessary to determine the location thereof. Said legislature shall also provide that, in case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast shall be submitted in like manner to the qualified electors of the state at the next general election.

Sec. 4. All property and institutions of the territory shall, upon adoption of the constitution, become the property and institutions of the state of Idaho.

Sec. 5. The governor, secretary of state, and attorney general shall constitute a board, to be known as the "State Prison Commissioners," and shall have the control, direction, and management of the penitentiaries of the state. The governor shall be chairman, and the board shall appoint a warden, who may be removed at pleasure. The warden shall have the power to appoint his subordinates, subject to the approval of the said board.

Sec. 6. There shall be appointed by the governor three directors of the asylum for the insane, who shall be confirmed by the senate. They shall have the control, direction, and management of the said asylums, under such regulations as the legislature shall provide, and hold their offices for a period of two years. The directors shall have the appointment of the medical superintendent, who shall appoint the assistants with the approval of the directors.

Sec. 7. The legislature, for sanitary reasons, may cause the removal to more situa-

ble localities of any of the institutions mentioned in section one of this article.

ARTICLE XI.

CORPORATIONS, PUBLIC AND PRIVATE.

Section 1. All existing charters or grants of special or exclusive privileges, under which the corporators or grantees shall not have organized or commenced business in good faith at the time of the adoption of this constitution, shall thereafter have no validity.

Sec. 2. No charter of incorporation shall be granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal, or reformatory corporations as are or may be under the control of the state; but the legislature shall provide by general law for the organization of corporations hereafter to be created: provided, that any such general law shall be subject to future repeal or alteration by the legislature.

Sec. 3. The legislature may provide by law for altering, revoking, or annulling any charter of incorporation existing and revocable at the time of the adoption of this constitution, in such manner, however, that no injustice shall be done to the corporators.

Sec. 4. The legislature shall provide by law that, in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and such directors shall not be elected in any other manner.

Sec. 5. All railroads shall be public highways, and all railroad, transportation, and express companies shall be common carriers, and subject to legislative control, and the legislature shall have power to regulate and control by law the rates of charges for the transportation of passengers and freight by such companies or other common carriers from one point to another in the state. Any association or corporation organized for

the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect within or at the state line with railroads of other states and territories. Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad, under such regulations as may be prescribed by law, and upon making due compensation.

Sec. 6. All individuals, associations, and corporations similarly situated shall have equal rights to have persons or property transported on and over any railroad, transportation, or express route in this state, except that preference may be given to perishable property. No undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers of the same class by any railroad or transportation or express company between persons or places within the state; but excursion or commutation tickets may be issued and sold at special rates, provided such rates are the same to all persons. No railroad or transportation or express company shall be allowed to charge, collect, or receive, under penalties which the legislature shall prescribe, any greater charge or toll for the transportation of freight or passengers, to any place or station upon its route or line, than it charges for the transportation of the same class of freight or passengers to any more distant place or station upon its route or line within this state. No railroad, express, or transportation company, nor any lessee, manager, or other employee thereof, shall give any preference to any individual, association, or corporation, in furnishing cars or motive power, or for the transportation of money or other express matter.

Sec. 7. No corporation, other than municipal corporations in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation without first filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form.

Sec. 8. The right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchise of incorporated companies, and subjecting them to public use, the

same as property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state.

Sec. 9. No corporation shall issue stocks or bonds except for labor done, services performed, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting, held after at least thirty days' notice given in pursuance of law.

Sec. 10. No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served, and no company or corporation formed under the laws of any other country, state, or territory shall have or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state.

Sec. 11. No street or other railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street or other railroad.

Sec. 12. The legislature shall pass no law for the benefit of a railroad or other corporation or any individual or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already past.

Sec. 13. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislature shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section.

Sec. 14. If any railroad, telegraph, express,

or other corporation organized under any of the laws of this state shall consolidate, by sale or otherwise, with any railroad, telegraph, express, or other corporation organized under any of the laws of any other state or territory, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction over that part of the corporate property within the limits of the state in all matters that may arise, as if said consolidation had not taken place.

Sec. 15. The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges.

Sec. 16. The term "corporation," as used in this article, shall be held and construed to include all associations and joint-stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships.

Sec. 17. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him.

Sec. 18. That no incorporated company, or any association of persons or stock company, in the state of Idaho, shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise.

ARTICLE XII.

CORPORATIONS—MUNICIPAL.

Section 1. The legislature shall provide by general laws for the incorporation, organi-

zation, and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated may become organized under such general laws whenever a majority of the electors at a general election shall so determine, under such provision therefor as may be made by the legislature.

Sec. 2. Any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with its charter or with the general laws.

Sec. 3. The state shall never assume the debts of any county, town, or other municipal corporation unless such debts shall have been created to repel invasion, suppress insurrection, or defend the state in war.

Sec. 4. No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint-stock company, corporation, or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: provided, that cities and towns may contract indebtedness for school, water, sanitary, and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created, and receive from any income arising therefrom its proportion to the whole amount so invested.

ARTICLE XIII.

IMMIGRATION AND LABOR.

Section 1. There shall be established a bureau of immigration, labor, and statistics, which shall be under the charge of a commissioner of immigration, labor, and statistics, who shall be appointed by the governor, by and with the consent of the senate. The commissioner shall hold his office for two years, and until his successor shall have been appointed and qualified, unless sooner removed. The commissioner shall collect information upon the subject of labor, its relation to capital, the hours of labor, and the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity. The commissioner shall annually make a

report in writing to the governor of the state of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the bureau.

Sec. 2. Not more than eight (8) hours' actual work shall constitute a lawful day's work on all state and municipal works.

Sec. 3. All labor of convicts confined in the state's prison shall be done within the prison grounds, except where the work is done on public works, under the direct control of the state.

Sec. 4. The employment of children under the age of fourteen (14) years in underground mines is prohibited.

Sec. 5. No person, not a citizen of the United States, or who has not declared his intention to become such, shall be employed upon, or in connection with, any state or municipal works.

Sec. 6. The legislature shall provide by proper legislation for giving to mechanics, laborers, and material men an adequate lien on the subject-matter of their labor.

Sec. 7. The legislature may establish boards of arbitration, whose duty it shall be to hear and determine all differences and controversies between laborers and their employers which may be submitted to them in writing by all the parties. Such boards of arbitration shall possess all the powers and authority, in respect to administering oaths, subpoenaing witnesses, and compelling their attendance, preserving order during the sittings of the board, punishing for contempt, and requiring the production of papers and writings, and all other powers and privileges in their nature applicable, conferred by law on justices of the peace.

Sec. 8. The commissioner of immigration, labor, and statistics shall perform such duties and receive such compensation as may be prescribed by law.

ARTICLE XIV.

MILITIA.

Section 1. All able-bodied male persons, residents of this state, between the ages of eighteen and forty-five years, shall be enrolled in the militia, and perform such military duty as may be required by law; but no person having conscientious scruples against bearing arms shall be compelled to

perform such duty in time of peace. Every person claiming such exemption from service shall, in lieu thereof, pay into the school fund of the county of which he may be a resident an equivalent in money, the amount and manner of payment to be fixed by law.

Sec. 2. The legislature shall provide by law for the enrollment, equipment, and discipline of the militia, to conform as nearly as practicable to the regulations for the government of the armies of the United States, and pass such laws to promote volunteer organizations as may afford them effectual encouragement.

Sec. 3. All militia officers shall be commissioned by the governor, the manner of their selection to be provided by law, and may hold their commissions for such period of time as the legislature may provide.

Sec. 4. All military records, banners, and relics of the state, except when in lawful use, shall be preserved in the office of the adjutant general as an enduring memorial of the patriotism and valor of the soldiers of Idaho; and it shall be the duty of the legislature to provide by law for the safe-keeping of the same.

Sec. 5. All military organizations under the laws of this state shall carry no other device, banner, or flag than that of the United States or the state of Idaho.

Sec. 6. No armed police force or detective agency or armed body of men shall ever be brought into this state for the suppression of domestic violence, except upon the application of the legislature, or the executive when the legislature cannot be convened.

ARTICLE XV.

WATER RIGHTS.

Section 1. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.

Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and

cannot be exercised except by authority of and in the manner prescribed by law.

Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but, when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes, or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section fourteen of article 1 of this constitution.

Sec. 4. Whenever any waters have been or shall be appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and, whenever such waters so dedicated shall have once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions, as to the quantity used and times of use, as may be prescribed by law.

Sec. 5. Whenever more than one person has settled upon or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of

this article provided, as among such persons priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but, whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Sec. 6. The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose.

ARTICLE XVI.

LIVE STOCK.

Section 1. The legislature shall pass all necessary laws to provide for the protection of live stock against the introduction or spread of pleuropneumonia, glanders, splenic or Texas fever, and other infectious or contagious diseases. The legislature may also establish a system of quarantine or inspection, and such other regulations as may be necessary for the protection of stock owners, and most conducive to the stock interests within this state.

ARTICLE XVII.

STATE BOUNDARIES.

Section 1. The name of this state is Idaho, and its boundaries are as follows: Beginning at a point in the middle channel of the Snake river, where the northern boundary of Oregon intersects the same; then follow down the channel of Snake river to a point opposite the mouth of the Kcoskooskia or Clearwater river; thence due north to the forty-ninth parallel of latitude; thence east along that parallel to the thirty-ninth degree of longitude west of Washington; thence south along that degree of longitude to the crest of the Bitter Root mountains; thence southward along the crest of the Bitter Root mountains till its intersection with the Rocky mountains; thence southward along the crest of the Rocky moun-

tains to the thirty-fourth degree of longitude west of Washington; thence south along that degree of longitude to the forty-second degree of north latitude; thence west along that parallel to the eastern boundary of the state of Oregon; thence north along that boundary to the place of beginning.

ARTICLE XVIII.

COUNTY ORGANIZATION.

Section 1. The several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state.

Sec. 2. No county seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal of the county seat shall not be submitted in the same county more than once in six years, except as provided by existing laws. No person shall vote at any county-seat election who has not resided in the county six months, and in the precinct ninety days.

Sec. 3. No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division: provided, that this section shall not apply to the creation of new counties. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its ratable proportion of all then existing liabilities of the county from which it is taken.

Sec. 4. No new county shall be established which shall reduce any county to an area of less than four hundred square miles, nor shall a new county be formed containing an area of less than four hundred square miles.

Sec. 5. The legislature shall establish, subject to the provisions of this article, a system of county governments which shall be uniform throughout the state, and, by general laws, shall provide for township or precinct organization.

Sec. 6. The legislature, by general and uniform laws, shall provide for the election biennially, in each of the several counties of the state, of county commissioners; a sheriff; county treasurer, who is ex officio public administrator; probate judge, who is ex officio county superintendent of public instruction; county assessor, who is ex officio tax collector; a coroner; and a surveyor. The clerk of the district court shall be ex officio auditor and recorder. No other county offices shall be established, but the legislature, by general and uniform laws, shall provide for the election of such township, precinct, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. The legislature shall provide for the strict accountability of county, township, precinct, and municipal officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession. The county commissioners may employ counsel when necessary. The sheriff, auditor, and recorder, and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistance as the business of their offices may require; said deputies and clerical assistance to receive such compensation as may be fixed by the county commissioners. No sheriff or county assessor shall be qualified to hold the term of office immediately succeeding the term for which he was elected.

Sec. 7. The officers provided by section six (6) of this article shall receive annually, as compensation for their services, as follows: Sheriff, not more than four thousand dollars, and not less than one thousand dollars, together with such mileage as may be prescribed by law; clerk of the district court, who is ex officio auditor and recorder, not more than three thousand dollars, and not less than five hundred dollars; probate judge, who is ex officio county superintendent of public instruction, not more than two thousand dollars, and not less than five hundred dollars; county assessor, who is ex officio tax collector, not more than three thousand dollars, and not less than five hundred dollars; county treasurer, who is ex officio public administrator, not more than

one thousand dollars, and not less than three hundred dollars; coroner, not more than five hundred dollars; county surveyor, not more than one thousand dollars; county commissioners, such per diem and mileage as may be prescribed by law; and justices of the peace and constables such fees as may be prescribed by law.

Sec. 8. The compensation provided in section seven (7) for the officers therein mentioned shall be paid by fees or commissions, or both, as prescribed by law. All fees and commissions received by such officers in excess of the maximum compensation per annum provided for each in section seven (7) of this article shall be paid to the county treasurer for the use and benefit of the county. In case the fees received in any one year by any one of such officers shall not amount to the minimum compensation per annum therein provided, he shall be paid by the county a sum sufficient to make his aggregate annual compensation equal to such minimum compensation.

Sec. 9. The neglect or refusal of any officer named in this article to account for and pay into the county treasury any money received as fees or compensation in excess of the maximum amount allowed to such officer by the provisions of this article, within forty days after the receipt of the same, shall be a felony, and the grade of the crime shall be the embezzlement of public moneys, and be punishable as provided for such offense.

Sec. 10. The board of county commissioners shall consist of three members, whose term of office shall be two years.

Sec. 11. County, township, and precinct officers shall perform such duties as shall be prescribed by law.

ARTICLE XIX.

APPORTIONMENT.

Section 1. Until otherwise provided by law, the apportionment of the two houses of the legislature shall be as follows:

The first senatorial districts shall consist of the county of Shoshone, and shall elect two senators.

The second shall consist of the counties of Kootenai and Latah, and shall elect one senator.

The third shall consist of the counties of

Nez Perce and Idaho, and shall elect one senator.

The fourth shall consist of the counties of Nez Perce and Latah, and shall elect one senator.

The fifth shall consist of the county of Latah, and shall elect one senator.

The sixth shall consist of the county of Boise, and shall elect one senator.

The seventh shall consist of the county of Custer, and shall elect one senator.

The eighth shall consist of the county of Lemhi, and shall elect one senator.

The ninth shall consist of the county of Logan, and shall elect one senator.

The tenth shall consist of the county of Bingham, and shall elect one senator.

The eleventh shall consist of the counties of Bear Lake, Oneida, and Bingham, and shall elect one senator.

The twelfth shall consist of the counties of Owyhee and Cassia, and shall elect one senator.

The thirteenth shall consist of the county of Elmore, and shall elect one senator.

The fourteenth shall consist of the county of Alturas, and shall elect one senator.

The fifteenth shall consist of the county of Ada, and shall elect two senators.

The sixteenth shall consist of the county of Washington, and shall elect one senator.

Sec. 2. The several counties shall elect the following members of the house of representatives:

The county of Ada, three members.

The counties of Ada and Elmore, one member.

The county of Alturas, two members.

The county of Boise, two members.

The county of Bear Lake, one member.

The county of Bingham, three members.

The county of Cassia, one member.

The county of Custer, two members.

The county of Elmore, one member.

The county of Idaho, one member.

The counties of Idaho and Nez Perce, one member.

The county of Kootenai, one member.

The county of Latah, two members.

The counties of Kootenai and Latah, one member.

The county of Logan, two members.

The county of Lemhi, two members.

The county of Nez Perce, one member.

The county of Oneida, one member.

The county of Owyhee, one member.

The county of Shoshone, four members.

The county of Washington, two members.

The counties of Bingham, Logan, and Alturas, one member.

ARTICLE XX.

AMENDMENTS.

Section 1. Any amendment or amendments to this constitution may be proposed in either branch of the legislature, and, if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals; and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and, if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

Sec. 2. If two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately.

Sec. 3. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and, if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members not less than double the number of the most numerous branch of the legislature.

Sec. 4. Any constitution adopted by such convention shall have no validity until it has been submitted to, and adopted by, the people.

ARTICLE XXI.

SCHEDULE AND ORDINANCE.

Section 1. That no inconvenience may arise from a change of the territorial gov-

ernment to a permanent state government, it is declared that all writs, actions, prosecutions, claims, liabilities, and obligations against the territory of Idaho, of whatsoever nature, and rights of individuals, and of bodies corporate, shall continue as if no change had taken place in this government; and all process which may, before the organization of the judicial department under this constitution, be issued under the authority of the territory of Idaho, shall be as valid as if issued in the name of the state.

Sec. 2. All laws now in force in the territory of Idaho which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature.

Sec. 3. All fines, penalties, forfeitures, and escheats accruing to the territory of Idaho shall accrue to the use of the state.

Sec. 4. All recognizances, bonds, obligations, or other undertakings heretofore taken or which may be taken, before the organization of the judicial department under this constitution, shall remain valid, and shall pass over to, and may be prosecuted in, the name of the state; and all bonds, obligations, or other undertaking executed by this territory, or to any other officer in his official capacity, shall pass over to the proper state authority, and to their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly. All criminal prosecutions and penal actions which have arisen, or which may arise, before the organization of the judicial department under this constitution, and which shall then be pending, may be prosecuted to judgment and execution in the name of the state.

Sec. 5. All officers, civil and military, now holding their offices and appointments in this territory, under the authority of the United States, or under the authority of this territory, shall continue to hold and exercise their respective offices and appointments until suspended under this constitution.

Sec. 6. This constitution shall be submitted for adoption or rejection to a vote of the electors qualified by the laws of this territory to vote at all elections, at an election to be held on the Tuesday next after the first Monday in November, A. D. 1889.

Said election shall be conducted in all respects in the same manner as provided by the laws of the territory for general election, and the returns thereof shall be made and canvassed in the same manner and by the same authority as provided in cases of such general elections, and abstracts of such returns duly certified shall be transmitted to the board of canvassers now provided by law for canvassing the returns of votes for delegate in congress. The said canvassing board shall canvass the votes so returned, and certify and declare the result of said election, in the same manner as is required by law for the election of said delegate.

At the said election the ballots shall be in the following form: "For the Constitution—Yes; No."

And as a heading to each of said ballots shall be printed on each ballot the following instructions to voters:

"All persons who desire to vote for the constitution, or any of the articles submitted to a separate vote, may erase the word 'No.'"

"All persons who desire to vote against the constitution, or against any article submitted separately, may erase the word 'Yes.'"

Any person may have printed or written on his ballot only the words, "For the Constitution," or "Against the Constitution," and such ballots shall be counted for or against the constitution accordingly.

Sec. 7. This constitution shall take effect and be in full force immediately upon the admission of the territory as a state.

Sec. 8. Immediately upon the admission of the territory as a state, the governor of the territory, or, in case of his absence or failure to act, the secretary of the territory, or, in case of his absence or failure to act, the president of this convention, shall issue a proclamation, which shall be published, and a copy thereof mailed to the chairman of the board county commissioners of each county, calling an election by the people of all state, district, county, township, and other officers, created and made elective by this constitution, and fixing a day for such election, which shall not be less than forty days after the date of such proclamation, nor more than ninety days after the admission of the territory as a state.

Sec. 9. The board of commissioners of the several counties shall thereupon order such election for said day, and shall cause notice thereof to be given, in the manner and for the length of time provided by the laws of the territory in cases of general elections for delegate to congress and county and other officers. Every qualified elector of the territory, at the date of said election, shall be entitled to vote thereat. Said election shall be conducted in all respects in the same manner as provided by the laws of the territory for general elections, and returns thereof shall be made and canvassed in the same manner and by the same authority as provided in cases of such general election; but returns for all state and district officers and members of the legislature shall be made to the canvassing board hereinafter provided for.

Sec. 10. The governor, secretary, comptroller, and attorney general of the territory, and the president of this convention, or a majority of them, shall constitute a board of canvassers to canvass the vote at such elections for all state and district officers and members of the legislature. The said board shall assemble at the seat of government of the territory, on the thirtieth day after the date of such election, (or on the following day, if such day fall on Sunday,) and proceed to canvass the votes for all state and district officers and members of the legislature, in the manner provided by the laws of the territory for canvassing the vote for delegate to congress; and they shall issue certificates of election to the persons found to be elected to said offices severally, and shall make and file with the secretary of the territory an abstract, certified by them, of the number of votes cast for each person for each of said offices, and of the total number of votes cast in each county.

Sec. 11. The canvassing boards of the several counties shall issue certificates of election to the several persons found by them to have been elected to the several county and precinct offices.

Sec. 12. All officers elected at such election shall, within thirty days after they have been declared elected, take the oath required by this constitution, and give the same bond required by the law of the territory to be given in case of like officers of

the territory, district or county, and shall thereupon enter upon the duties of their respective offices; but the legislature may require by law all such officers to give other or further bonds as a condition of their continuance in office.

Sec. 13. All officers elected at said election shall hold their offices until the legislature shall provide by law, in accordance with this constitution, for the election of their successors, and until such successors shall be elected and qualified.

Sec. 14. The governor elect of the state, immediately upon his qualifying and entering upon the duties of his office, shall issue his proclamation convening the legislature of the state at the seat of government on a day to be named in said proclamation, and which shall not be less than thirty, nor more than sixty, days after the date of such proclamation. Within ten days after the organization of the legislature, both houses of the legislature shall then and there proceed to elect, as provided by law, two senators of the United States for the state of Idaho. At said election the two persons who shall receive the majority of all the votes cast by said senators and representatives shall be elected as such United States senators, and shall be so declared by the presiding officers of said joint session. The presiding officers of the senate and house shall issue a certificate to each of said senators, certifying his election, which certificates shall also be signed by the governor, and attested by the secretary of state.

Sec. 15. The legislature shall pass all necessary laws to carry into effect the provisions of this constitution.

Sec. 16. Whenever any two of the judges of the supreme court of the state, elected under the provisions of this constitution, shall have qualified in their offices, the causes then pending in the supreme court of the territory, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state; and, until so superseded, the supreme court of the territory and the judges thereof shall continue, with like powers and jurisdiction, as if this constitution had not been adopted. Whenever the judge of the district court of any

district, elected under the provisions of this constitution, shall have qualified in office, the several causes then pending in the district court of the territory, within any county in such district, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the district court of the state for such county; and, until the district courts of this territory shall be superseded in the manner aforesaid, the said district courts and the judges thereof shall continue with the same jurisdiction and power, to be exercised in the same judicial districts respectively, as heretofore constituted under the laws of the territory.

Sec. 17. Until otherwise provided by law, the seals now in use in the supreme and district courts of this territory are hereby declared to be the seals of the supreme and district courts, respectively, of the state.

Sec. 18. Whenever this constitution shall go into effect, the books, records, and papers, and proceedings of the probate court in each county, and all causes and matters of administration and other matters pending therein, shall pass into the jurisdiction and possession of the probate court of the same county of the state, and the said probate court shall proceed to final decree or judgment, order, or other determination in the said several matters and causes as the said probate court might have done as if this constitution had not been adopted.

Sec. 19. It is ordained by the state of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits, owned or held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands

belonging to citizens of the United States residing without the said state of Idaho shall never be taxed at a higher rate than the lands belonging to the residents thereof; that no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use, and the debts and liabilities of this territory shall be assumed and paid by the state of Idaho; that this ordinance shall be irrevocable without the consent of the United States and the people of the state of Idaho.

Sec. 20. That, in behalf of the people of Idaho, we, in convention assembled, do adopt the constitution of the United States.

Done in open convention, at Boise City, in the territory of Idaho, this sixth day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

WM. H. CLAGETT,	WM. C. MAXEY.
President.	A. E. MAYHEW.
GEO. AINSLIE.	W. J. McCONNELL.
W. C. B. ALLEN.	HENRY MELDER.
ROB'T ANDERSON.	JOHN H. MYER.
H. ARMSTRONG.	JOHN T. MORGAN.
ORLANDO B. BATTEN.	A. B. MOSS.
FRANK W. BEANE.	AARON F. PARKER.
JAS. H. BEATTY.	A. J. PIERCE.
J. W. BALLENTINE.	A. J. PINKHAM.
A. D. BEVAN.	J. W. POE.
HENRY B. BLAKE.	THOS. PYEATT.
FREDERICK CAMPBELL.	JAS. W. REID.
FRANK P. CAVANAH.	W. D. ROBBINS.
A. S. CHANEY.	WM. H. SAVIDGE.
CHAS. A. CLARK.	AUG. M. SINNOTT.
I. N. COSTON.	JAMES M. SHOUP.
JAS. I. CRUTCHER.	DREN W. STANDROD.
STEPHEN S. GLIDDEN.	FRANK STEUNENBERG.
JOHN S. GRAY.	HOMER STULL.
WM. W. HAMMEL.	WILLIS SWEET.
H. S. HAMPTON.	SAM. F. TAYLOR.
H. O. HARKNESS.	J. L. UNDERWOOD.
FRANK HARRIS.	LYCURGUS VINEYARD.
SOL. HASBROUCK.	J. S. WHITTON.
C. M. HAYS.	EDGAR WILSON.
W. B. HEYBURN.	W. W. WOODS.
JOHN HOGAN.	JOHN LEMP.
J. M. HOWE.	N. I. ANDREWS.
E. S. JEWELL.	P. McMAHON.
G. W. KING.	SAMUEL J. PRITCHARD.
H. B. KINPORT.	J. W. BRIGHAM.
JAS. W. LAMOREAUX.	P. J. PEFLEY.
JOHN LEWIS.	

IDAHO ADMISSION BILL.

[PUBLIC 199.]

An act to provide for the admission of the state of Idaho into the Union.

Whereas, the people of the territory of Idaho did, on the 4th day of July, 1889, by a convention of delegates called and assembled for that purpose, form for themselves a constitution, which constitution was ratified and adopted by the people of said territory at an election held therefor on the first Tuesday in November, 1889, which constitution is republican in form, and is in conformity with the constitution of the United States; and

Whereas, said convention and the people of said territory have asked the admission of said territory into the Union of states on an equal footing with the original states in all respects whatever: Therefore,

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.

Sec. 2. That the said state shall consist of all the territory described as follows: Beginning at the intersection of the thirty-ninth meridian with the boundary line between the United States and the British possessions; then following said meridian south until it reaches the summit of the Bitter Root mountains; thence southeastward along the crest of the Bitter Root range and the Continental Divide until it intersects the meridian of thirty-four degrees of longitude; thence southward on this meridian to the forty-second parallel of latitude; thence west on this parallel of latitude to its inter-

section with a meridian drawn through the mouth of the Owyhee river; north on this meridian to the mouth of the Owyhee river; thence down the mid-channel of the Snake river to the mouth of the Clearwater river; and thence north on the meridian which passes through the mouth of the Clearwater to the boundary line between the United States and the British possessions, and east on said boundary line to the place of beginning.

Sec. 3. That until the next general census, or until otherwise provided by law, said state shall be entitled to one representative in the house of representatives of the United States, and the election of the representative to the fifty-first congress and fifty-second congress shall take place at the time, and be conducted and certified in the same manner, as is provided in the constitution of the state for the election of state, district, and other officers in the first instance.

The law of the territory of Idaho for the registration of voters shall apply to the first election of state, district, and other officers held after the admission of the state of Idaho. County and precinct officers elected at the first election held after the admission of the state of Idaho shall assume the duties of their respective offices on the second Monday of January, 1891.

Sec. 4. That sections numbered 16 and 36 in every township of said state, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in

such manner as the legislature may provide, with the approval of the secretary of the interior.

Sec. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Sec. 6. That fifty sections of the unappropriated public lands within said state, to be selected and located in legal subdivisions as provided in section 4 of this act, shall be, and are hereby, granted to said state for the purpose of erecting public buildings at the capital of said state for legislative, executive, and judicial purposes.

Sec. 7. That 5 per cent. of the proceeds of the sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state.

Sec. 8. That the lands granted to the territory of Idaho by the act of February 18, 1881, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the state of Idaho to the extent of the full quantity of 72 sections to said state, and any portion of said lands that may not have been selected by said territory of Idaho may be selected by the said state; but said act of February 18, 1881, shall be so amended as to provide that none of said lands shall be sold for less than \$10 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said state, and the income thereof be used exclusively for university purposes. The schools, colleges, and universities provided for in this act shall for-

ever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purpose shall be used for the support of any sectarian or denominational school, college, or university.

Sec. 9. That the penitentiary at Boise City, Idaho, and all lands connected therewith, and set apart and reserved therefor, and unexpended appropriations of money therefor, and the personal property of the United States now being in the territory of Idaho which has been in use in the said territory in the administration of the territorial government, including books and records and the property used at the constitutional convention which convened at Boise City in the month of July, 1889, are hereby granted and donated to the state of Idaho.

Sec. 10. That 90,000 acres of land, to be selected and located as provided in section 4 of this act, are hereby granted to said state for the use and support of an agricultural college in said state, as provided in the acts of congress making donations of lands for such purposes.

Sec. 11. That in lieu of the grant of land for purposes of internal improvement made to the new states by the eighth section of the act of September 4, 1841, which section is hereby repealed as to the state of Idaho, and in lieu of any claim or demand by the said state under the act of September 28, 1850, and section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant, it is hereby declared, is not extended to the state of Idaho, and in lieu of any grant of saline lands to said state, the following grants of land are hereby made, to wit: To the state of Idaho: For the establishment and maintenance of a scientific school, 100,000 acres; for state normal schools, 100,000 acres; for the support and maintenance of the insane asylum, located at Blackfoot, 50,000 acres; for the support and maintenance of the state university, located at Moscow, 50,000 acres; for the support and maintenance of the penitentiary, located at Boise City, 50,000 acres; for other state, charitable, educational, penal, and reformatory institutions 150,000 acres. None of the lands granted by this act shall be sold for less than \$10 an acre.

Sec. 12. That the state of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the legislature of the state may provide.

Sec. 13. That all mineral lands shall be exempted from grants by this act. But if sections 16 and 36, or any subdivision, or portion of any smallest subdivision, thereof, in any township, shall be found by the department of the interior to be mineral lands, the said state is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said state, in lieu thereof, for the use and benefit of the common schools of said state.

Sec. 14. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the surveyed, unreserved, and unappropriated public lands of the United States, within the limits of the state entitled thereto. And there shall be deducted from the number of acres of land donated by this act for the specific objects to said state the number of acres heretofore donated by congress to said territory for similar objects.

Sec. 15. That the sum of \$28,000, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, for defraying the expenses of said convention, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the territorial legislatures, and for elections held therefor and thereunder. Any money hereby appropriated not necessary for such purpose shall be covered into the treasury of the United States.

Sec. 16. That the said state shall constitute a judicial district, the name thereof to be the same as the name of the state; and the circuit and district courts therefor shall be held at the capital of the state for the time being, and the said district shall, for judicial purposes, until otherwise provided, be attached to the ninth judicial circuit. There

shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of the said district shall receive a yearly salary of \$3,500, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in the said district, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held in said district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties, required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the state of Oregon.

Sec. 17. That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States upon any record from the supreme court of said territory, or that may hereafter lawfully be prosecuted upon any record from said court, may be heard and determined by said supreme court of the United States; and the mandate of execution or for further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the said state from or to the supreme court of such state, as the nature of the case may require. And the circuit, district, and state courts herein named shall, respectively, be the successors of the supreme court of the territory, as to all

such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of the territory mentioned in this act, in any case arising within the limits of the proposed state prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said state into the Union.

Sec. 18. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of the said territory at the time of the admission into the Union of the state of Idaho, and arising within the limits of such state, whereof the circuit or district courts, by this act established, might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of said territory at the time of the admission of such territory into the Union, arising within the limits of said state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the state shall be pending, in any territorial court in said territory, shall abate by the

admission of such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: provided, however, that in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and, in the absence of such request, such cases shall be proceeded with in the proper state courts.

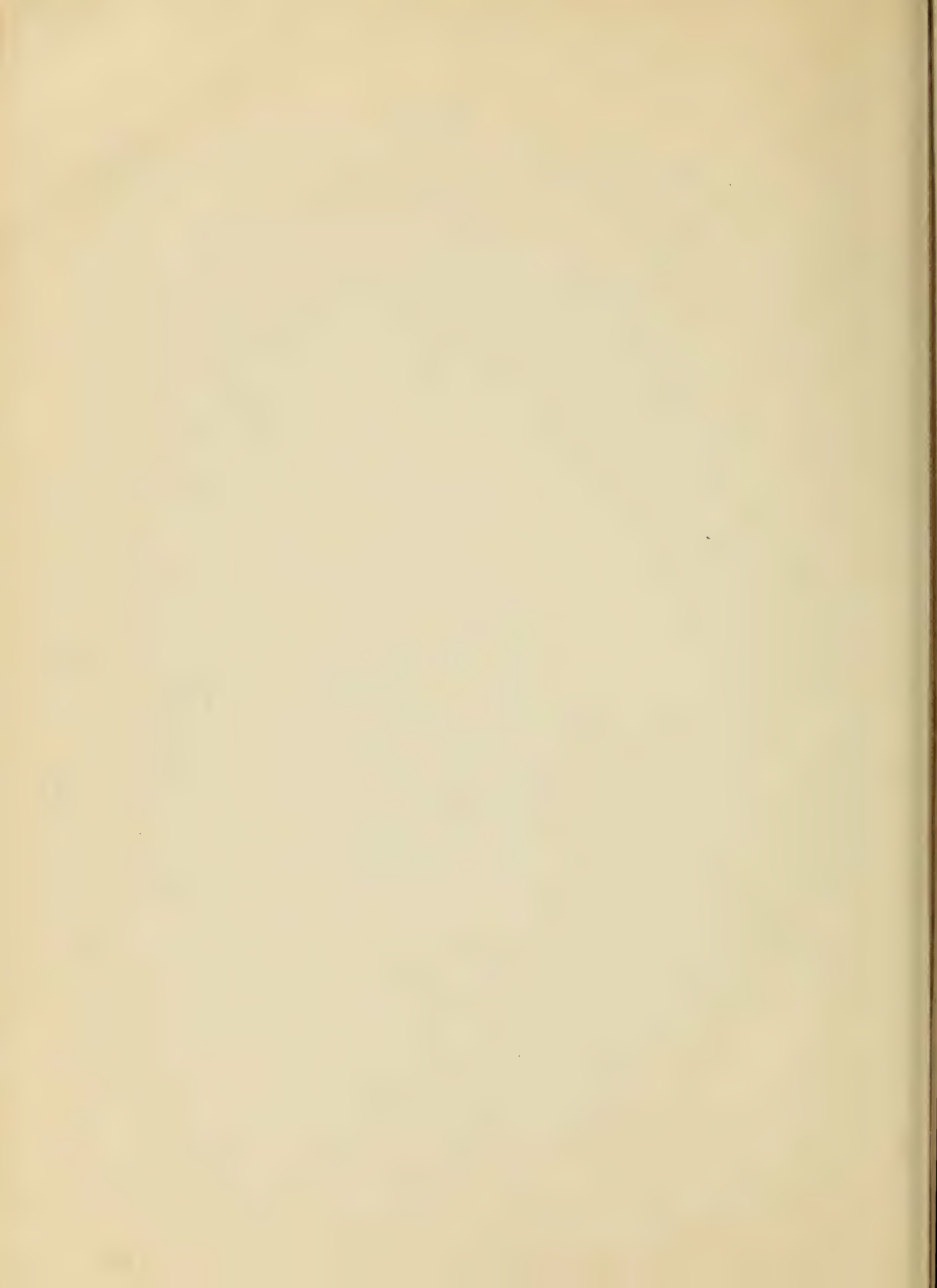
Sec. 19. That from and after the admission of said state into the Union, in pursuance of this act, the laws of the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States.

Sec. 20. That the legislature of the said state may elect two senators of the United States as is provided by the constitution of said state, and the senators and representative of said state shall be entitled to seats in congress, and to all the rights and privileges of senators and representatives of other states in the congress of the United States.

Sec. 21. That, until the state officers are elected and qualified under the provisions of the constitution of said state, the officers of the territory of Idaho shall discharge the duties of their respective offices under the constitution of the state, in the manner and form as therein provided; and all laws in force, made by said territory, at the time of its admission into the Union, shall be in force in said state, except as modified or changed by this act or by the constitution of the state.

Sec. 22. That all acts or parts of acts in conflict with the provisions of this act, whether passed by legislature of said territory or by congress, are hereby repealed.

Approved July 3, 1890.



TERRITORIAL DECISIONS.

*

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

SEPTEMBER TERM, 1881

CALDWELL v. RUDDY.

(September Term, 1881.)

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — SUFFICIENCY OF ANSWER.

1. Where, in an action on a note, the answer alleges that the note had been fully paid, an objection that it did not set forth a defense was properly overruled.

PLEADING — INCONSISTENT DEFENSES — HOW REACHED.

2. Under the statute regulating pleading, an objection that an answer contains inconsistent defenses cannot be made by demurrer; the remedy in such case being by motion to strike out.

NEGOTIABLE INSTRUMENTS — CONSIDERATION—IM- PROVEMENTS ON PUBLIC LANDS.

3. Improvements on public lands, being subjects of sale, constitute a sufficient consideration to support a promissory note.

SAME—INADEQUACY OF CONSIDERATION—FRAUD.

4. In an action on a promissory note given for certain improvements on public lands, an answer alleging that defendant was induced to sign the note by the misrepresentations of plaintiff as to the value of the improvements, and that plaintiff was not the sole owner of the land and improvements, constitutes no defense; it not appearing that defendant was disturbed in his enjoyment of the land, or that he had surrendered, or offered to surrender, it to plaintiff.

SAME—ACTION AGAINST SURETY — INSANITY OF MAKER.

5. In an action against the surety on a note, an answer alleging the insanity of the maker constitutes no defense.

Appeal from district court, Nez Perces county.

Action by W. A. Caldwell against Rich-

ard Ruddy on two promissory notes. From a judgment for defendant, plaintiff appeals. Reversed.

This action was brought by the plaintiff and appellant against defendant and respondent, as surviving partner, upon two joint and several promissory notes, executed by defendant and one Michael Ruddy, deceased, (father of defendant,) each for the sum of \$2,646.38, both bearing date March 7, 1872,—one payable October 15, 1872; the other October 15, 1873.—with interest at 10 per cent. per annum, payable to the order of appellant; also an account for \$303.34. Upon the first mentioned note there was a credit of \$1,554.13, January 15, 1873. The defendant, by his answer, set up want of consideration, and pleaded tender and payment; also denied a partnership. The case was first tried at spring term, 1879, of said court, with a jury, which resulted in a verdict for defendant. On motion of plaintiff, a new trial was granted. Defendant was allowed to amend his answer by adding thereto an allegation of fraud. Plaintiff demurred to the amended answer, upon the ground that several defenses had been improperly united. Demurrer overruled. Plaintiff excepted. Plaintiff also filed a motion to strike out portions of the amended answer. The action of the court upon such motion is only found in the journal entries made by the clerk at the trial, in which it appears the motion was in part sustained and part overruled. The case was retried before same court, with a jury, in April, 1880, which

Caldwell v. Ruddy.

trial, as before, resulted in a verdict for defendant. The plaintiff then made a motion to set aside the verdict, which motion was overruled. Judgment was rendered on said verdict April 29, 1880. This case was brought before this court by appeal at September term, 1880, which appeal was dismissed. In November, 1880, another appeal was taken, and is now before this court on such appeal.

A. E. Isham, for appellant.

The maker of a note cannot avail himself of a partial failure of the consideration unless he has offered to rescind the contract. *Burton v. Schermerhorn*, 21 Vt. 289; *Pars. Notes & B.* 205.

The defendant ought not to have been allowed to plead or prove inadequate consideration. 1 *Pars. Cont.* (5th Ed.) 436; *Pars. Notes & B.* 205, 207-209; *Johnson v. Titus*, 2 Hill, 606; *Lee v. Kirby*, 104 Mass. 420; *Chit. Cont.* (4th Ed.) p. 25.

The surety or joint maker on a note cannot plead or prove the incompetency of his comaker. *Carrier v. Sears*, 4 Allen, 336; *Bigelow*, *Estop.* 272; *Erwin v. Downs*, 15 N. Y. 575; *Remsen v. Graves*, 41 N. Y. 471.

The objections to the answer may be raised in the supreme court also, for the first time. *Haskell v. Moore*, 29 Cal. 437.

Where rulings appear as matter of record a bill of exceptions is unnecessary, and the ruling on a demurrer will be reviewed upon appeal from final judgment. 3 *Estee*, Pl. (2d Ed.) 436; *De Johnson v. Sepulbeda*, 5 Cal. 149; *Agard v. Valencia*, 39 Cal. 292; *McAbel v. Randall*, 41 Cal. 136. And, where error is disclosed, injury will be presumed. *Norwood v. Kenfield*, 30 Cal. 393.

Huston & Gray, for respondent.

What papers can be used on an appeal from the judgment: *Rev. Laws Idaho*, p. 183, § 448; *Civil Code Idaho*, p. 149, § 653; *Welsh v. Allen*, 54 Cal. 211; *Spinetti v. Brignardello*, 53 Cal. 281; *People v. Taing*, Id. 602.

The errors, if any there were, in overruling the motion to set aside the verdict, cannot be considered now. An appeal should have been taken from such order within 60 days. *Rev. Laws Idaho*, p. 179, §§ 61, 437; *Civil Code*, p. 146, § 642.

The demurrer must distinctly specify the grounds upon which objection is taken. *Rev. Laws Idaho*, p. 88, § 41; *Kent v. Snyder*, 30 Cal. 666; *Gale v. Water Co.*, 44 Cal. 43.

Fraud in the inception of the contract

renders it void as to all parties thereto not implicated in the fraud. *Story, Prom. Notes*, § 101; *Peaslee v. Robbins*, 3 Mete. (Mass.) 164; 2 *Chit. Cont.* p. 1035; 2 *Daniels, Neg. Inst.* p. 287; *Davis v. Bartlett*, 12 Ohio St. 541; *Munroe v. Cooper*, 5 Pick. 412; 1 *Daniels, Neg. Inst.* p. 1680, note.

PRICKETT, J. This action was brought by the plaintiff against the defendant, in the district court, upon two joint and several promissory notes, alleged to have been executed by the defendant and one Michael Ruddy, deceased. Each of said notes are for the sum of \$2,646.38, both dated March 7, 1872,—one due October 15, 1872; the other, October 15, 1873. Also upon an account for \$303.34. Upon the first-mentioned note is credited \$1,554.13, January 15, 1873. The defendant's amended answer consists of 10 subdivisions, each of which was, no doubt, intended as a complete or partial defense to the said several causes of action, or to some one or more of them. Such proceedings were had in the district court as resulted in the striking out of the seventh and ninth subdivisions of the answer. The plaintiff demurred in the court below to the amended answer, alleging as objections that the second and third subdivisions are inconsistent with the tenth, and that the sixth and eighth paragraphs are inconsistent with each other; and also specially demurred to the tenth paragraph, on the ground that it constitutes no defense to the action. The district court overruled the demurrer, and the plaintiff excepted to that ruling. The cause being tried by a jury, a verdict was rendered for the defendant, whereupon a judgment was rendered against the plaintiff for costs. From that judgment the plaintiff appealed to this court. Much of the matter contained in the transcript was stricken out on motion, because it constitutes no part of the record; not being made such either by the statute, or by bill of exceptions or statement.

The case as it now stands is to be reviewed upon the judgment roll alone, which consists of the complaint, amended answer, the demurrer to the answer, and the decision of the court thereon, and the exception of the plaintiff thereto, the verdict, and the judgment.

The plaintiff and appellant claims that he is entitled to a reversal of the judgment of the district court on the ground that the amended answer does not set forth a

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defense to any of the causes of action alleged in the complaint. This brings us to a consideration of the answer as upon a general demurrer to the whole thereof on the ground just stated. This objection may, no doubt, be raised in this court for the first time; but, in determining it, we must be governed by the same rule that the district court would have been had it been raised there, which is that, if there is any defense contained in the answer, the objection must be overruled. Upon an examination of the amended answer we find that the sixth subdivision thereof is as follows: "For a further and separate defense, avers that the said notes and accounts have been fully paid." This, if true, —and it is admitted to be so, for the purposes of this objection,—constitutes a full and complete defense to all of the several causes of action set forth in the complaint, and this general objection to the answer as a whole must be overruled.

We now proceed to an examination of the written demurrer interposed in the district court, and to review the decision of that court thereon. The first two subdivisions of the demurrer will be considered together. The language of the demurrer is that several defenses have been improperly united, but the objection urged on the argument is that the second and third paragraphs of the answer are inconsistent with the tenth, and that the sixth and eighth paragraphs are contradictory and inconsistent with each other. And the specifications of the particulars, as contained in the demurrer, clearly show that the real grounds of the objection are based upon an alleged inconsistency between the specified portions of the answer, and not upon an improper joinder of defenses. An objection that a pleading contains inconsistent allegations or denials cannot be made by demurrer. The grounds upon which a party may demur are specified and enumerated in the statute, and he must be limited to the statutory grounds. That a pleading contains inconsistent allegations or defenses is not one of these grounds. When this objection exists it should be taken advantage of by motion to strike out, or to require the party pleading to elect between them. The first and second subdivisions of the demurrer were therefore properly overruled.

The third subdivision of the demurrer is directed to the tenth paragraph of the answer. It is in effect an objection that that

paragraph does not contain facts sufficient to constitute a defense to any of the causes of action set forth in the complaint, and it specifies the particulars in which it is claimed to be deficient. The tenth paragraph of the answer is as follows: "For a further and separate defense defendant avers that the said notes were procured from the said Michael by the said plaintiff by fraud and misrepresentation; that the pretended consideration for said notes was certain improvements upon a certain piece or parcel of government land in said county; and the defendant alleges that the said plaintiff, in order to secure the execution of the said notes by the said Michael, and well knowing that the said Michael was then sick, and was laboring under both physical and mental derangement, which rendered him wholly incapable to transact his own business, falsely and fraudulently represented to the said Michael that he was the owner of the said lands and the improvements thereon, and that the same was then worth the sum of the said notes; and the said Michael at that time was the father-in-law of the said plaintiff, and had full confidence in, and fully believed all the representations made by, the said plaintiff, and was thereby induced to sign the said notes; and the defendant alleges the fact to be that the said land and improvements were not worth the said amount, or any amount in excess of \$1,600, and that the said plaintiff well knew the same; and defendant avers that the said plaintiff was not the owner of the said land or improvements, or any portion thereof more than one-half of the same, and plaintiff well knew the same at the time; and defendant avers that the most, if not all, of said improvements were made by one James Pierson, and that he, said Pierson, was the owner of at least one-half thereof,—all of which was well known to said plaintiff."

This portion of the answer is clearly intended to show illegality in, or failure of consideration either in part or in whole for, the promissory notes alleged to have been made by the defendant and his deceased father, Michael Ruddy, in his lifetime, and fraud on the part of the plaintiff in procuring the execution of the notes by the said Michael Ruddy; but it is wholly insufficient for either purpose. The sale of improvements upon the public lands of the United States is not prohibited by any law, neither is it against sound morals, public policy, or public interests; and

Schneider v. Hussey.

there is no reason why they may not be proper subjects of sale, and serve as actual value and valuable consideration for promissory notes and other contracts.

It is apparent that an entire want of consideration is not relied upon as a defense, because it is admitted by defendant that the land and improvements sold were worth the sum of \$1,600. The defendant does not say that his father did not get all the property for which the notes were given, but, in effect, that it was not worth the price agreed to be given therefor. This is merely alleging inadequacy, not failure, of consideration. This is no defense, unless there was also fraud on the part of the plaintiff in inducing the purchaser to believe it to be of greater value, which we shall presently consider. It is not the duty of courts to relieve parties from the obligations of their contracts, fairly made, because they are disadvantageous or foolish, but to enforce them. Courts, both of law and of equity, refuse to disturb contracts on grounds of mere inadequacy, whether the consideration is of benefit of the promisor or of injury to the promisee. 1 Pars. Cont. 436.

It is alleged in this portion of the answer, it is true, that the plaintiff was not the owner of more than one-half of the improvements sold to Michael Ruddy, but that one James Pierson was the owner of at least one-half thereof; but it is a sufficient answer to this allegation that it nowhere appears that said Michael Ruddy in his life-time, or his heirs or representatives, have ever been disturbed in their possession of the property, or that Pierson has ever asserted any rights thereto; but even if he had done so, and the purchaser had been actually evicted from a portion of the premises and improvements, he could not avoid payment of the notes without first surrendering or offering to surrender the remainder to the plaintiff, so that both parties might be remitted to their original rights.

Upon the question of mental incapacity of Michael Ruddy to make the notes, it is sufficient to say that this constitutes no defense in favor of this defendant. The contract of an insane person is voidable only, not absolutely void. 2 Bl. Comm. 291; 2 Kent, Comm. (6th Ed.) 451. The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian or representatives. The contract is binding upon the party who is of sound mind, and his liability is not

affected until it is avoided by the party entitled to disaffirm it. Nor could Michael Ruddy have disaffirmed the note on this ground without returning the property. A person may not disaffirm or rescind a contract and yet retain any portion of the consideration. The only exception to this rule is when the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from a purchase and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be enforced in part and rescinded in part. And if the property would be of any benefit to the seller he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before; otherwise he cannot do it. Chit. Cont. 276. And so, as to all the other allegations intended to show fraud, the same rules and principles apply. One of the two joint and several makers of a promissory note cannot defend on the ground that the signature of the other maker was procured by fraud. If, as is alleged, the defendant as a matter of fact executed the notes as surety for Michael Ruddy, then his standing is in no respect better, for a surety, guarantor, or indorser of a promissory note is deemed in law to contract that the principal maker of the note was in every way competent to contract in the manner he has, and that the instrument is a binding obligation upon said maker.

This subdivision of the answer does not contain facts sufficient to constitute any defense to the notes, and the demurrer thereto ought to have been sustained by the district court, and for that reason the judgment must be reversed and the cause remanded.

SCHNEIDER *et al.* v. HUSSEY *et al.*

(September Term, 1881.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.

1. Laws 8th Sess. p. 587, § 2, provides that, in cases where the cause of action has already accrued at the passage of this act, a party shall have the whole period prescribed by the act, after its passage, in which to commence action. Laws 8th Sess. p. 869, § 1, provides that the statute of limitations shall take effect at a day subsequent to the date of its actual passage and approval by the governor. *Held*, that the period of limitation did not begin to run until the statute took effect.

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WORDS AND PHRASES—"PASSAGE OF ACT."

2. The words "passage of this act" mean the time when the act takes effect. *Rogers v. Vass*, 6 Iowa, 408, followed.

Appeal from district court, Idaho county.

Action by Charles Schneider and another against James Hussey and another on a promissory note. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. Brumback, for appellants. *Huston & Gray*, for respondents.

The laws of the eighth session all went into operation and took effect on the 1st day of July, 1875. *Laws 8th Sess.* p. 869, § 1; *Cooley, Const. Lim.* p. 156, note 5; *Wheeler v. Shubbuck*, 16 Ill. 361.

MORGAN, C. J. This action was brought on a promissory note given by defendants to the plaintiffs, a copy of which appears in the complaint filed in the court below. The note was dated October 31, 1874, and was due on demand. Suit was commenced on the same, February 28, 1880. Defendants plead the statute of limitations. Plaintiffs moved for judgment on the pleadings, which motion was allowed by the court, and judgment entered accordingly for the amount of the note, interest, and costs. From that judgment defendants take an appeal to this court.

The question whether this action was barred by the statute of limitations depends upon the construction to be given to the language contained in section 2 of said act, which states that "when the cause of action has already accrued, the party entitled and those claiming under him shall have, after the passage of this act, the whole period herein prescribed in which to commence an action;" which period, at the time of the commencement of this suit, was five years. The question is as to whether the words "passage of the act" mean when it is signed by the governor, or when by law the act goes into effect. The first section of the act of January 15, 1875, fixes the time when this act, among others, takes effect, which is July 1, 1875. It will not be contended that one section of an act will take effect or be in force at any earlier date than other sections unless the act itself shall so state. There is no clause in this act providing that this section shall take effect sooner than any other section of the same act. This section, therefore, and no clause of it, can take effect until the first day of July, 1875. The words "passage of the act," while they have a technical meaning which

is well understood, in this connection and as used in the section referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any such life. The same construction of these words was given in the case of *Rogers v. Vass*, 6 Iowa, 408. The court there say: "A prominent objection made by the defendant is that the right of pre-emption was taken away by the act of twenty-fourth January, 1857, which repealed all prior acts allowing a pre-emption on the swamp lands, but with a proviso saving all actual settlers on said lands at the time of the passage of the act. As the act was passed in January, and the petitioner began his improvement in June, the defendant insists that the former acquired no right of pre-emption, he not being a settler at the passage of the act. But the objection is not well founded. This, and similar expressions in statutes, has legal reference to the time of their taking effect. No other construction would be consistent with that requirement of the constitution, which provides that the laws shall be published before they take effect." It is also the well-settled rule of courts that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen.

The judgment of the court below is therefore affirmed.

PEOPLE v. McDONALD.

(September Term, 1881.)

HOMICIDE—INSTRUCTIONS—MALICE.

1. Under Act Jan 14, 1875, c. 4, § 17, (*Crimes and Punishments Act*), providing that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," a charge in a prosecution for murder that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart" is unobjectionable.

SAME.

2. Nor, in such case, can error be predicated on the omission of the word "all" from the instruction; "all" being used in the statute by way of emphasis only.

Appeal from district court, Owyhee county.

Henry McDonald was convicted of

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murder in the first degree, and appeals. Affirmed.

Alanson Smith, for appellant.

The court erred in its definition of "murder."

(1) It omits the element of "considerable provocation," and withdraws that part of the law and that branch of the defense wholly from the consideration of the jury.

(2) It positively declares that law which is not the law, for when "considerable provocation appears" there is no implied malice, because the existence of such a provocation is as effectual to prevent the implication of malice as the absence of circumstances which show an abandoned and malignant heart is to prevent the implication of malice.

(3) And, when "considerable provocation appears," the law implies that the act of killing was done under the influence of passion provoked, not with malice aforethought, either express or implied, which must exist in murder of any degree. 2 Bish. Crim. Law, (6th Ed.) §§ 675, 697.

(4) The court left out of its definition of "murder" the element most favorable to the defendant, in that it required the jury to find abandoned and malignant heart from some or any of the circumstances of the killing; while the statute requires them to find it from all, and consider all.

(5) The court erred in not definitely instructing the jury that in finding a verdict against the defendant, upon the presumption of guilt, arising from the evidence, or upon the conclusive implication of malice, they should find the defendant guilty of the lesser offense, to wit, of murder in the second degree. *People v. Walter*, 1 Idaho, 386; *People v. White*, 24 Pa. St. 580; *Johnson v. Com.*, 24 Pa. St. 386; *State v. McCormick*, 27 Iowa, 402; *People v. Gibson*, 17 Cal. 283, and cases there cited.

Thos. D. Cahalan, for the People.

It is not error for the judge to omit to charge the jury on a particular point, unless asked to do so at the trial. *Hall v. Weir*, 1 Allen, 261; *Burns v. Sutherland*, 7 Pa. St. 103; *Davis v. Elliott*, 15 Gray, 90; *Jones v. State*, 20 Ohio, 34; *Bain v. Doran*, 54 Pa. St. 124; *Tomlinson v. Wallace*, 16 Wis. 224-235; *Pennock v. Dialogue*, 2 Pet. 1; *Keohler v. Wilson*, 40 Iowa, 183; *Miller v. Bryan*, 3 Iowa, 58; *People v. Haun*, 44 Cal. 96.

If instructions which the judge is asked to give cannot be properly given without

being modified, he may, for that reason, refuse to give them. *Bevan v. Hayden*, 13 Iowa, 122-127; *Grimes v. Martin*, 10 Iowa, 347; *Carpenter v. Stilwell*, 11 N. Y. 61-79; *Lucas v. Brooks*, 18 Wall. 436; *Hodges v. Cooper*, 43 N. Y. 216; *Railroad Co. v. Horst*, 93 U. S. 291.

If the judge has already instructed the jury properly, and with sufficient fullness as to the law of the case, and additional instructions are asked for, which simply present, in different language, points covered by the instruction given, it is not error to refuse them, nor is it the duty of the judge to refuse them. *Kelly v. Jackson*, 6 Pet. 622-628; *Railroad Co. v. Horst*, 93 U. S. 291, 295; *Jones v. Jones*, 71 Ill. 562; *People v. Murray*, 41 Cal. 66; *People v. Kelly*, 28 Cal. 423; *People v. Strong*, 30 Cal. 151; *People v. Williams*, 32 Cal. 280; *State v. O'Connor*, 11 Nev. 416; *State v. Waterman*, 1 Nev. 543.

MORGAN, C. J. Defendant was indicted, tried, and convicted of murder in the first degree. The first point urged upon the attention of the court, and which seems to be relied upon by the appellant as the main point, or as the only ground upon which he asks a reversal of the judgment below and an order for a new trial, is "that the court erred in the instruction giving the definition of murder, or in the direction as to when malice is to be implied. The language of the statute¹ is that malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." The language of the court in the instruction is: "Malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart." The language of the statute is in the alternative, and is equivalent to the following: Malice shall be implied either when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart; that is, in either case malice shall be implied. It is proper, then, that the court should give either cause for the implication that may, in his judgment, be applicable to the evidence.

The question remains, then, whether leaving out the word "all" makes such a

¹Act Jan. 14, 1875, c. 4, § 17, (Crimes and Punishments Act.)

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change in the statute as to mislead the jury. It is proper, first, to inquire what kind of an error or omission would authorize an appellate court to reverse a judgment of a court below and direct a new trial. It is not error to give general instructions, and if an omission occurs in a general instruction, unless it actually misleads the jury and procures a wrong verdict, it cannot be assigned for error. Thompson, in his work on Charging the Jury, § 81, says a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time, and cites a large number of authorities running through the reports of a number of the states. Neither is it sufficient if there is a mere tendency in the instructions to mislead the jury; in such a case also the defendant must ask additional explanatory instructions in order to avail himself of the defect in a court of error. *Id.* § 82; *Kenan v. Holloway*, 16 Ala. 53. A proper jury is composed of men of sound judgment and ordinary intelligence. It cannot be supposed that such men would infer from this instruction that they were to take a part of the circumstances and from these imply malice; such men would know that, when the court said the circumstances of the killing, all the circumstances were intended, and not a part.

It cannot be said, and it is not said, by the appellant that this instruction in the form given misled the jury, and it can scarcely be said that it had a tendency even to mislead the jury. The word "all," in the connection used, is a word of emphasis only, and is not in any sense essential to the completeness of the direction. The court is never required to give instructions in the exact language of the statute; it would be in some cases erroneous to do so; it is sufficient if the substance is correctly given. When all the instructions are taken together no improper inference can be drawn. The jury are repeatedly, and in differing language, charged that every reasonable doubt arising from the evidence must be resolved in favor of the defendant. This reasonable doubt is defined in the instructions to be not speculative in its nature, but a real uncertainty, and a wavering of the mind after consideration of all of the evidence; and the concluding clause of the instructions of the court is, "You will carefully consider all the facts and circumstances of the case as detailed by the

evidence." The different degrees of murder and manslaughter are also clearly defined.

The six instructions refused had been substantially and fully given by the court. These six instructions are clearly bad on account of their mystical character also, and appear to have been framed to confuse the jury instead of to instruct them. We find no error in the causes assigned.

Judgment is therefore affirmed.

GRETE v. KNOTT.

(September 14, 1881.)

APPEAL—RECORD—STIPULATIONS.

1. Where a paper containing a stipulation between the parties to an action is, without objection, made a part of the transcript, and both parties refer to it in their arguments on appeal, such paper will be considered as part of the record by consent of parties.

PRACTICE IN CIVIL CASES—STIPULATION OF JUDGMENT.

2. Where defendant stipulates in writing that an item of the complaint be increased, and that the whole judgment be enlarged to include this increase, such stipulation warrants a judgment for the enlarged amount.

Appeal from district court, Owyhee county.

Action by John Grete against William B. Knott. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Nugent, for appellant. *Richard Z. Johnson*, for respondent.

BUCK, J. The plaintiff filed his complaint in this action on the third day of October, 1879. Summons was issued on the same day, but personal service was never effected. An attempt at service was made by publication on the twenty-seventh day of April, 1880. The following stipulation was entered of record in the case and filed: "In the District Court of the Second Judicial District, in and for Idaho Territory, Owyhee County. John Grete v. Wm. B. Knott. It is stipulated by and between the parties hereto that in the item of the complaint containing the account of Timothy Warren against the defendant, be enlarged to the amount of six hundred and seventy-seven dollars, on account of a failure of certain credits allowed in the complaint, and that the whole judgment be enlarged to embrace said sum. Wm. B. Knott. April 27, 1880." On the same day judgment was entered in compliance with

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the prayer of the complaint and that stipulation on file for \$4,291.89 and costs and disbursements. The said stipulation was the only appearance of the defendant in the case. The case comes to this court on an appeal from the judgment, and the record consists of the judgment roll alone. The appeal seeks to reverse the judgment on the following grounds: (1) Because the record shows that the defendant was a non-resident, and does not show sufficient service of the summons to give the court jurisdiction of the person of defendant; (2) that there was no waiver of service of the summons; (3) that the paper appearing in the transcript marked "stipulation for judgment," was not an appearance on the part of the defendant; (4) that the record does not show that said stipulation was signed by defendant, and that proof of such signature should appear in the judgment roll.

In the argument of the case the attention of the respective attorneys was given chiefly to two points: (1) Whether the service of the summons, as shown by the record, was sufficient to give the court jurisdiction; (2) whether the paper indorsed "stipulation" was sufficient to sustain the judgment.

The first point is a question of great importance, involving the validity of service of summons by publication, much discussed in later decisions in federal and state courts.

The judgment of the court, however, is based in this case on the stipulation for judgment, and it is not, therefore, necessary to consider the first point. The paper marked "stipulation for judgment" properly forms no part of the judgment roll, and under former decisions of this

court would have been stricken out on motion, had such a motion been made. But as it is made a part of the transcript, and no objection being made to it, and the attorneys of the respective parties having given prominence to it in the argument, the court is of the opinion that it should be considered as a part of the record by consent of parties. This paper is entitled and filed as other papers in the action. Appellant claims that it has reference to but one specified item in the complaint. But in direct terms it refers to the whole judgment. In terms, it stipulates that that item be enlarged to \$600, and that the whole judgment be enlarged to include that amount. The whole judgment, by reasonable construction, is the judgment asked for in the complaint. The court is of the opinion that this writing, in terms, consents, at least, that the judgment entered according to the prayer of the complaint be enlarged by \$600. If advantage was taken of defendant in entering judgment too soon, or contrary to the terms of the stipulation, the defendant might have had it corrected in the court below under section 68 of the Code of Civil Procedure. The judgment recites that it was entered according to the prayer of the complaint and the stipulation on file. Even without reference to the terms of the stipulation, from the terms of the judgment we presume that the truth of the recitals was established by competent evidence to the satisfaction of the court, but the evidence should form no part of the judgment roll.

The judgment is affirmed.

MORGAN, C. J., and PRICKETT, J., concurred.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

SEPTEMBER TERM, 1882.

RUPERT *v.* BOARD OF COM'RS OF ALTURAS COUNTY.

(September 11, 1882.)

APPEAL — APPEALABLE JUDGMENTS — ORDER OF BOARD OF COUNTY COMMISSIONERS.

No appeal will lie from a judgment of the district court upon an appeal from an order of the board of county commissioners declaring the result of an election, the remedy of the aggrieved party in such case being by writ of error.

Appeal from district court, Alturas county.

An election was held in Alturas county for the relocation of the county seat. From an order of the board of county commissioners declaring the result of the election, Joseph A. Rupert appealed to the district court. From the judgment of the district court the county commissioners appealed. Appeal dismissed.

J. Brumback, for appellants. *R. Z. Johnson and Huston & Gray*, for respondent.

MORGAN, C. J. In the matter of the motion to dismiss the appeal taken by the board of county commissioners of Alturas county, Idaho territory, from the judgment of the district court of the Second judicial district in and for said county of Alturas, entered in the records of said court on the third day of November, 1881. It appears from the record in this cause that pursuant to law an election was held in Alturas county, for the relocation of the county seat thereof, on the twelfth day of September, A. D. 1881; that on the

twenty-second day of September, A. D. 1881, the said board of county commissioners canvassed the votes cast at said election, and duly entered the result thereof in their records on said last-mentioned date; that on the first day of October, A. D. 1881, one Joseph A. Rupert, of said county, took an appeal from the order of said board declaring the result of said canvass to the district court in and for said county; that after hearing said cause final judgment was entered therein, as stated, on the third day of November, 1881. From said judgment the said board of county commissioners attempt to take an appeal to this court under and by virtue of sections 641 and 642, 11th Sess. Laws Idaho. The question is, can this cause be brought to this court by this method? At common law appeals of this character are unknown. See *Pow. App. Proc.* p. 194, § 6; *Wiscart v. Dauchy*, 3 Dall. 321; *Curt. Conv.* § 185. The right to appeal, therefore, and the method of perfecting it, is wholly dependent upon the statutes in force in this territory. See, also, *U. S. v. Gilson*, 1 Idaho, 364. Section 1869 of the organic act of this territory states that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court of all the territories, respectively, under such regulations as may be prescribed by law; that is, such regulations as may be prescribed by the laws of the territory. Section 642, 11th Sess. Laws Idaho, distinctly and clearly sets forth what class of cases may be

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brought to this court by appeal, as follows: An appeal may be taken to the supreme court from a district court (1) from a final judgment in an action or special proceeding commenced in the court in which the same is rendered; (2) from a judgment rendered on an appeal from an inferior court; (3) from an order granting or refusing to grant a new trial, and from various other orders mentioned in said third clause.

Clearly, it is not the duty of this court to give the words of a statute any other meaning than is expressed by their legal signification. It is not the duty of this court, nor has it the authority, to give a statute any broader scope than that intended by the legislature. Does this case come within the first clause of said section? Was this an action or special proceeding commenced in the district court? By virtue of section 28, p. 690, Rev. Laws Idaho, it became the duty of the said board of county commissioners to canvass the votes cast at said election, and declare the result, which they did. From the order declaring this result the first clause of section 25, county commissioners' law, (Rev. Laws Idaho, 529,) gives the right of appeal to the district court. Section 26, Id., gives the method of appeal. Section 28 directs the clerk of the board of county commissioners as to his duties upon receiving the notice of appeal and undertaking. Section 27 authorizes and directs the district court to hear the case anew, and empowers said court to affirm, reverse, annul, or modify the order of the board.

The appeal of the respondent in this court was taken from the order of the board in accordance with the sections above set forth, and the cause was heard in the district court on said appeal. We think it must be held that said action was commenced when the notice of appeal was filed with the clerk of the board of county commissioners; that the order of the board of county commissioners is a constituent and necessary part of this cause, and the foundation of the action. All the proceedings until the appeal was perfected were had before the board of county commissioners, or with the clerk of said board. An appeal from the order of the board of commissioners necessitates such an order by the board as a priority to the appeal and the foundation thereof. In an action or special proceeding commenced in the district court it will be found that the papers which com-

menced the action are always placed on file in said district court with the clerk thereof; and it is never an appeal from a judgment, order, or decision of any other court, tribunal, or board whatever. The ordinary and legal signification of the word "appeal" indicates that there has been an order, judgment, or decision by some inferior board or tribunal. We think it must be held that this cause or proceeding was commenced before the board of county commissioners, and therefore does not come under the first clause of section 642. The second clause of said section allows appeals from the judgments rendered by inferior courts. A court is a body in the government to which the public administration of justice is delegated. The one common and essential feature in all courts is a judge or judges having some sort of judicial functions, power, or authority. Bouv. Law Dict. 373 et seq. Section 1907, Rev. St. U. S., specifies in what bodies or persons judicial power is vested in the territories, namely: In supreme court, district courts, probate courts, and in justices of the peace. Boards of county commissioners are not among the number, and have no judicial functions or power, and cannot be vested therewith; therefore they are not courts. This clause is clearly not within the third clause of section 642.

Parties deeming themselves aggrieved by the judgment of the district court, are not without a complete remedy. Writs of error, aided by bills of exceptions, have for six centuries, under the common law, furnished a complete and perfect means of bringing causes from an inferior court to the appellate court for review, and for the correction of errors, if any there be. All the virtues of this ancient and complete remedy are at the service of the people of this territory.

We think this appeal, not being allowed by the statute, should be dismissed; and it is dismissed.

PRICKETT and BUCK, JJ., concurred.

PEOPLE v. MOONEY.

(September 13, 1882.)

HOMICIDE—INSTRUCTIONS—DEGREE OF OFFENSE.

Under Act Jan. 14, 1875, § 17, (Crimes and Punishments Act,) providing that all murder which shall be committed in the perpetration or attempt to perpetrate robbery shall be deemed murder in the first degree, error can-

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not be predicated in a charge in a prosecution for murder that "if the jury believe from the evidence, beyond a reasonable doubt, that the killing was perpetrated while the defendant, either by himself or any other person, was attempting to commit a robbery, then they may find the defendant guilty of murder in the first degree."

Appeal from district court, Oneida county.

One Mooney was convicted of murder in the first degree, and appeals. Affirmed.

H. M. Bennett, for appellant. *W. A. Crawford*, Dist. Atty., for the People.

PRICKETT, J. At the November term of the district court of the Third judicial district, held in and for the county of Oneida, A. D. 1881, the defendant was indicted for the crime of murder; and, upon a trial, was convicted of murder in the first degree, and thereupon judgment of death was pronounced against him. From that judgment the defendant has appealed to this court, and the case has been submitted upon briefs, without oral argument. There is no evidence or bill of exceptions in the record, nor is there any assignment of errors on file. We are, therefore, left to an examination of the record, viz., the indictment, the instructions of the district court to the jury, and the judgment; and if there be no error apparent upon their face, the judgment must be affirmed. The indictment seems, upon inspection, to be perfect, and no objection is urged to the judgment, but from the tenor of the appellant's brief we conclude that he objects to the following instruction given by the court to the jury, to-wit: "If the jury believe from the evidence, beyond a reasonable doubt, that this defendant killed Joel Hinkley, and that such killing was perpetrated while the defendant, either by himself or with another person, was attempting to commit a robbery, then they may find the defendant guilty of murder in the first degree." There being no evidence in the record, upon the familiar principle that he who alleges error must show it, if the instruction was correct under any possible state of the evidence, it must be sustained.

The statutes of this territory (section 21 of the act concerning crimes and punishments) provide that involuntary manslaughter shall consist in the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might

produce such a consequence, in an unlawful manner, provided that when such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." Section 17 of the same act provides that all murder which shall be committed * * * in the perpetration or attempt to perpetrate * * * robbery * * * shall be deemed murder of the first degree.

Thus it will be seen that section 21 makes the unintentional killing of a human being committed in the prosecution of a felonious intent, murder, and section 17 makes it murder in the first degree, if the intent was to commit the felony of robbery, and some others therein enumerated. Under the statute, then, the instruction was proper; indeed the court might have instructed the jury, under the circumstances stated, not only that they might find the defendant guilty of murder in the first degree, but that such was their duty. It is competent for the legislature to prescribe what felonious homicides shall be deemed murder, and to define the degrees. It is the policy of the law to hold persons engaged in felonies, or attempts to commit felonies, responsible for all the consequences of their felonious acts, whether such consequences were definitely intended or not; the intent to commit a felony standing in the place of the malice in ordinary cases of murder. It follows that the instruction given being correct in law, those asked by the defendant's counsel, upon the view that the killing, in order to constitute murder, must have been intentional, were incorrect, and were properly refused.

There being no error either in the giving or refusal to give instructions, the judgment of the court below must be affirmed, and it is accordingly hereby affirmed.

The cause is remanded to the district court, with directions to fix anew the time for executing its judgment.

MORGAN, C. J., and BUCK, J., concurring.

UNITED STATES v. HAILEY.

(September 13, 1882.)

ABATEMENT AND REVIVAL—DEATH OF PARTY—
PRESENTATION OF CLAIM—TO ADMINISTRATOR.

Rev. Laws, p. 267, § 140, providing that, "if any action be pending against the testator

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or intestate at the time of his death, the plaintiff shall present his claim to the executor or administrator for allowance or rejection, and no recovery shall be had in the action unless proof be made of the presentation," applies to actions in which the United States is a party plaintiff.

Appeal from district court, Ada county.

Action by the United States against A. H. Robie, as surety upon the bond of Virgil S. Eggleston. Upon the death of Robie, John Hailey, administrator of his estate, was substituted as defendant. From a judgment for defendant, entered upon a verdict directed by the court, plaintiff appeals. Affirmed.

Wallace R. White, U. S. Dist. Atty.

No laches can be imputed to the public.

1 Cooley's Bl. Comm. 247; Troutman v. May, 33 Pa. St. 455; People v. Gilbert, 18 Johns. 227; Wallace v. Miner, 6 Ohio, 367; Munshower v. Patton, 10 Serg. & R. 334; Bagley v. Wallace, 16 Serg. & R. 245; Stoughton v. Baker, 4 Mass. 528; Ang. Lim. §§ 34-40.

A statute does not and cannot divest the crown or public of any rights unless the government is specially named therein. 8 Bac. Abr. p. 92, "E," 5; U. S. v. Herron, 20 Wall. 251; U. S. v. Knight, 14 Pet. 315.

A debt due to the United States, though it be by one who owes it is a surety, is not barred by debtor's discharge, under the bankrupt act of 1867, because United States is not named therein. U. S. v. Herron, 20 Wall. 251.

No claim of the United States is barred by the statute of limitations unless expressly named in the United States statute laws. U. S. v. Thompson, 98 U. S. 487; McKeehan v. Com., 3 Pa. St. 151; People v. Gilbert, 18 Johns. 227; U. S. v. Herron, 20 Wall. 251; Ang. Lim. §§ 34-40.

It is through this doctrine that no laches can be imputed to the public; that government is not bound by statute of limitations unless expressly named. U. S. v. Knight, 14 Pet. 315.

The law prescribing time in which claims shall be brought against decedent estates is a statute of limitation. Wren v. San, 1 How. (Miss.) 115; Parmilee v. McNutt, 1 Smedes & M. 179; U. S. v. Hoar, 2 Mason, 311.

Statutes prescribing the period in which claims against decedent estates must be presented cannot be set up against the state or United States. Parmilee v. McNutt, 1 Smedes & M. 179; U. S. v. Hoar, 2 Mason, 311-318; U. S. v. Williams, 5 Mc-

Lean, 133; Gaussen v. U. S., 97 U. S. 585; Swearingen's Ex'rs v. U. S., 11 Gill & J. 373; U. S. v. Backus, 6 McLean, 443.

The United States' claims against estates of deceased persons are not governed by probate laws. U. S. v. Hoar, 2 Mason, 311; U. S. v. Backus, 6 McLean, 443.

R. Z. Johnson and *Huston & Gray*, for respondent.

There being no proof of the presentation of the claim in suit to the administrator, the court below properly directed a verdict for the defendant, for want of such proof. Prob. Pr. Act, §§ 138, 140; Rev. Laws Idaho, p. 267; Code Civil Proc. Cal. §§ 1502, 1500; Bank v. Howland, 42 Cal. 132; Coleman v. Woodworth, 28 Cal. 568, 569.

It is only claims which have been presented and allowed that the administrator is authorized to pay. Harp v. Calahan, 46 Cal. 232; Pitte v. Shipley, Id. 161.

The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, were intended by congress to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. Hornbuckle v. Toombs, 18 Wall. 648.

Territorial courts are not courts of the United States, within the meaning of the constitution. Clinton v. Englebrecht, 13 Wall. 434; Hornbuckle v. Toombs, 18 Wall. 648.

Territorial enactments regulating the practice and proceedings of territorial courts are not displaced or suspended by general statute upon the same subject, passed by congress in reference to "courts of the United States." Page v. Burnstine, 102 U. S. 668.

But even in the courts of the United States the liability of executors and administrators would be regulated by the acts providing for the settlement of the estates of deceased persons, and a compliance with the provisions in question here and similar provisions would be required. U. S. v. Eggleston, 4 Sawy. 201; McGill v. Armour, 11 How. 142.

The effect of a judgment of a court of the United States against an administrator is determined by the probate law under which he is acting. Peale v. Phipps, 14 How. 375; Williams v. Benedict, 8 How. 111.

When compelled to come into court to enforce its rights, the United States must

Salmon River Mining & Smelting Co. v. Dunn.

come in as any other suitor. 2 Co. Inst. 573; King v. Cotton, 2 Ves. Sr. 296; Brent v. Bank, 10 Pet. 614.

MORGAN, C. J. In this case suit was brought January 24, 1877, by the United States upon the bond of Virgil S. Eggleston, upon which A. H. Robie was surety. The defendant A. H. Robie died some time previous to the November term of the district court for Ada county, 1878. At said term, at the suggestion of his death by attorneys for both parties, his administrator, John Hailey, was made a party to the suit, and appeared therein by his counsel. On the tenth day of December, 1881, the cause came on for trial before the court and jury. The plaintiff having completed its evidence and rested, the defendant moved the court to direct the jury to find a verdict for the defendant on the ground that the evidence does not show that the claim in suit has been presented to the administrator for allowance or rejection. The motion was allowed by the court, and the jury, under the instructions of the court, rendered a verdict for the defendant.

The case was brought by appeal to this court. The only question in this case is as to whether section 140, p. 267, Rev. Laws Idaho, binds the United States the same as any other litigant. The claim never having been presented to the administrator, the matter as to limitation of time does not come in question. For the same reason there is no question of laches on the part of the plaintiff; therefore, section 131, p. 265, Id., has no bearing on the question at issue. Section 955, Rev. Laws U. S., cited by counsel, directs in what manner administrators may become parties in the United States courts; the district court of the territory not being such a court, it does not apply. U. S. v. Mays, 1 Idaho, 763; Clinton v. Englebrecht, 13 Wall. 434; Hornbuckle v. Toombs, 18 Wall. 648. Nor is there any question in this case as to the appearance of the administrator; he having voluntarily appeared both in person and by attorney. Section 140, Rev. Laws, before quoted, states: "If any action be pending against the testator or intestate at the time of his death, the plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection, authenticated, as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by law." In cases in the United States

courts the practice in all cases is regulated by the laws in force in the states or territories wherein such suit is pending. U. S. v. Mays, supra; Clinton v. Englebrecht, supra; Hornbuckle v. Toombs, supra; Reynolds v. U. S., 98 U. S. 154; U. S. v. Eggleston, 4 Sawy. 201 et seq.; McGill v. Armour, 11 How. 142. The administrator is exclusively bound to account for all the assets which he receives, under and by virtue of his administration, to the court from which he derives his authority. Vaughn v. Northup, 15 Pet. 6; Youly v. Lavender, 21 Wall. 279 et seq. When the United States is compelled to come into court to enforce its rights it must come in as any other suitor. Mitchel v. U. S., 9 Pet. 743. And the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where the suit is commenced. In this case the probate laws in this territory must govern and determine the method of procedure to obtain judgment. Peale v. Phipps, 14 How. 375; Williams v. Benedict, 8 How. 111; Bank v. Horn, 17 How. 157; Pullian v. Osborne, Id. 475, 476. A right of priority of payment on the part of the United States is not involved in this cause, and, if it was, the right of the United States to priority given by law is recognized by section 239, Probate Act, Rev. Laws Idaho.

Judgment of the court below must therefore be affirmed.

BUCK, J., having been of counsel for appellant in the court below, did not sit in the hearing of this case.

SALMON RIVER MINING & SMELTING CO. v.
DUNN.

(September 13, 1882.)

CORPORATIONS—POWERS—ACTS ULTRA VIRES.

A corporation "to mine, smelt, refine, and operate in mining property" has not the power to purchase a chose in action.

Appeal from district court, Custer county.

Action by the Salmon River Mining & Smelting Company against Ballard S. Dunn. From a judgment for plaintiff, defendant appeals. Reversed.

James H. Hawley and J. Brumback, for appellant.

Acts of a corporation that are *ultra vires* are void. Currier v. Railroad Co., 11 Ohio St. 228; Com. v. Erie & N. E. R.

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Co., 27 Pa. St. 339; St. Louis v. Weber, 44 Mo. 547; Wheeler v. Board, 39 N. J. Law, 291; Diligent Fire Co. v. Com., 75 Pa. St. 291; Darst v. Gale, 83 Ill. 136.

Thomas J. Galbraith, for respondent.

Where a defendant has contracted with a person, natural or artificial, under disability, and becomes liable to pay money to such person, he will not be permitted to avail himself of such disability to avoid his obligation. Navigation Co. v. Weed, 17 Barb. 378; Smith v. Sheeley, 12 Wall. 358; Reynolds v. Com'rs, 5 Ohio, 205; Gaines v. Bank, 12 Ark. 769; Glass Co. v. Dewey, 8 Amer. Dec. 128; Mitchell v. Deeds, 1 Amer. Corp. Cas. 460; Touchard v. Touchard, 5 Cal. 306; Mining Co. v. Woodbury, 14 Cal. 424; California St. Tel. Co. v. Alta Tel. Co., 22 Cal. 398; Mining Co. v. Allment, 26 Cal. 286; People v. Frank, 28 Cal. 507; Rondell v. Fay, 32 Cal. 354; Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 354; Vandall v. Dock Co., 40 Cal. 83; Dean v. Davis, 51 Cal. 406; McKiernan v. Lenzen, 56 Cal. 62; Canal Co. v. Pinkham, 1 Idaho, 790; U. S. v. Amedy, 11 Wheat. 392.

PRICKETT, J. This action was commenced in the district court of the Third judicial district, in and for Lemhi county, and afterwards transferred to Custer county, in the same district, for trial. The complaint alleges that the plaintiff is a corporation organized and existing under the laws of the state of Nebraska for the purpose of mining, smelting, and refining and marketing the products thereof, and the sale of, and otherwise operating in, mining properties, and, as such, has been, for more than four months last past, doing business in its corporate name. It is further alleged in the complaint that the appellant, Ballard S. Dunn, and one Carson, on the twenty-third day of July, 1880, entered into a contract, by the terms of which Carson was to build a bridge across

Salmon river, and to receive therefor, from appellant, the sum of \$3,100; that subsequently to the making of said contract the location of the bridge was changed, and the length of the bridge was, by such change, necessarily increased, and that in consequence of such increased length it was agreed that \$650 should be added to the original contract price; that Carson built the bridge and performed all the conditions of the contract on his part, and on the seventh day of October, 1880, assigned all his right, title, and interest in said contract to the plaintiff; that no part of the money due upon the contract has been paid by the defendant; that defendant has taken and holds possession of the bridge.

The only question before the court is whether the complaint contains facts sufficient to constitute a cause of action; for, notwithstanding the fact that the transcript contains a paper called a bill of exceptions, it is not such in any sense of the term. It is merely an assignment of errors, without any record or bill of exceptions showing the proceedings or decisions of the court in respect to the matters assigned as errors. The general rule is that a corporation has and may exercise such powers as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted, and not as having any other. The plaintiff in this case, as the complainant states, is a corporation organized for the purpose of mining, smelting, refining, and operating in mining properties. The purchasing of choses in action is entirely foreign to this business. In every contract there must be mutuality, and therefore parties capable of contracting. The demurrer to the complaint should have been sustained.

The judgment of the district court is reversed, and the cause remanded, with directions to allow the plaintiff to amend his complaint.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1884.

VAN CAMP *v.* BOARD OF COM'RS OF CUSTER COUNTY.

(January 25, 1884.)

APPEALABLE JUDGMENTS—ORDER OF BOARD OF COUNTY COMMISSIONERS—EQUALIZATION OF TAXES.

1. No appeal will lie from a judgment of the district court, upon an appeal from an order of the board of county commissioners reviewing an assessment of taxes; the remedy of the aggrieved party in such case being by writ of error. *Rupert v. Board*, 2 Pac. Rep. 718, followed.

WRIT OF ERROR—PARTIES—REVIEW OF TAX ASSESSMENT.

2. Where a mining company appeals to the county board of equalization from an assessment of taxes levied against it, and the board orders a reduction in the assessment, and from this order an appeal is taken by a taxpayer to the district court, resulting in a reversal of the action of the county board, a writ of error will lie at the instance of the mining company to review the action of the district court.

SAME.

3. In such case the fact that the name of the mining company did not appear in the title of the original notice of appeal, or in the judgment of the district court, is not prejudicial to the company's right to a writ of error, under Code Civil Proc. § 711, providing that an affidavit, notice, or other paper with a defective title is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

SAME—PLEADING—DISMISSAL.

4. Nor, in such case, is it sufficient ground for the dismissal of the writ that there were no allegations in it pleading payment or tender of the taxes as fixed by the board of county commissioners.

Appeal from district court, Custer county.

From an assessment of taxes, made on its property by the assessor of Custer county, the General Custer Mining Company appealed to the county board of equalization. The county board ordered a reduction, and from this order James H. Van Camp appealed to the district court. The district court reversed the action of the county board, and from this judgment the Custer Mining Company appealed, and sued out a writ of error. Van Camp moved to dismiss the appeal and writ of error. Motion to dismiss appeal granted. Motion to dismiss writ of error denied.

James H. Hawley, M. Kirkpatrick, and E. P. Johnson, for appellant. *Thomas J. Galbraith and Huston & Gray*, for respondent.

PRICKETT, J. It appears from the transcript in this cause that the assessor of Custer county assessed the property of the General Custer Mining Company for the year 1881 as follows: its mill and appurtenances at \$70,000, and bullion produced by them and in their possession, \$170,000; that at the regular meeting of the board of equalization of that county, held in August, 1881, the superintendent of the company appeared, and complained that such assessment was too high, and asked a reduction; that, upon such complaint, the board reduced the assessment and valuation of the mill and appurtenances to \$35,000, and of the bullion to \$25,000; that from such order James H.

Van Camp v. Board of Com'rs of Custer County.

Van Camp, a citizen and tax-payer of the county, appealed to the district court of the Third judicial district, held in and for Custer county; that the notice of such appeal was addressed and directed to the board of commissioners of Custer county and the General Custer Mining Company, and was served by mail upon the superintendent of the company; that the commissioners appeared by counsel in the district and moved to dismiss the appeal, on the ground that no appeal lies from the order of the board of equalization, and that, if it does lie in this case, that James H. Van Camp is not authorized or qualified by law to take such appeal, which motion was denied by the court. Such proceedings were afterwards had in the district court as resulted in a judgment, rendered June 17, 1882, modifying the decision of the board of commissioners, and fixing the value of the mill and appurtenances at \$35,000, (as previously ordered by them,) and of the bullion at \$170,000, and requiring the board of commissioners, the county auditor, and the assessor and collector of taxes to proceed, and to adjust and collect the proper taxes upon such valuation, in manner and form, now for then, as if the appeal to the district court had not been taken. It was further ordered that a copy of the judgment be served upon the board of commissioners, the county auditor, the assessor, and tax collector of the county, and upon the General Custer Mining Company or its attorney.

On the fourteenth day of September, 1882, the General Custer Mining Company filed in the office of the clerk of the district court, and served, a notice of appeal from said judgment to this court, and on the next day gave an undertaking on said appeal, and on the sixteenth day of November, 1883, the said company sued out, and caused to be issued from this court, a writ of error to said district court. The respondent in this appeal and the defendant in error, James H. Van Camp, now moves to dismiss both the appeal and the writ of error,—the former on the ground that no appeal is allowed by law in the cause, and the latter because the General Custer Mining Company is not a party to the record or judgment in the district court; that it does not appear from the record that the commissioners of Custer county authorized or consented to the suing out of the writ; that it does not appear from the writ of error herein that the board

of commissioners or the General Custer Mining Company are injured or prejudiced by the judgment of the district court; that the said company has no standing in this court, because it does not appear by the record that it has paid or tendered the tax on its property upon the valuation thereof as fixed by the board of commissioners; and on the further ground that there is no statement of the case or bill of exceptions in the transcript in support of the writ of error. At the last term of this court, in the case of *Rupert v. Board*, ante, 21, 2 Pac. Rep. 718, it was decided that no appeal would lie to this court from a judgment of the district court rendered upon an appeal from an order of a board of county commissioners, because such cases, although somewhat anomalous in character, do not partake of the nature of suits in chancery, which can be transferred from one court to another in that manner, but were proceedings at law, which, in the absence of any statute conferring the right of appeal, were to be reviewed by writ of error, and that there is no statute of this territory authorizing or providing for an appeal to this court in such cases. That decision was rendered on the eleventh day of September, 1882, about the time the notice of appeal was filed in the district court from its judgment in this case; from which fact, and the subsequent suing out of the writ of error, it is reasonable to presume that the General Custer Mining Company abandoned its appeal, and concluded to rely upon its writ of error instead. Indeed, the appeal is not now insisted upon by counsel for the appellant. Upon the authority of the case above referred to the appeal is dismissed.

The objections made by the moving party to the writ of error, and to the right of the plaintiff in error to be heard thereon, will now be considered and briefly discussed; and—*First*, is the General Custer Mining Company such a party to the record, proceedings, and judgment of the district court as is entitled to a writ of error to review the same? The rule concerning writs of error at common law (and we have not now any statute extending or changing that rule) unquestionably is that no one can bring error unless he is a party or privy to the record, or is prejudiced by the judgment, and the rule seems to be inflexible, (*Bac. Abr. "Error;" Connor v. Peugh's Lessee*, 18 How. 394;) and, as proceedings in error are in the nature of new actions, this rule probably had its origin

Van Camp v. Board of Com'rs of Custer County.

in the same general principle that governs in relation to the parties in personal actions, that the action must be brought in the name of the party whose legal right has been affected.

The origin and foundation of the proceedings in this cause was the complaint made by the General Custer Mining Company, through its superintendent and agent, to the board of equalization, that its property was assessed too high. In that initiatory proceeding or step the company stood in the relation of complainant or plaintiff. Upon such complaint, and the hearing had thereunder, they procured an order favorable to their interest,—a reduction in the assessment, and a consequent reduction in the amount of taxes to be paid. To the order and decision of the board they had a vested right, subject only to a reversal or modification, by competent authority, in the mode prescribed by law; and although the proceedings before the board neither had or were required to have a name or title, the General Custer Mining Company were unquestionably interested in such proceedings, and in the order obtained therein. The statute (Rev. Laws, p. 529, § 25) authorizes appeals to be taken from orders of the board of county commissioners to the district court, and the appeal in this case was taken under that statute; but an appeal, strictly speaking, is not the commencement of a new action or proceeding, but a continuation of the same case, action, or proceeding, being only a transfer from one court, tribunal, or body to another for final trial and judgment. Hence, the policy and propriety of the statute, which requires the notice of appeal in such cases to be served on "any person having a beneficial interest in the order or decision appealed from," in order that they may have an opportunity to defend their claim, and maintain the advantages of the order, if they are able to do so. They are still parties to the proceeding, and continue so to be until their rights in the matter are finally adjudicated, whether they appear in the appellate tribunal or not.

Much stress was laid in the argument upon the fact that the name of the General Custer Mining Company does not appear in the title of the original notice of appeal or other papers, or in the judgment of the district court; and it is urged that therefore they are not a party to the record or judgment. The papers, proceeding, and judgment are, it is true, entitled "J. H.

Van Camp v. The Board of County Commissioners of Custer County," but the plaintiff in error is not responsible for that name or title, nor do I know of any law requiring the papers, proceeding, and judgment to be so entitled. "Van Camp's Appeal" would, perhaps, be the more appropriate title. The title or name by which an action or proceeding is called certainly cannot change its character or divest interests acquired before the christening. They remain the same. It is provided by section 711 of our Code of Procedure that "an affidavit, notice, or other paper without the title to the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding." We think that section applicable to the question under consideration, and even without it that it would be the duty of the court to look beyond the mere title to ascertain who are interested and affected parties. As to the judgment, we think it cannot be seriously contended or claimed that the direction and order therein contained, that the several revenue officers of the county proceed and collect the taxes upon the increased valuation of the property, imposes no liability or obligation upon the General Custer Mining Company to pay taxes thereon. As long as laws exist for enforcing the collection of taxes, it must be evident to all that the contrary is the case. We conclude, therefore, upon this question, that the General Custer Mining Company is a party to the record, proceedings, and judgment, and that such judgment was and is prejudicial to its interests, in the sense that it increased its liability to the public.

There are no pleadings in proceedings of this character in which the fact of payment or tender of the taxes upon the valuation of the property, as fixed by the board, could be alleged, and it is difficult for us to understand how that fact could be made to appear by the record. The bond given as a supersedeas is theoretically and presumptively, at least, sufficient to save the defendant in error and the public harmless from all damages they may suffer by reason of the delay in the payment of the taxes, if they have not been paid. This is not a case in which it is necessary for the record to show payment or tender in order to give the party standing in court. It is not, in the opinion of this court, necessary, to entitle a party to a writ of er-

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ror, that there should be either bill of exceptions or statement; the object of these is to bring into and make of record what was not so. If errors appear upon the face of the judgment roll, they can be shown and taken advantage of upon the hearing.

The motion to dismiss the writ of error is denied.

BUCK, J., concurred. MORGAN, C. J., did not sit in this case.

WARNER *v.* TEACHENOR *et al.*

(January 28, 1884.)

APPEAL—NOTICE—SUFFICIENCY OF SERVICE.

Under Code Civil Proc. § 685, providing that service may be made upon an attorney during his absence from his office by leaving the notice with his clerk therein, or with a person having charge thereof, or, when there is no person in the office, by leaving it between the hours of 8 A. M. and 6 P. M. in a conspicuous place in the office, sufficient service of a notice of appeal was not shown by the affidavit of the attorney making the same, reciting that "affiant served the notice upon the attorney for respondent by leaving a true copy thereof at his office."

Appeal from district court, Ada county.

Action by one Warner against one Teachenor and others. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Huston & Gray, for appellants. *J. Brumback*, for respondent.

BUCK, J. This cause comes into this court on appeals from final judgment, and from an order overruling a motion for a new trial. The respondent appears specially by his attorney, and moves a dismissal of the appeal from the judgment on the ground that more than one year had elapsed from the entry of the judgment until the taking of the appeal, and also from the order overruling the motion for a new trial: (1) For defect in the undertaking; (2) because the notice of appeal contains simply the surname of plaintiff and respondent, without the Christian name; (3) that the record shows no service of notice of appeal.

The objection that the appeal from the judgment was not taken in time was not contested by the attorney for the appel-

lant, and the defect in the undertaking having been cured by the filing of a new undertaking under section 657 of our practice act, there remains only the objection to the contents, and service of the notice of appeal, to be passed upon.

The proof of service of the notice of appeal is contained in the affidavit of the attorney for defendants and appellants to the effect "that affiant served the notice upon the attorney for respondent and plaintiff by leaving a true copy thereof at his office in Boise City, Ada county, Idaho territory, on the twenty first of May, 1883. Section 685 of the Code of Civil Procedure provides that service may be made upon an attorney during his absence from his office by leaving the notice with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of 8 in the morning and 6 in the afternoon in a conspicuous place in the office. This section provides for constructive service instead of personal, and being in derogation of the common law, which required personal service, the statute must be strictly construed.

In *Jackson v. Gardner*, 2 Caines, 95, the court say, speaking of an affidavit of service like the one at bar: "The affidavit is defective: it does not state that there was no one in the office. The notice might have been slipped down without any intimation and have remained unobserved. To make such service good it ought to have stated that there was not any one in the office."

This is still more distinctly declared to be the law in *Doll v. Smith*, 32 Cal. 475, in a case in all respects identical with the one at bar.

It is maintained by the appellants that under section 269, Code Civil Proc., the defect in proof should be disregarded. But service of notice of appeal is a jurisdictional fact which affects the substantial rights of the parties, and the court is of the opinion that the section referred to does not contemplate the disregarding of a defect in proof of a fact necessary to give the court jurisdiction of the matter in controversy.

As to the contents of the notice itself the court is not prepared to say that it is so defective as not to give the respondent sufficient information as to the judgment appealed from. The determination of the court as to the service of the notice of appeal, however, renders it unnecessary to consider the contents of the notice.

Gray v. Cederholm.

The motion of respondent is sustained, and the appeals are dismissed.

PRICKETT, J., concurred. MORGAN, C. J., did not sit in this case.

GRAY, Sheriff, *v.* CEDERHOLM *et al.*
(February 14, 1884.)

APPEAL—WHEN LIES—DEFECTIVE JUDGMENT.

1. Where the docket entries of the probate court merely show that a complaint was filed, a summons issued and served, and a demurrer to the complaint filed, there being no entry showing what disposition was made of the demurrer, or for which party judgment was rendered, an entry of "damages, \$310," is not sufficient to constitute a judgment, even though the fee bill made by the court contains a charge for the overruling of defendant's demurrer, and the entry of default for want of answer; and from such judgment no appeal will lie.

JUDGMENT—ENTRY AFTER CLOSE OF TRIAL.

2. Under Civil Code, § 603, providing that, when trial is by the court, judgment must be entered at the close of the trial, the action of the probate court in such case, in entering a formal judgment for plaintiff *nunc pro tunc* after an appeal had been taken to the district court, was void.

Appeal from district court, Alturas county.

Action by one Gray, sheriff, against one Cederholm and others in the probate court. There was judgment for plaintiff, and defendants appealed to the district court. From a judgment of the district court dismissing the appeal, defendants appealed. Affirmed.

Kingsbury & McGowan, for appellants.
Angell & Sullivan, for respondent.

MORGAN, C. J. This case was commenced in the probate court of Alturas county, by filing a complaint on the twenty-seventh day of November, A. D. 1882. The next day summons was issued and made returnable December 3, 1882, and was so returned, served on defendants. On the return-day the defendants, by their attorneys, Messrs. Kingsbury & McGowan, appeared specially in said cause, and filed their motion to set aside and quash proceedings for reasons stated therein. This motion was overruled by the probate court. Thereupon a demurrer to plaintiff's complaint was filed by defendants. It does not appear from the transcript of the docket that the said demurrer was either sustained or overruled, the

only reference thereto being found in the fee-bill, as follows, to-wit:

To filing demurrer by defendant.....	.25
To overruling demurrer, entering default for want of answer.....	.50

Then follow various entries in the record of fees for swearing witnesses, after which the following entries were made:

Plaintiff introduced in evidence judgment roll of district court in suit of Chas. Nelson *v.* W. E. Milner:

Bond for release of attachment property	\$ 25
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(Two executions offered in evidence.

Defendants' counsel object to the introduction of this documentary evidence as being irrelevant and immaterial. Objection overruled. Excepted to by defendants' counsel.)

To entering final judgment.....	1 00
Certified copy for roll.....	1 50
Docketing judgment.....	50
Making judgment roll.....	50
Filing judgment roll.....	25

\$ 4 00

Sheriff's fees.....	5 00
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Damages	310 00
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\$319 00

There is nothing else in the record indicating any judgment by the probate court, either on the demurrer or on the evidence in the cause. From this supposed judgment, the defendants give notice of an appeal to the district court of Alturas county, on the seventh day of December, A. D. 1882, and file an undertaking on the ninth day of December following. On the fifteenth day of January following the papers were placed on file in the district court. On the eighth day of August, 1883, the district court in and for said Alturas county, upon motion of plaintiffs herein, dismissed said appeal. To said judgment dismissing the appeal the defendants excepted, and on the third day of October following took an appeal to this court.

The only substantial assignment of error in defendants' bill of exceptions is that the court erred in dismissing the appeal from the probate court. It is evident that the first question to be considered is, was there any judgment by the probate court in this cause? If there was no judgment then there could be no appeal, and an attempted appeal should be at once dismissed. Section 350, Civil Code, says "a judgment is the final determination of

General Custer Min. Co. v. Van Camp.

the rights of the parties in an action or proceeding." Is there a determination of the rights of either party in this record? The entry of "damages, \$310," is claimed to be a judgment. It has none of the elements of a judgment. It is nowhere stated that it is adjudged, ordered, decreed, or considered that the plaintiff should have or recover of defendants, nor that defendant should have or recover of plaintiff, the sum of \$310, or any other sum. There is no word or words used which indicates an adjudication by the probate judge for or against either party. In this there is no indication whether judgment is given for plaintiff or for defendants, and one can only infer from the fact that the probate judge has charged a fee for "entering default for want of answer;" that no answer was filed; and therefore that possibly it was the intention to enter judgment for plaintiff. There is no judgment entered either sustaining or overruling demurrer; no default of defendants entered; and no judgment for either plaintiff or defendants. No execution is authorized for either party, and the pretended judgment does not indicate which party is entitled to execution. *Wright v. Fletcher*, 12 Vt. 431.

The following entry: "We, the jury, find in favor of the plaintiff and assess his damages at \$4,493, (and the record showed the entry;) whereupon the court entered judgment on the verdict"—was held to be no judgment. *Faulk v. Kellums*, 54 Ill. 189.

In *Barrett v. Garragan*, 16 Iowa, 44, referred to by counsel for appellant, the transcript showed proceedings up to and including the trial, after which was written:

Judgment for plaintiff against the defendant for ———, October 24, 1856.

Damages	\$84 00
Justice fees	80
Constable fees	25
Two witnesses	25

This was held to be a good judgment. This indicates for whom and against whom judgment was given, time, and amount,—a very different judgment from the one at bar.

It appears that an attempt was made in the probate court to enter up a formal judgment on the twenty-sixth day of July, A. D. 1883, *nunc pro tunc*. Section 603, Civil Code, requires, when trial is by the court, (probate or justice,) judgment must be entered at the close of the trial.

Judgment was not so entered. An appeal was taken to the district court on the seventh day of December, 1882. After an appeal is taken to the district court and perfected, the probate judge lost all jurisdiction in the cause, and could do nothing in reference thereto, except by order of the district court. Any action, therefore, taken by the probate court after said appeal was not legally taken, and could not change the condition of the record in the district court. There being no judgment in the probate court there could be no appeal, and the appeal was properly dismissed.

This conclusion having completely disposed of the cause, it is not thought proper to enter into the discussion of matters which do not and cannot affect the judgment of the court.

Judgment affirmed.

PRICKETT and BUCK, JJ., concurred.

GENERAL CUSTER MIN. CO. v. VAN CAMP.

(February 14, 1884.)

APPEALABLE ORDERS—ORDER OF BOARD OF EQUALIZATION.

No appeal will lie from an order of the county board of equalization reducing the amount of an assessment of taxes.

Error to district court, Custer county.

The assessor of Custer county assessed the property of the General Custer Mining Company for the year 1881 at \$70,000, and bullion on hand at \$170,000. Upon appeal by the mining company to the county board of equalization, the assessment was reduced, and James H. Van Camp appealed to the district court. From a judgment of the district court, reversing the order of the board of equalization, the mining company brings error. Reversed.

James H. Hawley, M. Kirkpatrick, and E. P. Johnson, for plaintiff in error. *Thos. J. Galbraith and Huston & Gray*, for defendant in error.

PRICKETT, J. The assessor of Custer county, in this territory, for the year 1881, assessed the mill and appurtenances of the plaintiff in error at \$70,000, and bullion on hand at \$170,000. Upon the complaint of the manager of the company, the board of equalization of the county reduced such assessment to \$35,000 on the mill and its appurtenances, and to \$25,000

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upon the bullion. From the order of the board reducing the assessment, James H. Van Camp, a private citizen of the county, appealed to the district court of the Third judicial district for Custer county. A motion was made in the district court to dismiss the appeal, on the grounds that no appeal is allowed by law from an order of the board of equalization, and that Van Camp was not, in any event, a proper party to take such appeal. The motion to dismiss was overruled. The cause was tried *de novo*, and the court rendered judgment restoring the assessment on the bullion to the original sum of \$170,000, and fixing the assessment of the mill and appurtenances at \$35,000, as fixed by the board.

The questions submitted to this court are the same as were raised in the district court on the motion to dismiss the appeal. Will an appeal lie from an order of the board equalizing assessments? Is it a legal and proper remedy? In order to answer these questions we must look to the statutes, for the right to appeal is purely statutory, unknown to the common law, and it cannot be extended by courts to cases not within the statute.

The defendant in error, to sustain the right of appeal, relies upon section 25 of the act creating the board of county commissioners and defining their duties and powers. Rev. Laws, 529. It provides that "appeals may be taken from orders of the board of county commissioners, as follows: *First*, from any order, by any person aggrieved thereby; *second*, from an order allowing an account or demand against the county, by any elector or taxpayer of the county, on the ground of improper or excessive allowance; *third*, from any order prejudicially affecting the public interest, by either the district attorney or the probate judge of the county, on behalf of the county.

Section 19 of the same act defines the duties and powers of the board of commissioners; and the twelfth subdivision of that section provides that they shall "act as a board of canvassers and equalization, and do and perform all other acts required of them by the organic act and laws of Idaho territory not in conflict with this act." Under this last-mentioned provision it is claimed that the board, while equalizing assessments under the revenue law, are discharging duties and exercising powers imposed and conferred upon them as county commissioners. In

this connection it is proper to notice that the general meetings of the board of commissioners are required to be held in January, April, July, and October of each year, at all of which meetings "they shall transact any business which may be required of them by law."

Section 22 of the revenue law of this territory (Rev. Laws, 487) provides that "the commissioners of the county shall constitute a board of equalization, of which the clerk of the board of commissioners shall be clerk;" and that "the board of equalization shall meet on the third Monday in August in each year, and shall continue in session from time to time until the business of equalization presented to them is disposed of," etc. The provisions and requirements of this section of the revenue law are full and complete, and nothing is added to or subtracted from them by the repetition contained in subdivision twelve of section nineteen of the county commissioners' law empowering the commissioners "to act as a board of equalization."

It seems quite clear that the board of county commissioners and the board of equalization are two separate and distinct bodies, created by different acts of the legislature; that by section 22 of the revenue law persons holding the office of county commissioners by election or appointment are invested with another distinct office having a different name. The revenue act, complete in itself, provides what duties the board of equalization shall perform. It requires them to meet and discharge those duties at a time not fixed by law for a meeting of the board of commissioners. It provides them with a clerk, and designates him as the clerk of the board of equalization; and, although the two boards are composed of the same persons, they are as completely different in respect to organization, powers, and duties as if composed of different individuals. There being two separate boards, the right of appeal given by statute from orders of the board of commissioners does not imply the same right from the orders and decisions of the board of equalization.

We conclude, therefore, that the district court erred in entertaining the appeal, and in denying the motion to dismiss it.

It becomes unnecessary to consider whether Van Camp was a proper party to appeal from an order of the board of commissioners under any circumstances, as the question already disposed of is decisive of the case.

People v. Ah Too.

Judgment reversed and the cause remanded, with directions to the district court to dismiss the appeal.

BUCK, J., concurred. MORGAN, C. J., did not sit at the hearing.

PEOPLE v. AH TOO.

(February 14, 1884.)

HOMICIDE—INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

Where, on a trial for murder, the entire evidence is that of eyewitnesses to the homicide, error cannot be predicated on the refusal of defendant's requested instruction that, "if the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances by themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive for committing the offense charged," as such instruction is not pertinent to the evidence in the case.

Appeal from district court, Ada county
Ah Too was convicted of murder, and appeals. Reversed.

G. W. Adams, E. J. Curtis, and Fremont Wood, for appellant. T. D. Cahalan, for the People.

BUCK, J. Ah Too was indicted, tried, convicted, and sentenced at the November term of the district court, 1882, in Ada county, on an indictment for murder in the killing of Ah You. This appeal is taken from the judgment and from the order of the court overruling the motion for a new trial. The errors assigned in the bill of exceptions, and insisted upon in the argument on appeal are—*First*, the refusal of the court to give a certain instruction at request of the defendant; and, *second*, the order of the court overruling the motion for a new trial. The instruction asked by defendant and refused by the court is as follows: "If the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances by themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive of the defendant for committing the offense charged." The exception to the refusal of the court to give this instruction seems based, by a reference in appellant's brief, upon a principle in 3 Grah. & W. New Trials, 710, where it is stated: "To refuse such instructions as properly arise in the case is

error." This proposition is conceded to be good law, and it suggests the question: did the instruction asked for properly arise in the case? While "there is no evidence admissible in a court that does not depend more or less on circumstance for credit,"—Whart. Crim. Ev. (8th Ed.) § 10,—yet it can hardly be claimed that in an instruction as to the character and weight of circumstantial evidence should be given in all cases. The court cannot be called upon to charge the jury upon abstract propositions. 3 Grah. & W. New Trials, 795. An abstract proposition may be correct in principle, and yet so irrelevant to the facts as to have no practical bearing upon the issues tried. To give a jury such an instruction would perplex rather than aid them in finding a verdict. In the case at bar there seems to have been an entire absence of circumstantial evidence. The shooting occurred in the day-time, in the midst of several witnesses, and the defendant admitted that the fatal shot came from his revolver, but alleged that the shooting was wholly accidental. The entire evidence was by eye-witness, except the dying declaration of deceased; and those declarations criminating defendant depended entirely upon the credibility of the witness to whom they were said to have been made. We find no element of circumstantial evidence therein. The ruling of the court in refusing this instruction might be sustained on other grounds; but, with a view to correcting the practice of asking rambling and irrelevant instructions, the court sustains the ruling of the court below, upon the ground that the instruction asked for was properly refused because not pertinent to the evidence in the case.

Upon the second branch of the case, to-wit, that the verdict is contrary to the evidence, the court is of the opinion that the objection to the verdict is well taken. In coming to this decision we do not disregard or ignore the principle insisted upon by respondent, to-wit, "where the evidence is conflicting the verdict will not be set aside." Upon an inspection of the evidence we are of the opinion that the case at bar does not come within the rule. As a result of the conclusion of the court will probably be a new trial in the court below, a discussion of the evidence here would be out of place.

The judgment of the court below is reversed, a new trial ordered, and the case is remanded to the district court, Ada

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county, Second judicial district, Idaho territory, for further proceedings.

MORGAN, C. J., and PRICKETT, J., concurred.

PEOPLE v. STAPLETON.

(February 16, 1884.)

BURGLARY—INSTRUCTIONS—DOUBT.

1. On a trial for burglary, error cannot be predicated on the refusal of defendant's requested instruction that, "if the jury are in doubt upon any material fact sought to be proved by the prosecution, they should give the defendant the benefit of the doubt, and acquit," as such instruction would require the jury to acquit in case of "any" doubt.

SAME—OBJECTIONS TO INDICTMENT—MOTION IN ARREST OF JUDGMENT.

2. Under Act Jan. 14, 1875, § 293, (Criminal Practice Act,) providing that any objection appearing on the face of an indictment can only be taken advantage of by demurrer, an objection to an indictment for burglary that it does not give the legal appellation of the offense attempted to be charged, and is not certain as to the offense attempted to be set forth, cannot be raised for the first time by motion in arrest of judgment.

SAME—INDICTMENT—ALLEGATION AS TO VALUE.

3. Under Rev. Laws, p. 332, § 59, providing that any person who shall forcibly break and enter, in the night-time, any house with intent to commit larceny or other felony, shall be guilty of burglary, an indictment charging a breaking and entering with intent to commit larceny need not allege the value of the property intended to be stolen.

Appeal from district court, Ada county.

W. S. Stapleton was convicted of burglary, and appeals. Affirmed.

G. W. Adams, for appellant. T. D. Cahalan, for the People.

BUCK, J. The defendant, W. S. Stapleton, was tried, convicted, and sentenced at the November term of the district court in Ada county on an indictment for burglary. When called upon to plead, he entered the plea of not guilty, and made no objection to the form or substance of the indictment, by demurrer or otherwise. Upon the rendition of the verdict, the defendant moved an arrest of judgment, (1) on the ground that the indictment does not substantially conform to section 234 of the criminal practice act, in that it does not give the legal appellation of the offense attempted to be charged, and is not certain as to the offense attempted to be set forth; (2) that the facts stated in said in-

dictment do not constitute a public offense, in this, that it does not appear upon the face of said indictment that defendant attempted to commit a felony, there being no allegation therein that the value of the goods and property intended to have been stolen by defendant were of the value of \$60, or of any value.

The assignment of error sets out error in the refusing of the court to grant an arrest of judgment, and, in addition thereto, the refusal to give the following instructions, at the request of the defendant: "(1) In order to find the defendant guilty, as charged in the indictment, the jury are instructed that the evidence must prove, beyond a reasonable doubt, that the defendant, with a felonious intent, did attempt to forcibly break and enter the alleged dwelling-house, in the night, with the further felonious and concurrent intent of committing a felony therein by then and there stealing and carrying away the goods, property, and money of J. P. Gordon, therein, being of the value of sixty dollars or more, and this intent to commit said felony must be proved to have existed in the mind of defendant, as a matter of fact, and not as a presumption of law. (2) If the jury are in doubt upon any material fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit." Error is also alleged in the giving by the court of the following instruction: "It is not necessary for the prosecution to prove that the defendant intended to steal sixty dollars worth of money or property, or more, but it will be sufficient if the jury believe from the evidence, beyond a reasonable doubt, that the said defendant then and there intended to steal any amount, either more or less than sixty dollars' worth of property or money. The intent of the defendant is to be gathered from his acts and all the circumstances."

The first instruction asked by defendant and refused by the court, and the instruction given by the court and excepted to by defendant, both involve the main question at issue in the motion for arrest of judgment, (namely, must the intended larceny, as charged in the indictment, necessarily be a felony?) and can be disposed of in the consideration of that branch of the case.

The remaining objection, to-wit, the refusal to give the following instruction: "If the jury are in doubt upon any mate-

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rial fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit,"—involves the question of doubt, which is perhaps of all ideas the most difficult for juries to understand and apply. Section 357 of our criminal practice act (Rev. Laws, 415) provides that "in case of a reasonable doubt whether defendant's guilt be satisfactorily shown, he is entitled to be acquitted." The doubt here provided for is a reasonable one, and courts have for years exercised their ingenuity and learning in endeavoring to frame an instruction which would convey to a jury a practical understanding of a reasonable doubt, with little satisfaction to themselves, and probably little assistance to the juries. In the instruction asked for, however, the court is relieved of any effort to define that perplexing term, but is asked to instruct the jury that in case of any doubt they must acquit. Such an instruction, if good in one case, would be good in all, and would render a conviction for crime almost impossible. The instruction was properly refused.

The first ground upon which the motion in arrest of judgment was asked was that the indictment did not conform to section 234 of the criminal practice act. Section 293 "provides that when the objections mentioned in section 285 of said act appear upon the face of the indictment they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts do not constitute a public offense, may be taken in arrest of judgment." That the indictment does not substantially conform to section 234 is one of the grounds provided for by section 285, and such an objection should be taken by demurrer, unless section 293 is abrogated by section 426. The two sections are apparently inconsistent, and a judicial construction seems necessary to the intelligent understanding of our criminal practice. These two sections are found in the same act, and, if possible, should be so construed as to give force and effect to both. It is not to be presumed that the legislature intended that any part of a statute should be without its proper meaning, force, and effect. The established rule of construction "is that the intention of the law giver and the meaning of the law are to be discovered and

deducted from a view of the whole, and of every part of the statute, taken and compared together." Dwar. St. 188.

In *People v. Nash*, 1 Idaho, 206, we find the following language in the opinion of the court: "After the verdict the defendant moved in arrest of judgment, and, although several grounds are assigned, we can only consider one of them, because, under section 293, objections which are grounds of demurrer can only be taken advantage of on demurrer, except two, viz., want of jurisdiction of the court, and that the facts do not constitute a public offense. The defendant did not urge the objection on demurrer * * * that the indictment does not conform to the requirements of sections 233 and 234, criminal practice act, and she is precluded from raising it afterwards, except the objection that the indictment does not show facts constituting a public offense." This question was fully considered in *People v. Shotwell*, 27 Cal. 402. In deciding this branch of the case we cannot do better, perhaps, than to adopt the language of the court in that case as adapted to our statute: "If section 426, which provides that a motion in arrest of judgment may be founded on any of the defects mentioned in section 285, be read without reference to section 293, its language, it may be concluded, is comprehensive enough to embrace the objection made. But we are not at liberty to disregard the 293d section, inasmuch as section 423 may be interpreted as referring only to the causes for arresting the judgment which stand unaffected by section 293." The alleged defect in the indictment cannot be considered on a motion in arrest of judgment.

The consideration of the remaining objection, to-wit, that the alleged intent must be to commit a felony, involves the construction of the statute upon which the indictment was drawn. The statute reads as follows: "Every person who shall in the night-time forcibly break and enter, etc., any house whatever, or tent, with intent to commit murder, rape, mayhem, larceny or other felony shall be deemed guilty of burglary." Rev. Laws, 332, § 59. It is argued by appellant that from the peculiar arrangement, punctuation, and combination of the words "mayhem, larceny or other felony," the intention of the legislature must be interpreted to be that there can be no burglary except the breaking is combined with the intent to commit a felony. The objection to this

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argument is that larceny in this territory is not necessarily a felony, and no amount of punctuation and illogical combination of words can make it such. It is stated that our statute was taken from California, and, under the authority of *People v. Murray*, 8 Cal. 519, the meaning of the statute has been adjudicated and determined. The decision referred to was made in 1857. In 1858 the legislature of that state, recognizing the validity of the decision, amended the law to conform to it. In 1864 the statute under consideration was enacted by the Idaho legislature. There was no such statute in California at the time, nor had there been for six years prior to the enactment of our statute. It is hardly reasonable to suppose that our legislature would seek a statute in any state with an adjudication which had been regarded for six years as unworthy to be in their own statute book, for the purpose of making it a part of our law. The doctrine that in adopting a statute from one state we adopt the adjudication of it, though true, yet is so limited as to be hardly applicable to the case at bar.

The authority cited by appellant in *Campbell v. Quinlin*, 3 Scam. 288, reads: "The construction supposed to be adopted is one that the statute had received by a uniform series of judicial exposition." A single decision, in force but a year, can hardly be called a series of judicial exposition. We are unable to see that the construction insisted upon necessarily follows the statute, nor do we feel assured that the statute was taken from California. It is an exact copy of the Massachusetts law, and is also the common law upon that subject, except that the word "felony" is left out and specific felonies substituted therefor, and larceny added thereto. At common law burglary is defined to be (2 Archb. Crim. Pr. & Pl. 253) the crime of breaking, etc., with intent to commit a felony. Under our statute that crime is defined, the act of breaking, etc., with intent to commit robbery, mayhem, larceny, or other felony. We have no authority to add the word "grand" or "petit" to the term "larceny." Larceny is general, and includes both grand and petit. In Massachusetts all larceny was a felony, and their law in the exact words of ours punished all breakings with intent to commit larceny of any grade. We think our legislature intended the same thing. The Massachusetts law punishes burglaries where the intent to commit larceny over

\$100 with a more severe penalty than where the amount was less than \$100. Our legislature might have made a distinction in the punishment between burglaries with intent to commit grand and petit larceny, but they have not yet done so, and the penalty is the same, whatever the amount intended to have been stolen.

The judgment below is affirmed.

MORGAN, C. J., and PRICKETT, J., concurred.

UTAH & N. R. CO. v. FISHER, County Assessor.

(February 16, 1884.)

TAXATION—RAILROAD PROPERTY IN INDIAN RESERVATION.

Though Act March 3, 1863, § 1, (Organic Act of Idaho; 12 U. S. St. 808,) provides that there shall not be included in Idaho any territory which, by treaty with any Indian tribes, is not, without the consent of the tribe, to be included within the territorial limits or jurisdiction of any territory, yet inasmuch as the tract of land known as the "Fort Hall Indian Reservation" was included within the territory by the act supra, and as there is no Indian treaty which would exclude such tract, it is within the jurisdiction of the territory, and consequently the property of a railroad within this tract is subject to taxation for territorial purposes.

Appeal from district court, Oneida county.

Action by the Utah & Northern Railroad Company against one Fisher, tax collector of Oneida county, to restrain defendant from enforcing the collection of a tax assessed against plaintiff's property in the Fort Hall Indian reservation. From a judgment dismissing the temporary injunction, plaintiff appeals. Affirmed.

Williams & Young, for appellant. *Willard Crawford*, for respondent.

PRICKETT, J. This appeal has been submitted upon briefs, without oral argument. The facts as shown by the record are that the Utah & Northern Railway Company is a corporation owning and operating the Utah & Northern Railway, extending into and through the county of Oneida in this territory; that 69.18 miles of said railway is within and upon the Fort Hall Indian reservation, a tract of land situated within the exterior boundaries of said Oneida county, but which, by an order of the president of the United States, dated July 30, 1869, in pursuance of a treaty with the eastern band

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of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, was set apart as a reservation for the Bannock Indians; that the respondent, being the assessor and *ex officio* tax collector of said Oneida county for the years 1882, assessed plaintiff's railroad and other property situated upon said reservation; that there was levied upon the railroad and property situated upon the reservation for the year 1882 a tax for territorial and county purposes of \$4,478.42; that such tax not having been paid within the time required by law, the defendant, as tax collector, was proceeding to enforce and collect the same under the laws of the territory, by advertisement and sale of the property, when the plaintiff commenced this action to enjoin and restrain him therefrom; a temporary injunction was issued, which at the trial was by the judgment of the court dissolved and set aside, and the defendant also recovered judgment for costs. From that judgment the plaintiff appealed to this court.

The sole question presented for the consideration and decision of this court is whether or not the Fort Hall Indian reservation is a part of Idaho territory, and of Oneida county. The act of congress organizing the territory of Idaho, approved March 3, 1863, (12 U. S. St. 808,) includes within its exterior lines the tract of land now known as the Fort Hall Indian reservation, and by the act of the legislative assembly of this territory, creating and defining the boundaries of Oneida county, it is included within the exterior boundaries of that county; but section 1 of the organic act of the territory, contains a proviso as follows: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty with the United States and such Indians, or to include any territory which by treaty with any Indian tribes is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the president of the United States to be included within said territory or to affect the authority of the government of the United States to make any regulations respecting such In-

dians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." No provision similar to the foregoing is to be found in any act of congress creating a territory prior to that organizing the territories of Nebraska and Kansas, (10 U. S. St. 277,) and the reason for it in that act was that before the organization of those territories the United States, by treaty with the Shawnee tribe of Indians, and perhaps other tribes, occupying lands embraced in those territories, had agreed not, without their consent, to include any of their lands within any state or territory thereafter to be formed; and for the same reason congress required a like provision to be incorporated into the constitutions of Kansas and Nebraska, before admitting them into the Union. The form of the organic act of those territories, in this respect, seems to have been uniformly followed by congress in organizing the other territories created since that time, without reference to the question whether such proviso was needed to save and protect any rights previously guarantied or not. It is not claimed that prior to the passage of the organic act of Idaho any treaty existed containing provisions similar to those in the treaty with the Shawnees, which would exclude or except out of the territory any portion of the lands embraced within the Fort Hall Indian reservation. Such lands were, therefore, included within the territory, March 3, 1863, by the terms of the organic act.

The proviso in the act creating the territories of Kansas and Nebraska, similar to that found in section 1 of our organic act above set forth, was several times considered and construed by the courts in Kansas.

In the case of *McCracken v. Todd*, 1 Kan. 148, taken by writ of error to the supreme court of Kansas, one of the questions presented was whether certain judicial proceedings which took place on the lands belonging to the Delaware Indians, when Kansas territory was organized, were not transacted without the territory, and therefore null and void. That court, after reciting the proviso, say: "This ground of objection calls for no comment by the court further than a statement that nowhere in any treaty with the Delaware Indians is there a provision that the lands of that tribe shall not, with-

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out its consent, be included within the territorial limits of any state or territory. All the lands of that tribe, within the boundaries specifically described in the law referred to, were therefore included within the limits of the territory." In the case of *U. S. v. Ward* the circuit court of the United States for Kansas, MILLER, J., presiding, held that the state court, and not that of the United States, had jurisdiction to try and punish for the crime of murder committed upon the Kansas reservation, because the treaty with the Kansas Indians contained no provision excepting their reservation from the territorial limits or jurisdiction of any state or territory. McCahon, 198.

The land embraced within the Fort Hall Indian reservation having been included within and made a part of the territory by section 1 of our organic act, passed March 3, 1863, we will next inquire whether those lands have since been withdrawn therefrom. If so, it must be because of some provision in the treaty between the United States and the eastern band of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, and of the executive order made in pursuance thereof, (15 St 673,) for it is by and under these that the Bannock tribe of Indians occupy said reservation. Section 2 of that treaty provides as follows: "It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the president of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the Port Neuf and Kansas, (meaning Camas prairie countries,) and that, when this reservation is declared, the United States will secure to the Bannocks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided, for the Shoshone reservation." On the thirtieth day of July, 1869, in pursuance of this treaty, the president, by order of that date, set apart the Fort Hall Indian reservation for the use and occupation of the Bannocks; but there is nothing in this treaty or order from which to imply that such tract of land was withdrawn from or taken out of the territory of Idaho. It was set apart merely for the use and occupation of the Bannock tribe of Indians.

The appellant relies for the reversal of the judgment in this case upon the decision of the supreme court of the United States in *Harkness v. Hyde*, 98 U. S. 476. That court there held that the territory embraced within the Fort Hall Indian reservation was "as much beyond the jurisdiction, legislative or judicial, of the government of Idaho as if it had been set apart within the limits of another country or of a foreign state," which would certainly be conclusive in favor of the position assumed by the appellant but for the decision of the same court upon the question subsequently rendered in the case of *Langford v. Monteith*, 102 U. S. 145, which is relied upon by counsel for respondent. In the last case cited Mr. Justice MILLER, delivering the opinion of the court, says: "The act of congress of March 3, 1863, to provide a temporary government for the territory of Idaho, (12 Stat. 808,) contains a clause precisely similar to that admitting Kansas into the Union. This court, in *Harkness v. Hyde*, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this, it seems, we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction." The decision in the case of *Harkness v. Hyde* is therefore no longer authority upon the point made in the appellant's brief.

Our conclusion is that the railroad and property of the appellant is subject to taxation, notwithstanding its location and situation upon the Fort Hall Indian reservation.

The judgment of the district court is affirmed.

MORGAN, C. J., and BUCK, J., concurred.

JONES v. ST. JOHN IRRIGATING CO.

(February 18, 1884.)

PLEADING—ANSWER—ISSUE JOINED.

1. Where, in an action to recover damages alleged to have been sustained by diver-

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sion of water from plaintiff's premises, the answer denies any diversion or injury, plaintiff's contention on appeal that the answer did not raise any issue between the parties will not be sustained.

APPEAL—REVIEW—ERROR AGAINST RESPONDENT.

2. On appeal the court will only notice the errors committed against the appellant, and not those committed against the appellee.

Appeal from district court, Oneida county.

Action by one Jones against the St. John Irrigating Company to recover damages alleged to have been sustained by reason of the diversion by defendant of water from plaintiff's premises. From a judgment awarding him damages of \$50, plaintiff appeals. Affirmed.

Heed & Standrod and *James L. Onderdonk*, for appellant. *Smith & McCollom*, for respondent.

PRICKETT, J. This action was commenced in the district court of Oneida county, by the filing of a complaint therein September 12, 1883. The object of the action was to recover, as damages, the sum of \$1,000, alleged to have been sustained by the plaintiff by reason of the diversion by defendant of water from plaintiff's premises, to which he alleges he was entitled for irrigation. The amended answer of the defendant denies that it at any time diverted any water from the stream named to which plaintiff was entitled, and denies that plaintiff has been injured by the defendant in the sum of \$1,000, or any other sum whatever. Upon the issues made by the complaint and amended answer the cause was tried by jury, and a verdict and judgment were rendered for plaintiff for the sum of \$50. A question having arisen in the court below, as to whether the plaintiff was entitled to recover his costs, upon a verdict for less than \$100, under the statutes, the court below awarded the plaintiff his costs. The plaintiff appealed from the judgment.

A paper, purporting to be a bill of exceptions, has been stricken out of the transcript, on motion, because it was not settled and filed in the mode prescribed by the statute, and the case now stands for review on the judgment roll alone. On an appeal from a judgment without a statement or bill of exceptions nothing belongs to the record except the judgment roll, and no question arising outside the judgment roll can be considered. The mode of pre-

senting questions not arising on the judgment roll, for review on appeal, is by statement or bill of exceptions, properly settled, signed, and filed.

It is urged by the appellant's counsel that, though the court has stricken out the bill of exceptions, the chief question in dispute can be reviewed upon the record as it still stands; that there is no issue formed by the complaint and amended answer; that the amended answer is evasive; and that the plaintiff was entitled to judgment on the pleadings in the court below. But we think the denials of diversion by the defendant, and of damages sustained by the plaintiff, do certainly raise material issue between the parties to the action.

Another point made by the appellant's counsel is that the amended answer, after filing and verification, was again amended by striking out certain matter, and that, after being so re-amended, it was never verified, and that it thus became an unverified answer to a verified complaint, and for that reason should not be considered as an answer at all. But these objections do not appear upon the face of the judgment roll, and, if they existed, should have been brought into the record by the proper objections and bill of exceptions.

On the part of the respondent it is urged that, under our statutes, in an action for damages, where the plaintiff recovers less than \$100, he is not entitled to costs, and that the allowance of costs to the plaintiff by the district court was error, which can and should be corrected here; but, on appeal, this court can only notice the errors committed against the appellant, not those committed against the successful party, or the respondent in the appeal. *Seaward v. Malotte*, 15 Cal. 304; *Travers v. Crane*, Id. 12; *Stevenson v. Smith*, 28 Cal. 102.

The judgment is affirmed.

MORGAN, C. J., and BUCK, J., concurred.

WINTERS v. SWIFT *et al.*

(February 19, 1884.)

DEED—CONSTRUCTION—WHEN A MORTGAGE.

1. Where A. gives B. a deed absolute on its face, the fact that on the same day B. gives A. a bond agreeing to reconvey the property upon payment within a certain time of the consideration named in the deed will not ren-

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der such deed a mortgage, the bond being a mere option to repurchase, and not a defeasance.

USURY—WHAT CONSTITUTES—CONFLICT OF LAWS.

2. Where A., residing in Idaho, gives B. a promissory note, signed in blank, and B. goes to Utah, and there procures money on such note, giving, under power of attorney from A., a mortgage upon A.'s property in Idaho as collateral security, the fact that the rate of interest charged on such note is greater than the Idaho legal rate will not render such contract usurious, it appearing that the rate is not usurious in Utah; such contract being an Utah contract.

Appeal from district court, Alturas county.

Action by John B. Winters against J. O. Swift and another to have a deed from plaintiff's assignor to defendants declared a mortgage. From a judgment dismissing the bill, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

F. Ganahl, L. Vineyard, and D. E. Waldron, for appellant. *James H. Beatty*, for respondents.

MORGAN, C. J. It appears from the evidence and the findings of the court in this cause that Wilhelm Jaikowski was the owner and in possession of two-thirds interest in the North Star mine and one-half interest in the American Eagle mine, both situated in Warm Spring district, Alturas county, Idaho; that one Riley was the owner of the one-third of the North Star mine and one-half of the American Eagle; that in working said mine Jaikowski, prior to the seventh day of September, 1881, had become indebted to Pinkham & Leonard in the sum of \$2,082.98, for which he had given his note and mortgage on one-third of the North Star mine, dated, respectively, January 7, 1881; that he was then also indebted to J. O. Swift & Co., a firm composed of J. O. Swift and T. E. Clohecy, both defendants herein, to the amount of between three and four thousand dollars; that to pay off said indebtedness, and obtain means to work said mines, Jaikowski, about the first of March, A. D. 1881, employed defendant Clohecy to go to Salt Lake City and procure a loan of \$6,000; to enable Clohecy to secure said loan, Jaikowski executed to said Clohecy a note for \$6,000, with place where payable and name of payee in blank, dated March 1, 1881, and due in five months from date; he also executed to Clohecy a

power of attorney to sell or mortgage his interest in said North Star mine; that Clohecy thereupon went to Salt Lake City, and secured a loan from McCormick & Co. in the sum of \$6,000; that Clohecy delivered to said McCormick & Co. the said promissory note, properly filled out and indorsed by him; that he also, for the purpose of securing said note, executed a trust deed conveying Jaikowski's interest in the North Star mine to William H. Greenhow and George A. McCormick, with power to them or the sheriff of the county to sell said interest on default of payment of the debt. With the \$6,000 thus obtained, Clohecy paid off various items of indebtedness due from Jaikowski, including the debt due Pinkham & Leonard.

During the summer of 1881 Jaikowski made various attempts to sell his interest in the North Star mine, employing Clohecy and others to aid him in effecting said sale. The mine was not sold. The latter part of August Jaikowski went to Salt Lake; the note and trust deed were coming due September 1, 1881. Jaikowski attempted to get further time on the \$6,000 note, which was refused by McCormick & Co. About the first of September J. O. Swift, defendant, went to Salt Lake City, and, at Jaikowski's request, went with him to various persons to effect a sale of the mine, but was unable to do so. After all these failures to sell Jaikowski's interest in these mines, during which he had offered the whole for \$12,000, he (Jaikowski) offered to sell to Swift, on the sixth day of September, 1881, two-thirds of the two mines, all the ore on the dumps, with the cabin, tools, cooking utensils at the mine, and his claim for contribution against Riley, his partner, if Swift would pay the debt to McCormick & Co., his debt to J. O. Swift & Co., and furnish him money to go back to Idaho. Swift, after seeing McCormick & Co. and obtaining further time on that debt, on the seventh day of September told Jaikowski that he would accept his offer, and would pay the debt to McCormick & Co. and the debt to J. O. Swift & Co., and would furnish him \$60 to return to Idaho, if Jaikowski would sell the property to him at that price. The terms above stated being agreed upon by both parties, they went together to the office of W. C. Hall, an attorney, the terms of the sale were stated to the attorney in the presence of both parties, and he was directed to draw up a deed for two-thirds of both mines, a bill of

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sale of all the ores on the dump of said mines, all the tools, cabin, cooking utensils, and an assignment of Jaikowski's claim for contribution against his mining partner, Riley, for the consideration aforesaid, which was stated to be \$11,058.49. The attorney drew the said deed, assignment of claim for contribution, and bill of sale of tools, etc., all absolute on their face, according to instructions given in the presence of both parties. These papers were duly signed by Jaikowski and acknowledged before a commissioner of deeds, the parties going to another office for the purpose of acknowledgment.

Shortly after the execution of these papers, and the same day, the parties again appeared in the office of Hall, the attorney aforesaid, and Swift directed Hall to draw up a bond for the conveyance of the two-thirds interest in the two mines, by Swift to Jaikowski, on or before the seventh day of December, A. D. 1881, in case the latter should pay him the sum of \$11,058.49. This was accordingly done, signed by Swift, and delivered to Jaikowski. As soon as the papers were completed, Swift went with Hall to McCormick & Co., paid the interest on the \$6,000 to September 1, 1881, amounting to \$1,080, assumed in the name of J. O. Swift & Co., his firm, the payment of the note of \$6,000, in consideration of which McCormick reduced the rate of interest to one per cent. per month. On the same day Swift wrote to his firm at Ketchum stating that he had bought out Jaikowski, and directed them to charge the account due the firm from Jaikowski to his private account, which was accordingly done. Swift paid Jaikowski the \$60 to return to Idaho, and also paid for Jaikowski \$10 to the attorney for drawing the papers.

In the latter part of September, or first of October, Swift went into possession of the mines and other property, and has continued to hold and work them until the present time. On the tenth day of October, 1881, Jaikowski executed to one Shaeffer, consideration being an open account, \$432, or \$452, and some small sums of money, the amount of which the parties were not able to state, a deed for the two-thirds interest of the said mines, and assigned to him the bond. This sale, as Winters, plaintiff herein, testifies, was negotiated and promoted by him, and he states he had had his eye on this property as being valuable ever since he came to Wood River. On the seventeenth of No-

vember, 1881, Shaeffer executed to plaintiff, Winters, a deed of said property, and assigned to him the bond. On the third day of December, 1881, plaintiff, John B. Winters, commences this suit, files his complaint, praying that said deed to Swift, of September 7, 1881, and bond to Jaikowski be declared a mortgage, and that said plaintiff be allowed to redeem; that, to ascertain the amount to be paid to Swift, an accounting be had between J. O. Swift & Co.—T. E. Clohecy and J. O. Swift—and Jaikowski, with various other prayers not now necessary to mention.

To the said complaint the defendant Swift answered, and averred that the said transaction that took place between himself and Jaikowski on said seventh day of September, 1881, was an absolute bargain and sale of all said Jaikowski's interest in said mines to defendant Swift; was never intended or understood by either party to be a mortgage; that said bond was executed and delivered to said Jaikowski to give him an opportunity to repurchase said mines if he desired so to do on or before the said seventh day of December, 1881. Defendant Clohecy answered, denying any interest in the transaction of September 7, 1881, or any interest in the result of the suit, substantially. The cause was tried before the court at the July term of the district court in and for Alturas county, and resulted in the following findings by the court as conclusions of law: "(1) That the transaction of the seventh of September, 1881, between Jaikowski and the defendant Swift was one of bargain and sale, and not one of security for debt; there being no pre-existing debt, no loan at the time, and no continuing indebtedness, there could be no mortgage, and the deed operated as an absolute sale and conveyance of the property to Swift. (2) That the bond from Swift to Jaikowski was not a defeasance of the deed, but simply an option to repurchase. (3) Neither Jaikowski nor his assigns having tendered the stipulated price within the period limited, the plaintiff is not entitled to relief. (4) That, upon the whole case, the equities are with the defendants and they are entitled to judgment for the dismissal of plaintiff's bill of complaint and for their costs in the action." Plaintiff made a motion for a new trial, which motion was denied by the court. From the judgment of the court denying the motion for

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a new trial an appeal is taken to this court, and the following errors assigned: The court erred in its conclusions of law, and the same are not justified or supported by the evidence in the case, in this, to-wit: "(1) The transaction of the seventh of September, 1881, between Jaikowski and Swift was one of mortgage and not of sale, there being a pre-existing and continuing debt carrying interest beyond the seventh day of September, 1881. (2) The bond from Swift to Jaikowski being signed on the same day, and witnessed by the same parties, and acknowledged by and before the same officer, expressing the same consideration and for the same property as that in the deed from Jaikowski to Swift, was a defeasance to the deed and constitutes with it one instrument, viz., a mortgage, and the action being brought for a redemption and praying an account, no tender was necessary. (3) The promissory note of McCormick & Co. is usurious and no claim for interest thereon can be collected, as the same was made and delivered in this territory and not in Utah. (4) That upon the whole case the equities were with the plaintiff,—in debt, pressed by his creditors, wanting time, everything tends to show that he was not a free man,—and that in doubtful cases of like character the law always construes transactions of like character a mortgage and not a sale."

It will be at once seen that the main question, in short, almost the only question, before the court, is, was the transaction between Swift and Jaikowski on the seventh of September, 1881, a sale, with a bond giving Jaikowski an option to repurchase, or was it a mortgage? In construing any instrument the first matter to be examined is the language of the instrument itself. The ordinary provision in a legal mortgage is that in case the grantor shall pay or cause to be paid the sum mentioned in the deed, with interest thereon, then the deed shall be void, otherwise, etc., or any words equivalent to these in the deed itself which shall indicate that it was intended as a security for money loaned, or security for the payment of a debt by the parties to such instrument, then it is a mortgage. 1 Jones, Mortg. § 242; Adams v. Stevens, 49 Me. 362. Upon the most cursory reading it will be at once seen that the deed from Jaikowski to Swift, executed on the seventh of September, 1881,

contains no such provision, and none equivalent thereto; it is a deed pure and simple; it is not claimed to be other than an ordinary deed in and of itself. Was there any separate deed executed at the time, or soon thereafter, which was intended by the parties as a defeasance?

It is claimed by the plaintiff that a bond for a deed, which was executed by Swift to Jaikowski soon after the deed was executed, was a defeasance, and was so intended by the parties thereto. The same rules of construction must be applied to this as to the other, that is, (1) does the instrument itself show upon its face that it was so intended? Upon examination it will be seen that it makes no reference to the deed whatever. There is nothing in it which shows that it had any reference whatever to the deed that had before been executed. There is nothing in it which indicates that Jaikowski was indebted to Swift in any sum whatever; nor is there anything in the deed which indicates that Jaikowski is indebted to Swift. Taking both instruments together, and assuming that they were both executed at the same time, and there is nothing which shows that they were intended as a mortgage. There is no obligation on the part of Jaikowski to pay, and no continued indebtedness, and no intimation of such an obligation. In this case the defendant Swift had no remedy against the person of Jaikowski; there was nothing in either or both of the papers executed which would enable Swift to obtain a judgment against Jaikowski. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. These must exist in order to constitute it a mortgage. See Conway's Ex'rs v. Alexander, 7 Cranch, 236; Henley v. Hotaling, 41 Cal. 28; Farmer v. Grose, 42 Cal. 169; Flagg v. Mann, 14 Pick. 478.

There being nothing in the deed, nothing in the bond, nothing in both, if construed together, to constitute the transaction a mortgage, we must next inquire into the intention of the parties at the time the deed was executed. This is to be gathered from the testimony. Hall, the attorney who drew the deed, and who is a disinterested witness, testified that Swift and Jaikowski came into his office. "Swift, in presence of Jaikowski, said he had bought a two-thirds interest in North Star and American Eagle; asked me to draw a deed, which I did, and explained

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the legal effect thereof to Jaikowski. The parties agreed upon the consideration and I put it in. Some time after deed and bill of sale of cabin and tools were executed, Swift said he had concluded to give Jaikowski a bond, so that he might have a chance to turn round, which I then drew up, and Swift signed it. There was nothing said about its being intended as a mortgage or security for any debt. I would not be positive. When the deed was signed something was said about giving bond back. The bond was signed when Swift came back, within half an hour."

Swift, defendant, testifies Grosbeck and Jaikowski had been talking about a sale. Jaikowski told me about Grosbeck wanting the property. I went to Grosbeck and told him I would take half the mines if he would take half at \$12,000. Grosbeck refused. Jaikowski offered both mines, North Star and American Eagle, for \$12,000. I did all I could to assist him to sell the property. I offered to Chambers to buy the property with him, but he also refused. I went to several mining men after that for Jaikowski, but could get none of them to take it. Jaikowski came to me every day to do something with the property. On the sixth of September, 1881, Jaikowski said if I would pay the McCormick & Co. note and the J. O. Swift & Co. debt, and give him money enough to go back to Wood River, he would give me his entire interest in the two mines. I told him I would see McCormick, and that I might trade with him. Saw McCormick, and then told Jaikowski I would take property at his proposition. Deed was drawn up and acknowledged. I paid the interest on McCormick's note and assumed the payment of the note, assumed payment of J. O. Swift & Co. debt, paid Jaikowski \$60 and Hall \$10. When we were coming back from getting deed acknowledged I told Jaikowski I would give him a bond for 90 days if he wanted. We went back to Hall's office, and I did so. The transaction between us was understood to be a sale, and not a mortgage. The bond was spoken of first when we were returning from having deed acknowledged.

On the twenty-eighth day of October, 1881, Jaikowski made an affidavit before Greenhow that the sale to Swift was absolute and *bona fide*, and was not made as a security for payment of any debt; that Shaeffer and Winters, plaintiff, had

induced him while intoxicated to make an affidavit to the contrary.

Peter Wise testifies that between the tenth and fifteenth of September, 1881, Jaikowski, after his return from Salt Lake, said that he had sold North Star and American Eagle to Jim Swift, told me the terms, and said he was glad Swift had taken it, for he did not want McCormick to get it for the \$6,000, and that Swift had given him a bond. Stiner testifies that he had a conversation with Jaikowski in September or October, 1881, in presence of Wise, in which Jaikowski said he had sold the North Star and American Eagle to J. O. Swift. Greenhow and Clohecy testify to similar conversations with Jaikowski, in which he told them he had sold all out to Swift.

On the part of the plaintiff, Jaikowski testifies as follows: On the sixth of September, 1881, I met Swift, and he said if I would give him security on the North Star and American Eagle mines, my claim against Owen Riley for his one-third due for all the debts incurred on the North Star, embracing the McCormick & Co. claim of \$6,000 and interest, and the debt to Swift & Co., claimed to be \$3,598.15, my cabin, tools, etc., ore on the dumps, he would pay off the debts, and give me three months' time, and if any ore was sold in the meantime he would give me credit. I told him "all right;" and he told me to meet him next day and see what he could do. I saw Swift next day. He said everything was ready. We went into the lawyer's office and sat down. The lawyer finished the papers; read them to me. I signed two papers then, and Swift signed one. Swift took them all and went to the commissioner or notary public. I signed the deed and bill of sale to Swift, and he signed the bond and gave it to me.

This is substantially all the testimony upon both sides with reference to the intention at the time of the execution of the deed and bond.

If we leave out the testimony of the two parties, Swift and Jaikowski, and take the instruments with the testimony of Hall as to what was said by the parties at the time of their execution, the manner of their execution, with the statement of Jaikowski to Stiner, Wise, Greenhow, and Clohecy, the conclusion is irresistible that the intention of the parties was to make an absolute sale, with a bond allowing Jaikowski to repurchase within the time stipu-

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lated. The testimony of Swift is strongly corroborated by testimony of Hall and all the witnesses to whom Jaikowski had talked, and also by the affidavit made by Jaikowski before Greenhow, notary public, as well as the character of the instruments themselves. On the other hand, the testimony of Jaikowski with reference to the intention of the parties is not at all corroborated by any of the circumstances nor any witness. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition respecting a mortgage; all the conversation between Jaikowski and Swift and other parties was in reference to bargain and sale. During the summer before, Jaikowski, with those whom he had employed to assist him, were all the time trying to sell the mine. This deed was not given to secure a pre-existing debt. Swift had no interest in the McCormick & Co. debt, and only a partial interest in the debt to J. O. Swift & Co. These are all given as strong indications of absolute bargain and sale, and not of mortgage. *Conway's Ex'rs v. Alexander*, supra. When there is no debt and no loan, an agreement to resell will not change an absolute conveyance into a mortgage. *Henley v. Hotaling*, 41 Cal. 25; *Glover v. Payn*, 19 Wend. 521; *Rich v. Doanee*, 35 Vt 125; and other cases cited in 41 Cal. 25. The question as to inadequacy of consideration cuts no figure whatever, as the complaint alleges that the mines at the date of the commencement of the suit, December 3, 1881, were worth \$100,000. It is entirely immaterial what they were then worth. The only proper question would be what were they worth on the seventh of December, 1881,—a matter not put in issue by the pleadings.

It is urged by the plaintiff that when the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mortgage. *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, and *Wilson v. Shoenberger's Ex'rs*, Id. 295, are cited to sustain the position. It is clear that when the separate instrument is intended as a defeasance by the parties that this principle is correct. Both the cases cited are cases where the parties both intended the instruments as mortgages, and denominated them as such on the face of the instruments. It is also indicated by the proof that one was a loan of money, and the other a loan of credit upon which to

raise money. Neither case is at all like the one at bar, and it is remarkable that they should be quoted as sustaining the principle that a separate agreement for repurchase is by operation of law a mortgage.

Again, it is asserted that at law an absolute deed and separate defeasance or agreement to convey, executed at the same time, amount to a mortgage, and a large number of cases are cited. It is only necessary to say that where the parties intended them to be such, and such intention is indicated either on the face of the instrument or by parol testimony, then they are such, and not otherwise, and this only is indicated by the cases cited, beyond question. There is no case that we have yet been able to find which holds that an absolute deed, and a bond to convey the same property when not intended as mortgage, or security for money, as evidenced by the deed or parol testimony, is held by the court to be a mortgage. A large number of cases which were cited by the plaintiff have been examined, and they all tend to the same point, that when the parties intend the instruments as simply a security for money, then they are construed as mortgages by the courts, and this intention of the parties is to be ascertained—*First*, from the instruments themselves; *secondly*, by parol testimony.

The third error assigned is that the promissory note given to McCormick & Co. is usurious, and no claim for interest thereon can be collected, as the same was made and delivered in this territory, and not in Utah. The evidence shows that Jaikowski executed a note in blank, and gave Clohecyc a power of attorney, authorizing him to sell or mortgage his interest in the mines to raise money in Salt Lake City, Utah. Clohecyc was the agent of Jaikowski, and executed and delivered the note and trust deed to McCormick & Co., in Utah. They are not usurious, therefore, being in accordance with the laws in force there.

It is therefore concluded by the court that the instrument executed by Jaikowski to Swift, September 7, 1881, is an absolute deed, as the result of a bargain and sale of the property therein described; that the bond given by Swift to Jaikowski, of the same date, is an agreement to convey a portion of the same property upon the payment of a sum of money at a stipulated time, which has not been either paid or tendered, and that they are not,

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and were not, intended to be a mortgage or security for money.

The judgment of the court below is therefore affirmed.

PRICKETT and BUCK, J.J., concurred.

PEOPLE v. PIERSON.

(February 20, 1884.)

CRIMINAL LAW—REVIEW ON APPEAL.

1. Under Rev. Laws, p. 432, § 465, subd. 2, providing that an appeal to the supreme court from the district court shall be on questions of law alone, an objection that the evidence does not support the conviction in a criminal cause cannot be considered on an appeal from the judgment.

HOMICIDE—EVIDENCE.

2. Where, on a trial for murder, defendant seeks to justify the homicide on the ground that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be defendant's wife, and that she kept a house of prostitution, is admissible to show that deceased was on defendant's premises for purposes other than felonious.

SAME—INSTRUCTIONS—PROVINCE OF JURY.

3. Where, on a trial for murder, defendant has testified in his own behalf, error cannot be predicated on the refusal of his requested instruction that his testimony is entitled to the same credit as that of any disinterested witness, provided it is corroborated by other credible and unimpeached evidence, as such instruction invades the province of the jury.

SAME—INSTRUCTIONS.

4. On a trial for murder, error cannot be predicated on an instruction that the jury should find defendant guilty if they believed from the evidence that defendant was actuated by a desire to kill deceased in revenge for some real or imagined injury deceased inflicted upon defendant's wife.

SAME—DECLARATIONS.

5. On a trial for murder, declarations of defendant, made to a sheriff shortly prior to the homicide, seeking protection for an alleged assault upon his wife by deceased, are not admissible, as part of the *res gestæ*. BUCK, J., dissenting.

Appeal from district court, Alturas county.

George Pierson was convicted of murder, and appeals. Affirmed.

L. Vineyard, for appellant. Jas. H. Hawley and T. D. Cahalan, Pros. Attys. for Alturas and Ada counties, respectively, for the People.

MORGAN, C. J. The defendant, George Pierson, was indicted, tried, and convicted at the October term, A. D. 1882, of the district court for Alturas county, for the murder of John T. Hall, at Vienna, in said county, on the twenty-fifth day of August, 1882. The case is brought to this court by an appeal from the judgment. In the argument of the case considerable time was occupied in the apparent effort to show that the verdict was contrary to the evidence. The court is unable to see any substantial objection to the verdict upon that ground. There is no occasion, however, to consider that branch of the argument. The appeal is taken from the judgment. Subdivision 2, § 465, p. 432, Revised Laws, provides that the appeal to the supreme court from the district court shall be on questions of law alone. The only method whereby this court can review the evidence for the purpose of determining whether the verdict is sustained thereby, is through an appeal from the order of the court below denying a new trial upon that ground. As no such appeal is taken in the case at bar, we can only review the evidence so far as is necessary to determine the questions of law brought here by the appeal from the judgment.

The bill of exceptions alleges as error the refusal of the court to allow the declarations of the defendant to the deputy sheriff in endeavoring to procure the arrest of deceased for alleged offenses against the wife of defendant, made on the day of the homicide, and immediately preceding the same; and the ruling of the court in refusing to instruct the jury, at the request of the defendant, that if the jury believe, from the evidence, that the deceased approached the defendant's dwelling at the time of the fatal affray with the intent of committing a felony upon the person of the defendant, or upon the woman in the dwelling of defendant, whom he claims as his wife and who claims the protection of the defendant, and an asylum in his house, and that the defendant did the killing in order to prevent such felony, then the killing was justifiable, and the jury should acquit. Also in giving the following instructions, to-wit: "If you find from the evidence that the defendant was justified, under the rules of law given above, in firing the first shot, but that, after such shot had been fired by the defendant, the deceased, Hall, retreated, and all danger from him was over, and that, while deceased was still retreating and

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all danger from him being over, the defendant pursued him and fired upon him, thereby inflicting the mortal wound, then the defendant is guilty." While the law recognizes the right of the husband to protect the person of his wife from assault or personal injury, even to the taking of the life of the assailant, still, before this plea can be invoked, it is incumbent upon the defendant to establish two precedent facts to the satisfaction of the jury, to-wit: (1) That the relation of husband and wife actually existed between the defendant and the person against whom the assault was threatened or made; (2) that an assault was actually being made or attempted against the wife of the defendant at the time the homicide was committed, and that, in the judgment of a reasonable person, the killing of the deceased was necessary, at the time, to protect the wife from death or great bodily harm.

The appellant also set out in his brief certain assignments of error in admitting and rejecting testimony on the trial, which do not appear in the bill of exceptions, and therefore cannot be considered.

The defendant urges error in the court refusing to give two instructions, as follows: "When the defendant is a witness in his own behalf, as in this case, his evidence is entitled to the same credit as that of any disinterested witness, provided his testimony is sustained and corroborated by other credible and unimpeached evidence; and also that the defendant, Pierson's, testimony was to be weighed like the testimony of other witnesses in the case, provided it was corroborated by other unimpeached testimony. In the one case the court is asked to charge the jury as to the credit which they should accord to the witness, and, in the other, as to the weight they should give to certain testimony." Either of these charges, if given, would be an invasion by the court of the especial province of the jury, and they were properly refused.

Defendant also claims error in the admission of evidence of the character of the wife of the defendant, not for the purpose of impeachment, but with a view of showing, on the part of the prosecution, that the deceased was upon the premises of the defendant, at the time of the homicide, for purposes other than felonious. This exception is founded upon an assumption that the woman called Banjo Nell was the wife of defendant. The fact is that whether she was his wife or not was a matter be-

fore the jury on the trial. At the time this evidence was objected to the prosecuting attorney stated that he expected to inquire into the pretended marriage, which had been testified to on the defense, and also that he expected to show the character of the alleged wife of the defendant, the house she kept, and the right of deceased to be there. We think for these purposes the evidence was properly admitted. The object of proving marriage on the part of the defense was to allow defendant the protection of the law in defending the sanctity of his house, but proof that his house was a house of prostitution, the sanctity of which had been destroyed by the common and public prostitution of his wife, would be competent evidence to rebut the presumption that the deceased was there with a felonious intent.

Error is claimed in the following instruction: "If the jury believe from the evidence that at the time defendant killed deceased, he (the defendant) was actuated by a desire so to do in revenge for some real or imagined injury the deceased had inflicted upon the wife of the defendant, if she were his wife, and not in the necessary defense of his (the defendant's) own person, or the person of his wife, (if she were his wife,) then the defendant is guilty of murder, and the jury should so find." It is difficult to conceive of any substantial objection to this charge. Revenge is defined to be a malicious injury inflicted in return for an injury. The law does not excuse one who kills another for revenge. This instruction is in accordance with law, and properly given.

The remaining exceptions to the instructions involve the same principles which are at issue in the exception to the ruling of the court in rejecting the declarations of defendant at the time he sought the services of Deputy Sheriff Either, a short time prior to the affray, and the conclusion of the court upon that exception will dispose of the entire case. The defendant, by his counsel, at the trial excepted to the ruling of the district court excluding the declarations of the defendant made to the witness Either, deputy sheriff, when applying to such deputy sheriff to arrest Hall, the deceased, for alleged acts and intentions in regard to the woman called Banjo Nell, and her personal security in the house, claimed by the defendant as his own. This application is shown by the testimony of Either to have been made by the defend-

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ant on the day of, and but a short time before, the killing. And such refusal is alleged as error.

Declarations of a defendant in his own favor are *prima facie* inadmissible, and if the declarations and statements of the defendant, made when trying to procure the arrest of Hall, were admissible at all, it must be on the ground that they were part of the *res gestæ*, and as tending to show the condition of the defendant's mind at the time of firing the fatal shot. If defendant had killed Hall with the first shot fired by him at or near the door of the cabin, evidence of his declarations made concerning Hall a few minutes before, accompanying his request to the officer, might have been properly admitted as tending to indicate the state of defendant's mind, for the purpose of enabling the jury to fix the degree of the crime; but the evidence clearly shows that the first shot did not strike the person of Hall, and that the fatal shot was fired by the defendant while Hall was running and endeavoring to escape, and when all appearance of danger, either to the defendant himself, his habitation, or to any person residing or being therein, was past and over, if it had ever existed. There is no disputing the evidence on this point, for there is no conflict. Under these circumstances, when Hall had succeeded in wholly withdrawing himself from the immediate vicinity of the house, and that so palpably as to manifest his good faith, and to remove any just apprehension of danger from the defendant's mind, there can be nothing to mitigate, excuse, or justify the killing.

The judgment of the court below is therefore affirmed, and the cause remanded to the second district court in and for Alturas county, with directions to fix anew the time for executing its judgment.

PRICKETT, J., concurred.

BUCK, J., (*dissenting*.) While I concur in most of the opinion as read by the court, I am compelled to dissent from so much thereof as refers to the refusal of the court to admit the declarations of defendant at the time he called upon the deputy sheriff for protection a short time prior to the homicide. The record shows that defendant did not ask protection for himself, but for his habitation. Under section 25, p. 324, Rev. Laws Idaho, a person has at least as much and possibly more pro-

tection in law in defending his property as he does in the protection of his person. The evidence admitted prior to the offer to prove the declarations referred to, tended to show that the deceased, Hall, had on several occasions prior to the homicide, during the three or four months prior thereto, been in the premises of defendant, overthrown the stove, broken the door, discharged his revolver, and done other acts of violence. One of these occasions had been four or five days prior to the shooting, and the last one on the day of the shooting, but just how long before does not appear. The sheriff or deputy had frequently been to the house to quiet the disturbance, had ejected the deceased, and deceased had violated his promise not to return to the premises. Within a short time before the homicide defendant had returned to his house, or his alleged house, found the stove overthrown, his wife or his alleged wife beaten. Within 10 or 15 minutes prior to the homicide he had sent for a physician, and he himself had gone to the sheriff, Either, and asked protection for his property. The doctor arrived soon after his return. Dr. Paterson testifies that defendant seemed agitated about something,—seemed exercised. This was from three to five minutes prior to the shooting.

Our statutes (page 323, § 17) provide that, to constitute murder in the first degree, there must be deliberation and premeditation. The doctrine of the *res gestæ*, as stated by Bishop, (Crim. Proc. § 1086,) is that declarations are competent whenever near enough to the act, either before or after, to be probably prompted by the same motive.

The act of going to the sheriff and seeking protection from an officer of the law would seem to be prompted by the same motive as sending for the physician, and the same alleged motive of committing the homicide; that is, the protection of his property.

The whole transaction occurred within a half hour; and it is claimed that the declarations offered in evidence were not more than 10 or 15 minutes prior to the shooting. The objection to such declarations is that they are self-serving, and may have been made for the occasion. But, in the case at bar, the condition of the house, and the bruising of the wife, or alleged wife, were facts existing outside of the defendant's co-operation. In sending for a physician and in going for a peace officer he acted as any good citizen would act.

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and it is hard to presume fraud upon a defendant when all his acts may be accounted for in the same manner that we would account for the same acts by any other person. I cannot avoid the conclusion that his going for the sheriff was so connected with the protection of his property as to form a part of the *res gestæ*, and th

act, with the accompanying declarations, should have been admitted, not to justify the homicide, but as bearing upon the question of deliberation and premeditation necessary to constitute murder in the first degree. *Mack v. State*, 48 Wis. 271, 4 N. W. Rep. 449; *State v. Keene*, 50 Mo. 358.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1885.

PEOPLE v. DEWEY.

(February 17, 1885.)

HOMICIDE — DECLARATIONS OF DECEASED — RES
GESTÆ.

1. Declarations of deceased, made from half to three-quarters of an hour after an affray in which he was fatally shot, and after he had been carried from the scene of the affray to his home, are inadmissible as part of the *res gestæ*.

SAME—INSTRUCTIONS—REASONABLE DOUBT.

2. On a trial for murder, an instruction that "a reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but it is such a doubt as a reasonable and prudent man would be likely to act upon in determining important affairs of life," is unobjectionable.

Appeal from district court, Owyhee county.

William H. Dewey was convicted of manslaughter, and appeals. Reversed.

Richard Z. Johnson, for appellant.

Declarations of deceased made from half to three-fourths of an hour after the shooting are inadmissible. *People v. Ah Lee*, 60 Cal. 85; *State v. Daugherty*, 17 Nev. 376; *Binns v. State*, 57 Ind. 46; *Field v. State*, 57 Miss. 474; *Waldele v. Railway Co.*, 95 N. Y. 274; *People v. Davis*, 56 N. Y. 96; *Reg. v. Bedingfield*, 14 Cox, Crim. Cas. 341; 14 Amer. Law Rev. 822, 823.

Error committed in a criminal trial will be presumed to have injured the defendant, unless the contrary clearly appears. *People v. Murphy*, 47 Cal. 103; *People v. Stanley*, Id. 114.

Huston & Gray, for the People.

MORGAN, C. J. The defendant was indicted and tried at the September term of

the Owyhee county district court, for the murder of Joseph Koenig. He was convicted of manslaughter. Defendant moved for a new trial; which motion was denied by the court, and defendant appealed from the judgment, and from the order denying a new trial, and assigned the following as error, viz.: "(1) The court erred in permitting the witness Williams, over the objection of defendant, to testify to statements of the deceased, highly criminative of defendant, made to the witness from one-half to three-quarters of an hour after the affray was terminated, and in the absence of the defendant, and after defendant had been arrested and taken from the scene of the conflict." The following cases are relied upon to support the ruling in the case at bar, to-wit: *Insurance Co. v. Mosley*, 8 Wall. 397; *Rex v. Foster*, 6 Car. & P. 325; *Com. v. McPike*, 3 Cush. 181; *Thompson v. Trevanion*, Skin. 402.

In the case of *Insurance Co. v. Mosley*, 8 Wall. 397, the deceased had fallen down stairs and received a severe hurt upon his head, from the effects of which he afterwards died. The question was as to whether his declarations, made immediately after the hurt was received, as to his bodily pains and injuries, were admissible in evidence. The court said that "what the deceased said as to his pains related to present existing facts at the time they were made." We may say, in passing, that declarations of this character are uniformly held to be proper. The declarations as to how he received the injury were made immediately or very soon after the fall. To sustain the admission of the

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latter declarations the court cites *Thompson v. Trevanion*, Skin. 402. In the latter case the court allowed what the wife said immediately upon the hurt received, and before she had time to contrive or devise anything for her own advantage, to be given in evidence.

In *Rex v. Foster*, 6 Car. & P. 325, the defendant was indicted for killing the deceased by driving a cab over him. The witness heard the deceased groan, and immediately went to him, and asked him what was the matter. GURNEY, Baron, said that what deceased said at the instant as to the cause of the accident was clearly admissible. PARK, J., said it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down.

In the case of *Com. v. McPike*, 3 Cush. 181, the defendant was charged with killing his wife. It appears that deceased ran up stairs from her own room in the night, crying murder and bleeding. A person who heard her cries went for a watchman, and, on his return, proceeded to the room where she was. He found her upon the floor, bleeding profusely. She said defendant had stabbed her. The declaration was admitted in evidence. The supreme court of Massachusetts held that the evidence was properly admitted, giving as a reason that the declaration was "of the nature of *res gestæ*," and that the time when it was made was so recent after the injury was inflicted as to justify receiving it on that ground.

It will be noticed that in each of these cases the declarations were made by the deceased almost immediately after the injury was received, before the deceased had time to think of or contrive a story, and they were admitted in each case for that reason. We cannot escape the conclusion that there was another reason for the admission of testimony in these cases, although not stated. In each case the defendant and deceased were the only persons present when the injury was inflicted. There was no other eye-witness. The absolute necessity of this testimony to work a conviction of a person believed to be guilty, and the nature of the declarations rendering it almost absolutely certain that the statement was true, must have entered into the consideration. The closing paragraph in the opinion of the court in the case of *Insurance Co. v. Mosley*, *supra*, indicates this. The court say: "In the ordinary concerns of life no one would

doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned." As to the necessity of bringing them in under the head of *res gestæ*, the court say "that what was said could not be received as dying declarations, although the person who made them was dead, and hence could not be called as a witness." The reasoning of the court, in brief, is this: These declarations were a part of the *res gestæ*. They were undoubtedly true. They were conclusive. They could not be admitted as dying declarations. The case could not be made out without them. Therefore they were properly admitted. If the first proposition is correct, there is no need of the others; and the last-named four propositions furnish no legal reasons for the admission of the testimony.

In the case at bar, the declarations sworn to by the witness Williams, were made one-half or three-quarters of an hour after the shooting occurred, and the same length of time after the conflict was ended. The deceased had been taken across the street into his own house. Several persons were present, all of them his own friends. Counsel for the people asked witness (Williams) the following questions: "Question. How soon after the shooting was it that you heard him (the deceased) make any statement? Answer. I could not tell exactly; the time may be half or three-quarters of an hour. Q. Do you know whether King at that time was aware of his condition? A. I cannot tell." Counsel then desired to renew the questions as to what King said as being part of the *res gestæ*. To this defendant's counsel objected. Objection was overruled, and defendant by his counsel excepted. The following is the testimony: "Question. Will you state what statements Mr. King made to you in regard to this shooting? Answer. I asked him which shot struck him, and he told me it was the first shot fired that struck him, just when he was going over the boards into the brewery. Q. He said that he was struck as he was going over those boards, and that it was the first shot? A. Yes, sir; just as he went over the boards." To indicate how far these declarations are from the original rule, with reference to matters coming under the head of "*res gestæ*," it is only necessary to refer to the definition of the term, which is, the "trans-action; thing done; the subject-matter;"

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as, when it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. Greenleaf says that the principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. 1 Greenl. Ev. § 108. The general rule is that declarations, to become part of the *res gestæ*, must accompany the act which they are supposed to characterize, and so harmonize with them as to constitute one transaction. *Enos v. Tuttle*, 3 Conn. 250; *State v. Daugherty*, 17 Nev. 376. If the declarations offered in evidence are mere narrative of a past event or occurrence, they are inadmissible. *Binns v. State*, 57 Ind. 46; *Denton v. State*, 1 Swan, 279; *State v. Tilly*, 3 Ired. 424. In *Bland v. State*, 2 Ind. 608, it was held incompetent for the accused to prove a statement made by himself half an hour after the homicide, concerning the circumstances under which it was committed.

The declarations admitted in evidence in the case at bar were a mere narration of a part of the affray which occurred a half or three-quarters of an hour before, after all danger was over, after the occurrence had entirely ceased, while the defendant was under arrest, and when the deceased had been among his friends during the whole time that had elapsed, and had a tendency to fix the responsibility for the affray upon the defendant.

The learned justice, in the case of *Insurance Co. v. Mosley*, *supra*, says: "The tendency of recent adjudications is to extend, rather than narrow, the scope of the doctrine of *res gestæ*." We have failed to discover such tendency, after an examination of all the cases within our reach which discuss the principle. If it does exist, it indicates a tendency in the courts to leave the field properly occupied by the judiciary and enter that of the law-making power. This is always a dangerous experiment. If evidence of this character is proper and necessary, it is the duty of the legislature to direct that it be admitted. The rules of evidence have been crystallized from the experience and the best thought of centuries. These rules become clearer, their boundaries better defined, as civilization

advances, and as the courts improve in the administration of justice. It is unsafe for the courts to extend or violate them. We think the evidence inadmissible, and that it had a tendency to injure the cause of the defendant.

The second error assigned is the definition given to the term "reasonable doubt" in the fifth instruction given by the court. It is as follows: "A reasonable doubt is not a mere possible doubt, nor is it a capitious or imaginary doubt, but is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life." While the court do not say that this is the best definition that could be given, it is substantially the one that has been approved by the courts in a number of cases. See *Arnold v. State*, 23 Ind. 170; *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 Iowa, 435, 458. The following definition has been given with approval: "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause." *May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457. This definition is no stronger than the one given in the case at bar, as the word "graver" is no stronger than the word "important." The last-named definition is open to the same objection that is urged to the instruction given in this case: it requires such a preponderance of evidence as would convince a reasonable man in the graver transactions of life.

The definition given by Mr. Chief Justice SHAW in the case of *Com. v. Webster*, 5 Cush. 320, and which the supreme court of California, in the case of *People v. Strong*, 30 Cal. 155, say is probably the best definition ever given to the words "reasonable doubt," is as follows: "The evidence must establish the truth of the fact to a reasonable and moral certainty." The word "moral" in that connection, meaning nothing more than "intellectual" or "mental," is therefore the same as "reasonable." The statement would therefore be: "The evidence must establish the truth of the fact to a reasonable certainty." This is a mere synonym for the term "beyond a reasonable doubt." The learned chief justice goes on to say that it is a certainty that convinces and directs the understanding; satisfies the reason and judgment of those who are bound to act conscientiously upon it. Does not a strong preponderance

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of evidence convince the understanding, satisfy the reason and the judgment, in many, if not all, the most important affairs of life? The understanding, the reason, and the judgment are substantially synonymous terms in the sense in which they are here used. This discussion simply demonstrates the futility of the efforts to define the term "reasonable doubt." The best efforts in this direction are those which use words most nearly synonymous with the term itself. Perhaps as good a definition as any—possibly the best—would be merely negative in its character, and one most easily understood by the conscientious juror; such as: It is not a mere imaginary doubt, but must be a doubt which fairly arises from the evidence, and compels the conscientious juror to say, "I am not satisfied from the evidence that the defendant is guilty, or that the fact in question is true." We think that the definition given by the court below, being substantially approved by the courts, was not erroneous.

The third assignment of error is: The court erred in striking out the following words in the tenth instruction asked by defendant, to-wit, "and pursue his adversary." It is a familiar principle that all instructions must be adapted to and founded upon the evidence in the case on trial. After a careful examination of the evidence in the transcript, and particularly that referred to by the counsel for the defendant upon which this instruction is based, we are unable to say that there is any evidence that the defendant pursued the deceased at all. Defendant himself swears "that after the commencement of the affray" he backed up a little after each shot. There appearing to be no evidence of any pursuit by the defendant, the modification was proper.

Judgment reversed, and cause remanded for new trial.

BUCK, J., concurred. BRODERICK, J., having tried the case in the court below, gave no opinion.

PEOPLE v. KUOK WAH CHOI.

(February 17, 1885.)

JURY—PEREMPTORY CHALLENGES—WHEN MADE.

Under Crim. Pr. Act, § 333, providing that a challenge to an individual juror must be taken when the juror appears, and before he is sworn, error cannot be predicated on the action of the trial court, in a criminal cause, in

compelling defendant to exercise his peremptory challenges as the jurors were severally called, and before the whole number of 12 jurors were drawn.

Appeal from district court, Alturas county.

Kuok Wah Choi, commonly called Ah Sam, was convicted of murder, and appeals. Affirmed.

G. L. Waters, for appellant.

The court erred in compelling defendant to exercise his peremptory challenges as the jurors were severally drawn. *People v. Scroggins*, 37 Cal. 676; *People v. Jenks*, 24 Cal. 11.

Huston & Gray, for the People.

PER CURIAM. The defendant was tried and convicted at the June term, 1884, in the district court in Alturas county, on a charge of murder in the first degree. He appeals from the judgment, and the order overruling his motion for new trial, and assigns as error the ruling of the court compelling him, in impaneling the trial jury, to exercise his peremptory challenges as the jurors were severally called, and before the whole number of 12 jurors were drawn, as in civil causes. Under the statutes of this territory the method of selecting, drawing, and summoning jurors is the same for both criminal and civil actions. The procuring the attendance of jurors preliminary to the trial is provided for in our Code of Civil Procedure, from sections 73-108, inclusive. Section 109 directs that when an action is called for trial such proceedings shall be had in impaneling a trial jury as are prescribed in said Code; and section 111 provides that if the action is a criminal one the jury must be impaneled as provided by the statutes relating thereto. The statutes relating thereto are in the criminal practice act. Sections 109 and 111 of the Code of Civil Procedure, if not contradictory, have at least the tendency to confuse the practice; but the obvious intention of the legislature was to provide different methods of impaneling juries in civil and criminal actions. This method in civil causes is specified in chapter 23 of our Civil Code; and in criminal actions, in the criminal practice act, from sections 318-353, inclusive. Section 313 of the criminal practice act, which provides that the trial juries in criminal actions shall be formed in the same manner as trial juries in civil actions, if it was intended to apply to the impaneling of trial juries to

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that extent, was repealed by section 111 of the Code of Civil Procedure. Section 332 of the criminal practice act provides "that a challenge to an individual juror is either peremptory or for cause." Section 333 provides that either of these challenges must be taken when the juror appears and before he is sworn to try the cause, but the court may for good cause permit either of these challenges to be taken after the juror is sworn, and before the jury is completed. Section 377 of the criminal practice act provides that in all cases, on the trial of an indictment for felony, the jurors sworn shall be kept together until finally discharged from a further consideration of the case. Section 4 of an act amendatory thereto, approved January 22, 1881, of the eleventh session, so far modifies this section as to allow jurors to separate in the discretion of the court in the trial of felonies less than murder.

These sections clearly contemplate that in trials for murder after a juror is called he shall remain under the control of the court until he is rejected as incompetent; or, if accepted, until the termination of the trial. The ordinary import of the language used in these sections would justify the practice of requiring the respective parties to exercise all their challenges, either peremptory or for cause, and, if accepted, that each juror be sworn to try the cause before another is called. This was the method pursued in impaneling the jury in the case at bar, and we think the exception to it is not well taken. This method may be, and often is, so far modified in the discretion of the court as to allow the clerk to draw 12 names from the box before any challenges are interposed, and after these are examined for cause and passed upon, to allow others to be drawn to take the place of those excused, and allowing the defendant to examine and pass upon all those thus called before exercising his peremptory challenges. We see no objection to this method, provided that in case of recess or adjournment the peremptory challenges be exercised or waived upon all those passed for cause, and those accepted be sworn to try the cause and remain under the control of the court.

The reason for this practice may be found in the necessity on the part of the government of securing jury trials as far as possible free from every suspicion of improper influences. It often occurs that

several days are occupied in impaneling a jury in important criminal cases. During this time a portion of the jury having been accepted must either be under the control of the court or allowed to mingle freely with the people in the community in which the court is held, and with those in attendance upon court, generally greatly interested in the cause about to be tried. Jurors are thus subject to various corrupt influences, and often to the necessity of hearing in advance numerous accounts and discussions of the action which they are about to try. The law-making power has attempted to guard against this evil as far as possible by placing the juror, from the time he is accepted by the respective parties and sworn, directly under the control of the court. It is claimed that this practice results in inconvenience to the juror; but mere inconvenience should not weigh against the hazard of corrupt trials. The defendant can suffer no injury by thus exercising his peremptory challenge before the jury is completed, for the statute provides that the court may, for good cause shown, permit a challenge, either peremptory or for cause, to be exercised after the juror is sworn and before the jury is completed. The cases cited in opposition to this construction are founded upon the California statutes, which provide that juries in criminal and civil cases be formed in the same manner. Our statutes provide a different method, and hence the authorities cited do not apply to the case at bar.

The legislature have modified the effect of swearing the juror to try the cause by providing, in section 4 of the act before referred to, that a jury sworn to try an indictment for any offense, except murder, may at any time during the trial, before the submission of the cause, in the discretion of the court, be permitted to separate; but this enactment does not modify the method of impaneling the jury. The appellant also assigns as error the admission of the statement of defendant before the committing magistrate at the time of his preliminary examination. The objection to this evidence was not distinctly made, nor was any exception taken to its admission. It is an established principle in practice that when evidence is admitted under objections, and no exception is taken to the ruling of the court, the objection is waived. *Turner v. Water Co.*, 25 Cal. 398.

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We are able to find no error in the record, and the judgment is therefore affirmed.

MORGAN, C. J., and BUCK and BRODERICK, JJ., concurring.

GUTHRIE *et al.* v. PHELAN *et al.*
(February 17, 1885.)

PLEADING—DEMURRER—INTERPOSITION ON APPEAL.

Where defendants, in the trial court, question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and defendants waive their rights to save the question so raised by not taking a bill of exceptions, only appealing from the judgment, another demurrer raising the same question cannot be interposed on appeal.

Appeal from district court, Oneida county.

Action by Guthrie, Dooly & Co. against Phelan & Ferguson on an account and on a promissory note. From a judgment for plaintiffs, defendants appeal. Affirmed.

Prickett & Lamb, for appellants.

Where the complaint shows no cause of action, a judgment by default can no more be taken than it can be over a general demurrer. *Abbe v. Marr*, 14 Cal. 210.

The averment of partnership is necessary where the contract sued on is in writing, and runs in the firm name. 1 Abb. Forms, p. 151, note c.; *Loper v. Welch*, 3 Duer, 644; *Oechs v. Cook*, Id. 161.

There must be a substantive cause of action existing at the commencement of the action, and the action cannot rest upon facts subsequently arising, whether by the efflux of time or otherwise. *Hare v. Van Deusen*, 32 Barb. 92; *McCullough v. Colby*, 4 Bosw. 603, 5 Bosw. 477; *Watson v. Tibbou*, 17 Abb. Pr. 184; *Pedrick v. White*, 1 Metc. (Mass.) 76; *McMahon v. Allen*, 12 How. Pr. 44.

Smith & McCollum, for respondents.

It is perfectly proper to set up rights accruing or acquired after the beginning of the action in an amended or supplemental complaint. *Smith v. Billett*, 15 Cal. 23; *Tustin v. Faught*, 23 Cal. 242.

PER CURIAM. This action was commenced in the court below on the eighteenth day of December, 1882, upon an open account for goods, wares, and merchandise, and also upon a promissory note. At the time of the commencement of the action the promissory note was not due, and did not become due until the first

day of January, 1883. When the action was commenced, the plaintiff caused an attachment to be issued, and certain goods of the defendants were levied upon. On the twenty-seventh day of December, 1882, the defendants, by their attorneys, appeared and demurred to the complaint. The record brought here does not notice any rulings or order upon the demurrer. On the fourth day of January, 1883, the plaintiff filed a supplemental complaint, which omitted the first count in the original complaint, and counted alone upon the promissory note. On the twenty-sixth day of March, 1883, the defendants filed a general demurrer to the complaint, which was denominated "Amended Demurrer." The record before us is silent as to the disposition of this demurrer. On the twenty-first day of May, 1883, the defendants filed their answer to the complaint, and on the twenty-fifth day of the same month a judgment was entered against the defendants upon the promissory note. No bill of exceptions was taken, and the cause is here upon the judgment roll, which is imperfect in almost every part; evidently, it is not a complete transcript of all the proceedings had in the case, and the clerk does not so certify. From an inspection of the record it is impossible to know what proceedings were had in the court below. But the parties, by their counsel, have appeared and argued and submitted certain questions for our determination.

The appellants interpose a demurrer in this court, and thereby question the sufficiency of the complaint to sustain the judgment, and contend for the correctness of their practice. While it is true that in some cases an objection to the sufficiency of the complaint can be raised for the first time in this court, yet it is not a practice that can be commended in causes where all parties appeared and had their day in the trial court. The public has an interest in all litigation, and when the defendant is in court, the time of the court should not be consumed in the trial of a cause where an objection by the defendant would terminate all proceedings, and save to parties and to the public the time and expense of litigation.

The question, however, in this case is not whether the appellants can object to the sufficiency of the complaint for the first time in this court, but whether they could raise their objection by demurrer in the court below, have it disposed of there, waive their right to bring the question

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here by a bill of exceptions, appeal from the judgment, and then interpose another or new demurrer in this court. It will be observed that the "amended" demurrer was filed in the court below after the filing of the supplemental complaint, and that the record brought here fails to disclose any order or decision upon it. The rule is that when there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issue of law should be first disposed of. The statute so provides. When there are both issues of law and fact, and the cause is brought on for trial, and the issues of fact are tried and a judgment rendered in the cause, the presumption will be indulged, on appeal, that the issue of law was previously disposed of by an order overruling the demurrer; and in this case the presumption is strengthened by the absence of proof that the record is complete. *Brooks v. Douglass*, 32 Cal. 208; *Abadie v. Carrillo*, Id. 172.

It has been settled by this court that when a party desires to have a decision or order of the district court reviewed by this court, he must except thereto when the ruling or decision is made, and he must also preserve and bring up such exceptions by a bill of exceptions or statement. *People v. Hunt*, 1 Idaho, 433. It has also been settled by this court in *Fox v. West*, Id. 782, that the exceptions which, by section 403 of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and cannot be considered on appeal without being incorporated into a bill of exceptions, and this made a part of the judgment roll.

With these adjudications upon these important questions of practice we are still satisfied. Sections 405 and 406 of the civil practice act provide the modes for preserving exceptions in the cases therein mentioned; and section 653 provides that "on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies." The exceptions which the law deems to have been taken by the defendants to the orders in the court below overruling the demurrers, not having been preserved and brought here for review by a bill of exceptions, and assigned as error, these questions are conclusively

settled, and cannot now be re-examined upon a new or independent objection raised by demurrer in this court. Final judgment was entered in open court, by an order of the court, and all intendments are in favor of its correct action.

Judgment affirmed.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

ON REHEARING.

(February 25, 1885.)

PER CURIAM Since announcing the opinion in this case, the appellants, by their counsel, submitted a petition for a rehearing, and we were referred to additional authorities bearing upon the questions decided. After a further examination, we concede that, independent of the decisions already made, the principal question decided in this case, namely, that the order overruling the demurrer, and the exception thereto, should have been incorporated into a bill of exceptions to be available, would not be entirely free from doubt. The legislature may have intended that on appeal from a judgment everything in a transcript which belongs to or constitutes the judgment roll should be considered by the appellate court in reviewing the action of the trial court, whether there is a formal bill of exceptions or not; but the statute does not say so. The authorities we find which have interpreted our statute are against the construction contended for by the appellant's counsel. Section 403 of our Civil Code corresponds to section 647 of the California practice act. In *Nash v. Harris*, 57 Cal. 242, 243, a construction was given to this section. The court say: "When the motion was argued and decided in the lower court, the attorney of the appellant was present, and reserved no exception to the decision of the court." But, according to section 647 of the Code of Civil Procedure, an appealable order "is deemed to have been excepted to." Yet a party who has excepted to a decision of a court, whether he excepted in person at the time the decision was made, or is deemed in law to have excepted, must, in statutory or reasonable time after his exception, avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge."

In this territory the question seems to

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have just arisen in *Ainslie v. Printing Co.*, 1 Idaho, 641. In this case the court held that the verdict of the jury, although "deemed to have been excepted to," should have been incorporated into a bill of exceptions to make it available as an exception. In *Fox v. West*, Id. 782, the question in another form was again raised, considered by the court, and the same conclusion reached as in the former case. This construction does not seem unreasonable. In those cases in which the statute requires the party to except, if he desires the question reviewed, the exception so taken will be unavailable unless incorporated into a bill of exceptions, and thus made a part of the judgment roll; and we think, in those cases where the statute saves the exception for the party against whom the ruling is made, that unless the ruling and exception are, within the statutory time, preserved by bill of exceptions, the question should thereafter be deemed waived. See *Grazidal v. Bastanchure*, 47 Cal. 167. Under this construction of the statute a rule of practice has been established, and in the face of these authorities we do not feel warranted in attempting to change it.

Rehearing denied.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

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EDDY *et al.* v. VAN NESS *et al.*

(February 17, 1885.)

APPEAL—SUFFICIENCY OF BOND—DISMISSAL.

Where appellants file and serve notice of appeal both from the order denying their motion for a new trial and from the judgment, an undertaking reciting that it is given "on such appeal" is void for uncertainty, and the appeals will be dismissed.

Appeal from district court, Alturas county.

Action of claim and delivery by Eddy, Harvey & Co. against J. H. Van Ness & Co. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Appeal dismissed.

Kingsbury & McGowan and *Prickett & Lamb*, for appellants. *F. E. Ensign* and *J. Brumback*, for respondents.

MORGAN, C. J. In this case the appellants filed and served notice of appeal,

both from the order refusing a new trial and from the judgment. The appeal in this case and the undertaking placed on file are precisely the same as the appeal and undertaking in the case of *Mathison v. Leland*, 1 Idaho, 712. The undertaking recites that the appellants are about to appeal from the judgment made and entered against them, and also from the order denying a new trial, and then undertakes to pay all costs and damages which may be awarded against them on the appeal or dismissal thereof, not exceeding \$300. The court say, in *Mathison v. Leland*, supra: "It is evident that such an undertaking covers but one appeal, and it is impossible, upon an inspection of it, to determine to which appeal it applies. This being the case, we must hold that neither the appeal from the judgment nor from the order is well taken." Upon the hearing of the motion to dismiss the appeal in this case, counsel for appellants stated that he had taken means to procure a good undertaking. The court, however, cannot determine in which appeal there is an insufficient undertaking, and in which there is none. The undertaking is therefore void for uncertainty. We think we must hold that there is no undertaking in either. The certificate of the clerk is also defective in not stating that an undertaking in due form was properly filed; and the clerk could not make such certificate, since no undertaking in due form was ever filed.

Appeal dismissed.

BUCK and BRODERICK, JJ., concurred.

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CREWS v. BAIRD, Sheriff.

(February 21, 1885.)

DETINUE—SUFFICIENCY OF COMPLAINT.

Where, in an action of detinue, the complaint alleges the wrongful taking of the property, the detention, the demand, and damages for wrongfully withholding the same, an objection that it is not sufficient to support a judgment for plaintiff will not be sustained on appeal.

Appeal from district court, Nez Perces county.

Action by Toliver Crews against Ezra Baird, sheriff, to recover possession of certain personal property. From a judgment for plaintiff, defendant appeals. Affirmed.

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Ezra Baird, in pro. per. J. W. Poe and W. T. McKern, for respondent.

PER CURIAM. In this case the appellant contends that the verdict of the jury is against the evidence, and we are asked to examine this question. That which purports to be a statement of the evidence and exceptions thereto was not settled and signed by the district judge. That the settling and signing of the statement is mandatory, and its omission fatal, is a proposition that cannot be disputed. Without this authentication the statement cannot be treated as part of the judgment roll, nor be considered in this court. The only question properly presented for our consideration is whether the complaint is sufficient to support the judgment. We think it is. The complaint alleges the wrongful taking of the property in question, the detention, the demand, and damages for wrongfully withholding the same. We think this sufficient.

Judgment affirmed.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

MILLS v. GLENNON *et al.*

(February 23, 1885.)

ASSUMPSIT—PLEADING—JOINDER OF COMMON COUNTS.

1. Under Code Civil Proc. § 251, providing that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged," in an action for the balance of an account all the common counts may be united in one count as one cause of action, without any specification of the sums due upon each.

CHATTEL MORTGAGES—WILLFUL SALE BY MORTGAGOR—ORAL CONSENT OF MORTGAGEE.

2. Under Laws 11th Sess. p. 307, making the willful sale of property upon which there is a chattel mortgage, without the written consent of the mortgagor, larceny, and declaring such sale void, evidence of an oral consent of the mortgagee to the sale is admissible as explaining the intent of the mortgagor in making such sale.

EVIDENCE—COPIES OF BOOKS OF ACCOUNT—COMPETENCY.

3. A copy of the original entries in an account book is admissible in evidence, in an action on the account, where it appears that the book of original entries has become lost.

Appeal from district court, Boise county.

Action by James C. Mills against Glennon & Co. on an account, and for breach

of contract. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendants appeal. Modified.

George Ainslee and James H. Hawley, for appellants.

The common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each cause. *Buckingham v. Waters*, 14 Cal. 146; *McCarty v. Fremont*, 23 Cal. 197; *Watson v. Railroad Co.*, 41 Cal. 17; *White v. Cox*, 46 Cal. 169.

A complaint for money had and received which fails to allege a demand is bad on demurrer. *Greenfield v. The Gunnell*, 6 Cal. 68.

Where a chattel mortgage is given on personal property, the legal title to the property vests in the mortgagee, and no sale of such property by the mortgagor is valid unless the mortgagee consents in writing to such sale, and the admission of verbal consent by one of the mortgagees is contrary to law. Gen. Laws Idaho, 11th Sess. 1880-81, p. 307, § 8, tit. "Chattel Mortgages." *Jones, Chat. Mortg.* §§ 426, 699, 700.

And the mortgagee may maintain trespass or trover for the goods against any one who takes or converts them, etc., even against the mortgagor himself after a forfeiture. *Jones, Chat. Mortg.* §§ 442, 444, 446-448, 706; *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Cal. 414.

And, in a proceeding to foreclose, the mortgage lien will be enforced against those holding under the mortgagor with record notice. *Apperson v. Moore*, 21 Amer. Rep. 170; *Arques v. Wasson*, Id. 718; *Jones, Chat. Mortg.* §§ 454, 460, 466, 484.

Where the contract which a party seeks to enforce, be it expressed or implied, is expressly or by implication forbidden by the common law or by statute law, no court will lend its assistance to give it effect, etc. *Blasdel v. Fowle*, 21 Amer. Rep. 533; *Heineman v. Newman*, Id. 279; *Pratt v. Short*, 79 N. Y. 437; *Turnpike Corp. v. Henderson*, 11 Amer. Dec. 593; *Wilson v. Spencer*, 10 Amer. Dec. 491; *Linn v. Bank*, 25 Amer. Dec. 71; *Seidenbender v. Charles*, 8 Amer. Dec. 682-691, and notes.

Huston & Gray and Prickett & Lamb, for respondent.

Although a sale of the mortgaged property by the mortgagor without the consent in writing of the mortgagee be prohibited by statute, the authority in the mortgagor may be inferred. *Jones, Mortg.*

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§ 456; Gage v. Whittier, 17 N. H. 312; Roberts v. Crawford, 54 N. H. 532.

The sale of the mortgaged property by the mortgagor with the mortgagee's consent discharges the mortgagelien thereon. Jones, Chat. Mortg. § 661; Conkling v. Shelley, 28 N. Y. 360; Brandt v. Daniels, 45 Ill. 453; Jones, Chat. Mortg. § 465

BUCK, J. This action sets forth in the complaint two causes of action: *First*, a balance on account; and, *second*, damages for breach of contract. It was tried by the court at the August term of the district court, 1884. Judgment was rendered for the plaintiff for the sum of \$1,638.79. The defendants made a motion for a new trial, which was overruled; and from the order overruling the same, and from the judgment, take this appeal, and bring the cause to this court upon a statement of the case.

The first assignment of error is that the court erred in overruling the demurrer to the complaint. The demurrer is both general and special, but the attorney urged upon the argument but one objection, namely, that in the first count in the complaint several causes of action are improperly united, and that the same is ambiguous and uncertain, and mixed together without any statement or averment of the amount claimed to be due on each one separately. That portion of the complaint objected to for these reasons is as follows: "That the said defendants are indebted to the said plaintiff in the sum of four hundred and twenty and 11-100 dollars, for balance of account for money loaned, services performed by plaintiff for defendants, for grain and various articles of farm produce, and for money paid for defendants' use,—the whole done, furnished, and performed at the request of the defendants between January 1, 1881, and April 1, 1884; that the whole aggregate value of which items is the sum of \$1,043.73, no part of which has been paid, except \$623.65, the said balance of \$420.11 still being unpaid." The objection to this pleading, set out in appellants' brief and urged in the argument, is "that the common counts cannot all be united in one count as one cause of action without any specification of the sums due upon each cause." Section 231 of the Code of Civil Procedure provides that several causes of action may be united in the same complaint, in several instances specified therein. Among these are causes arising upon

contract, express or implied; but the several causes must be separately stated. The allegation objected to set out a balance of account, specifying, by brief mention, the character of the different items composing the account. Section 251 of our Code provides as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular." This provision was evidently intended to relieve the pleader from the necessity of specifying the exact amount of each separate item, and amply protects the adverse party from surprise at the trial. The *gravamen* of the allegation is the failure of the defendants to pay the balance alleged to be due on the account. We think it constitutes but one cause of action, and was well pleaded. 1 Estee, Pl. & Pr. (1st Ed.) 374, note 5, and cases cited; Guernsey v. Carver, 8 Wend. 493; Stevens v. Lockwood, 13 Wend. 645.

The objection to the second count of the complaint was waived on the argument. The assignment of errors brings up two important questions of evidence. The first is an exception to the ruling of the court in admitting oral evidence of the consent of the mortgagee of a chattel mortgage to the transfer of the mortgaged property by the mortgagor. General Laws Idaho, 11th Sess. 1880-81, p. 307, tit. "Chattel Mortgages," is as follows: "If the mortgagor of any property mortgaged in pursuance of the provisions of this act shall, while such mortgage remains unsatisfied in whole or in part, willfully remove from the county or counties where the mortgage is recorded, destroy, conceal, or sell, or in any manner dispose of, the property mortgaged, or any part thereof, without the written consent of the owner of such mortgage, he shall be deemed guilty of larceny, and upon conviction shall be punished accordingly, and any such sale or transfer shall be void."

It is claimed by the appellants that under this enactment, under no circumstances, can oral evidence be admitted to justify a sale of mortgaged property, and that every such sale without the written consent of the mortgagee is void. A critical examination of the law will, we think, lead

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to a different conclusion. It is not every sale that becomes void. To thus avoid a sale it must be willfully done. In law "willfully" has a well-defined signification. Bouvier says it has been decided that "maliciously" is its equivalent. This term implies not merely voluntarily or intentionally, but "legal malice;" an evil intent without "justifiable excuse," with "a bad purpose," "corruptly."

The evident intent of the legislature in this enactment is to protect the mortgagee against the transfer of the mortgaged property with the corrupt purpose of destroying his security. When such a transfer is made he may disregard the transaction as void and take possession of the property. In the case at bar the validity of the sale is called in question by the vendee as against the vendor. The mortgagees are not objecting to it. The evidence objected to is as to the oral consent of the mortgagees to the transfer. In this instance there were two mortgagees. If the oral consent of one or both of these were given to the sale, it would be competent evidence to show the motive of the mortgagor in making the sale. It is claimed that the interests of the mortgagees were entirely distinct, and that one had no right to consent for the other. This might be true and yet the mortgagor might have supposed that one was authorized to speak for both; and under such supposition, honestly entertained, he could hardly be charged with a bad intent. We think this evidence was properly admitted. *Jones, Chat. Mortg.* §§ 455-465; *Stafford v. Whitcomb*, 8 Allen, 518; *Gage v. Whittier*, 17 N. H. 312.

The second objection to the evidence is to the ruling of the court admitting plaintiff's books of accounts. The plaintiff testified that his original books of account had been consumed in a fire that destroyed his house; that the book presented contained a copy of the original entries transferred by himself, sometimes once a week and sometimes once a month. No objection was urged upon the trial or in the argument as to the admission of the original books, had they been in existence. The only point raised and argued was as to the competency of this evidence; the original having been burned, and the book presented being a true copy thereof. No authorities were cited upon the briefs, nor in the oral argument of counsel. We find, however, in 4 Mass. 455, SEWALL, J., lays down the following proposition in the

case of *Prince v. Smith*, in which the original books had been burned: "If the proof in this case had extended to show that the items of this account had actually existed in the original books, and the transcript offered had been truly taken therefrom, I should have no doubt of the admissibility of a transcript, thus compared and proved, upon the ground of necessity, and that it was the best evidence which the case admitted, under all the circumstances." In the cases cited, these preliminary proofs were not given, and the ruling of the court in admitting the books was, for that reason, reversed. In the case at bar, these preliminary conditions being conceded, and the only point made being as to whether copies thereof could ever be admitted, we see no error in the court, under the authority cited, in admitting them.

A careful analysis of the evidence, however, shows that there were no items disputed in the account of plaintiff upon which evidence was not given, for and against, by living witnesses at the trial. Indeed, the record does not show that the account-book of plaintiff was in fact ever actually admitted. On the contrary, an inspection of the records indicates that it was used by the plaintiff as a memorandum from which to refresh his memory, and the disputed items seem to have been supported by evidence of witnesses at the trial. It is stated in *Baird v. Hooker*, 8 Ill. App. 306, "that where books of account are improperly admitted at a trial it is not such error as will reverse, if the facts have been proved by evidence *aliunde*."

We see no error in the admission of evidence which will justify a reversal of the judgment.

The appellants assign as error the amount of damages allowed, against the findings. An inspection of the evidence shows that 22,951 pounds of the grain in question were actually turned over by defendants to the mortgagors, Danski and Haug, and at the time of the trial was held by them under the mortgage. The contract price, therefore, was two and one-half cents per pound. The account of defendants for hauling said grain from Garden Valley to Idaho City was one cent per pound, as testified to by defendants, and undisputed by plaintiff. We think the judgment should be modified by deducting from the amount thereof the value of said grain and freight, amounting to \$802.88.

The cause is remanded, and the court directed to modify the judgment in accord-

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ance with this opinion; costs of appeal to be equally divided between parties.

MORGAN, C. J., and BRODERICK, J., concurring.

GUTHRIE *et al.* v. FISHER *et al.*

(February 25, 1885.)

ATTACHMENT BOND—ACTION AGAINST SURETIES—SUFFICIENCY OF ANSWER.

1. Where, in an action against the sureties on an undertaking in attachment, the answer alleges that the action in which the undertaking was given was prematurely brought, a motion to strike out such answer, as not constituting a defense, was properly granted.

PLEADING—DEMURRER—INTERPOSITION ON APPEAL.

2. Where defendants, in the trial court, question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and the ruling is not saved by bill of exception, another demurrer raising the same question cannot be interposed on appeal.

Appeal from district court, Oneida county.

Action by Guthrie, Dooly & Co. against William F. Fisher and another, as sureties on an undertaking in attachment. From a judgment for plaintiffs, defendants appeal. Affirmed.

Prickett & Lamb, for appellants.

A demand of the specific thing agreed to be performed by the covenant must be alleged and proved; otherwise, no cause of action is stated. *Nelson v. Bostwick*, 5 Hill, 37.

Sureties to an instrument cannot be charged or affected beyond the plain and necessary import of their undertaking; nor can a new term or condition be added to their stipulation. *Smith v. U. S.*, 2 Wall. 219; *McCluskey v. Cromwell*, 11 N. Y. 598; *Walsh v. Bailie*, 10 Johns. 181; *U. S. v. Jones*, 8 Pet. 399; *U. S. v. Boyd*, 15 Pet. 187; *Miller v. Stewart*, 9 Wheat. 702, 703.

If the allegation of the breach vary from the sense and substance of the contract, and be either more limited or larger than the covenant, it will be insufficient. *Batson v. Spearman*, 9 Adol. & E. 298; 1 Chit. Pl. 344.

Where a bond is conditioned for the performance of one thing or the other, so that the obligor may discharge the obligation by a compliance with one of the alternatives, a breach assigning a nonperformance of one of the alternatives only is bad. *People v. Tilton*, 13 Wend. 599.

Smith & McCollum, for respondents.

The judgment in the action in which the bond was given is conclusive on the sureties on the undertaking. *Riddle v. Baker*, 13 Cal. 295; *Chase v. Beraud*, 29 Cal. 138; *Ellis v. Hull*, 23 Cal. 160; *Pico v. Webster*, 14 Cal. 202.

PER CURIAM. This action is founded upon an undertaking given in an attachment suit brought by these plaintiffs against Phelan & Ferguson. The undertaking was given for the release from attachment of the property which had been seized by the attachment issued in the case, as the property of said Phelan & Ferguson, to secure the payment of any judgment which might be recovered in the action against them. By the undertaking the defendants promised that, in case the plaintiffs recovered judgment against Phelan & Ferguson in the action, they (Phelan & Ferguson) would, on demand, redeliver the property so released from the attachment to the proper officer, to be applied to the payment of the judgment, and that in default thereof these defendants would, on demand, pay to the plaintiffs the full value of the property released, not exceeding the sum of \$1,150. In the attachment suit judgment was recovered against Phelan & Ferguson on the twenty-fifth day of May, 1883, and remained unsatisfied. This action was commenced on the seventeenth day of April, 1884. A general demurrer to the complaint was interposed in the trial court and overruled.

On the seventh day of June, 1884, the defendants filed an answer which alleged that the action in which the undertaking was given was prematurely brought upon a promissory note not due, and that on the twentieth day of May, 1884, an appeal was duly taken to the supreme court from the judgment of May 25, 1883, and that an undertaking was given on said appeal. On motion of the plaintiffs, the answer was stricken from the files as irrelevant, and the defendants were given one day to answer. On the next day thereafter, defendants declining to answer, a judgment was rendered against them, as demanded by the complaint. To the ruling of the court striking the answer from the files, and also to the entry of the judgment, the defendants excepted, and present these questions by a bill of exceptions for the consideration of this court. We do not think the exceptions well taken.

The answer did not aver that an under-

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taking had been given to stay the execution of the judgment, nor did it allege any facts that constituted a defense to the action, and we think it was properly stricken from the files. The questions raised by the demurrer in the trial court have been argued here, but the ruling upon the demurrer and the exception thereto are not in form in the record to be reviewed, and by failing to preserve and present the questions in due form, the defendants are deemed to have waived the same, and cannot now by a new demurrer, interposed in this court, be heard to say that the complaint is insufficient. *Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, ante, 89, 6 Pac. Rep. 107; *Nash v. Harris*, 57 Cal. 242.

Order and judgment affirmed.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

PEOPLE v. BILES.

(February 25, 1885.)

CRIMINAL LAW—EMPLOYMENT OF COUNSEL TO ASSIST DISTRICT ATTORNEY.

1. Under the criminal practice act, (section 354, par. 2,) providing that the district attorney or "other counsel" for the people must open the cause, and offer the evidence in support of an indictment, by implication counsel may be employed to assist the district attorney in the trial of criminal causes.

SAME—REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW.

2. Where, on the trial of a criminal cause, no exceptions were taken to the instructions at the time they were made, an assignment of error that the trial court erred in giving certain of the instructions will not be considered.

SAME—RECEPTION OF VERDICT.

3. Where, on a trial for assault with intent to "murder," the jury render a verdict of guilty of assault with intent to "kill," error cannot be predicated on the action of the court in directing that the word "kill" in the verdict be changed to "murder," it appearing that the verdict, as amended, was read to the jury, and was assented to by them.

SAME—NEGLECT TO CHARGE.

4. Where, on a trial for assault with intent to murder, it does not appear that defendant requested the court to charge the jury that they might convict of the lesser offense, an assignment of error predicated on the court's neglect to so charge will not be considered on appeal.

SAME—NEW TRIAL—MISCONDUCT OF JUROR.

5. Where affidavits as to the alleged misconduct of a juror on a criminal prosecution are conflicting, the ruling of the court below denying a new trial will not be disturbed on appeal.

SAME—MISCONDUCT OF COUNSEL.

6. The action of a district attorney, in a criminal prosecution, in demanding the arrest, for perjury, of a witness for the defense as he came off the stand, though improper, is not sufficient ground for the granting of a new trial.

ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.

7. On a trial for assault with intent to murder, it appeared that defendant, meeting U., the assaulted party, in a saloon, provoked a quarrel by calling U. vulgar names; that the parties left the saloon quarreling; that defendant went into a shop, and procured a revolver; that they then went together to U.'s shop, where defendant again abused U.; and that U. tried to push defendant out of the shop, when defendant drew the revolver, and fired three shots. *Held* evidence sufficient to warrant the jury in finding premeditation and malice.

Appeal from district court, Alturas county.

George Biles was convicted of assault with intent to murder, and appeals. Affirmed.

James H. Hawley and *E. C. Brearly*, for appellant.

The verdict of a jury will always be set aside if the court should erroneously instruct the jury in a matter of law which might have influenced their verdict. *Balyies v. Davis*, 1 Pick. 206; *Lane v. Crombie*, 12 Pick. 177; *Boyden v. Moore*, 5 Mass. 365; *Dudley v. Summer*, Id. 438.

Drunkenness of a juror is sufficient to set aside a verdict. *People v. Gray*, 61 Cal. 164; *Perry v. Bailey*, 12 Kan. 539; *Kellogg v. Wilder*, 15 Johns. 455; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494; *Weis v. State*, 22 Ohio St. 486; *Madden v. State*, 1 Kan. 340; *Jones v. State*, 13 Tex. 168; *Davis v. State*, 35 Ind. 496; *State v. Bullard*, 16 N. H. 139; *Gregg v. McDaniel*, 4 Har. (Del.) 367; *Pelham v. Page*, 6 Ark. 535; *People v. Douglass*, 4 Cow. 26; *Brant v. Fowler*, 7 Cow. 562.

Lyttleton Price, for the People.

MORGAN, C. J. The defendant was indicted, tried, and convicted for the crime of assault with intent to murder. Defendant moved for a new trial, which motion was denied by the court, and the defendant appealed, both from the judgment and the order denying a new trial. The opinion states the errors assigned.

The first error assigned is that the court erred in allowing private counsel to assist in prosecuting the defendant. While the statute does not specifically authorize the employment of private counsel to assist in the prosecution of persons

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charged with crime, section 354 of the criminal practice act distinctly and in terms recognizes the right of private counsel to appear and assist the prosecution. The second clause of said section states: "The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the indictment." The words "or other counsel" evidently mean private counsel; as otherwise there could be no other counsel for the people. Section 356, as amended in 11th Sess. Laws, p. 227, still more clearly authorizes the appearance of counsel to assist the prosecution, and his right to assist in the prosecution, as follows: "If the indictment is for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it is for any other offense the court may, in its discretion, restrict the argument to one counsel on each side." This recognizes the right of more than one counsel to appear and assist in the prosecution of any criminal cause, but authorizes the court to restrict the argument, in his discretion, to one counsel on each side, in offenses less than capital, but not in capital cases. These sections are not repealed nor affected by section 6 of the act creating the office of district attorney. The latter section reads: "It shall be the duty of the district attorney to prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county, in which the people, or the territory or county, is interested as a party." It does not say that he shall do so unassisted or alone, but simply means the district attorney shall have the general management and control of all such cases. We see no reason why counsel may not be employed to assist the district attorney in the prosecution of criminal causes. See *People v. Turcott*, 65 Cal. 126, 3 Pac. Rep. 461.

The second error assigned is: "The court erred in giving the instructions 3, 4, 8, 9, 11, 12, 13, of instructions by the court." All these instructions were given by the court of its own motion. No exception was taken to any of these charges at the time they were given. This the defendant must do at the time the instructions are given, if he desires to have them reviewed in this court. Section 418, Rev. Laws, reads as follows: "On the trial of an indictment, exceptions may be taken by the defendant to a decision of the court 'in admitting or rejecting testimony, or in de-

ciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, or the trial of the issue.'" These exceptions must be taken at the trial. Section 419 reads: "A bill containing the exceptions must be settled and signed by the judge." Sections 420, 421, provide for settlement, signing, and filing the bill of exceptions. Section 422 does not save exceptions given by the court of its own motion, but refers only to instructions that have been presented to the court by either party and either given or refused. That section reads as follows: "When any written charge has been presented, and given or refused, the question or questions presented in such charge need not be excepted to nor embodied in a bill of exceptions; but the written charge itself, with the indorsement showing the action of the court, shall form part of the record, and any error in the decision of the court thereon may be taken advantage of, on appeal, in like manner as if presented in a bill of exceptions." In the case of *People v. Hart*, 44 Cal. 598, the court say, with reference to this section: "It is evident that these provisions refer to the written charges or instructions which either party may present and request to be given, and not to the charge which the court may give upon its own motion." These charges not having been excepted to on the trial, cannot be reviewed in this court. *Cook v. Territory*, 3 Wyo. 110, 4 Pac. Rep. 887.

The third assignment of error is: That the court erred in receiving the verdict of the jury and allowing said verdict to be amended. The verdict as returned was: "Hailey, Idaho, June 18, 1884. We, the jury in the case of *The People of the United States and the Territory of Idaho v. George Byles*, charged with an assault with intent to kill, find the defendant guilty as charged in the indictment." The word "kill" was changed to "murder" by direction of the court. This was a change in matter of form only, and was proper; the verdict being again read to the jury and assented to by them. *Bish. Crim. Proc.* 1013; *People v. Lee*, 17 Cal. 76.

The fourth error is that the court erred in neglecting to charge the jury that they might convict the defendant of a lesser offense than the one charged. If the defendant desires the court to give further or other instructions than those given, he must prepare the instruction, and present it to the court for approval or rejection.

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tion. If he do not do this, the omission to charge upon the particular point cannot be assigned for error. *Douglass v. Geiler*, 32 Kan. 499, 4 Pac. Rep. 1039. We find no evidence having a tendency to show that defendant was guilty of any lesser offense than the one charged. The court was not, therefore, required to charge the jury that they might find him guilty of a lesser offense.

In support of the motion for new trial, appellant alleges the drunkenness of the jurors. This allegation is supported by the affidavits of three persons. The fact of drunkenness is denied by the respondent, and this denial is supported by the positive affidavits of six members of the jury, each of whom state that the juror was not intoxicated; that he discussed the evidence and instructions intelligently; and one of the jurors testifies that the said juror was the last one to agree to the verdict. Where affidavits as to the misconduct of the juror are conflicting, the ruling of the court below will not be disturbed. *People v. Dye*, 62 Cal. 523. The newly-discovered evidence is merely cumulative, and not ground for new trial.

It is claimed by appellant that defendant should be allowed a new trial on the ground of misconduct of one of the counsel for the prosecution. The case shows that one McDermott testified as a witness for the defense; that upon his coming off the stand the assistant counsel for the prosecution demanded his arrest for corrupt perjury. The court remarked that "the grand jury was in session, and that the district attorney could present the matter to them if he thought proper." Counsel for the defense then objected to anything being said having a tendency to influence the minds of the jury. The assistant counsel continuing to make further remarks with reference to the witness, he was stopped by the court, who remarked: "There had better be nothing more said about this matter now." This occurred in open court, in the presence of the defendant and his counsel, before the argument of the cause to the jury. The remarks of the counsel were not approved by the court. No action was taken thereon, and the argument of the cause followed, when counsel could discuss the credibility of the witness. The charges of the court followed, with the usual charge that the jury were sole judges of the weight to be given to the testimony of any particular witness. The cases referred to in support of

the position taken by the appellant were cases in which the successful party had talked to jurors, or in their presence, during a recess of the court, when neither the opposite party nor his attorney were present, differing materially in this respect from the case at bar. While we think the conduct of the assistant counsel was improper and reprehensible, we do not think it sufficient ground for new trial.

The evidence sufficiently shows premeditation and deliberation. The quarrel commenced at a saloon 150 to 200 yards from Uhl's shop, by defendant calling Uhl vulgar names, and the parties left the saloon a few minutes thereafter, and proceeded towards Uhl's shop together, quarreling on the way, and while going towards the shop the defendant threw away a stone, saying "he would get something better," stepped into a saloon, procured a revolver, and put it into his pocket, defendant being angry at the time. They both proceeded to the shop, and Uhl handed the boots he had been repairing to defendant, when the latter abused him again and called him hard names. Uhl then pushed him out of the shop, and while he was thus pushing him backward defendant got hold of his revolver and fired at Uhl; pressing it into Uhl's face, fired two more shots, one of which struck his face, inflicting a flesh wound. They were then parted by persons who had reached them. There was evidence tending to show that Uhl had kicked the defendant either before pushing him backward or while doing so. Procuring the revolver while they were proceeding to the shop, and during the process of the wordy quarrel, indicated a deliberate intention to use it in the manner he did use it in attempting to shoot Uhl. We think the jury were fully warranted in finding premeditation and malice.

Judgment affirmed, with direction to the court below to make such further order as may be necessary to carry the judgment into effect.

BRODERICK and BUCK, J.J., concurred.

SHOUP v. WILLIS, Tax Collector.

(February 27, 1885.)

TAXATION—RECOVERY OF ERRONEOUS ASSESSMENT.

1. Where, in an action to recover a special assessment of taxes paid under protest, it appears that the tax was levied to pay the

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interest on certain county bonds, an answer admitting that the bonds had not been negotiated at the time of the action is demurrable.

SAME—PLEADING—SUFFICIENCY OF COMPLAINT.

2. In an action to recover a special assessment of taxes, the complaint alleged that the assessment was erroneous; that, before paying the same, defendant was notified in writing that it was illegal and void; and that suit would be commenced to recover it. *Held* facts sufficient to constitute a cause of action.

Appeal from district court, Custer county.

Actions by George L. Shoup against Frank B. Willis, tax collector, to recover an assessment of taxes paid under protest. From a judgment for plaintiff, entered upon an order sustaining a demurrer to the answer, defendant appeals. Affirmed.

Prickett & Lamb and *Johnson & Onderdonk*, for appellant.

It is not sufficient to state in a pleading that the taxpayer "first served upon defendant his protest in writing against paying the same, therein and thereby notifying him how and for what reasons the levy and assessment of special tax was claimed to be illegal and void." The contents, or at least the substance, of the notice, should be stated in order that the court may determine whether it was a protest. *Cooley, Tax'n*, pp. 567, 568; *Meek v. McClure*, 49 Cal. 628.

Charles A. Wood, for respondent.

Taxes illegally assessed may always be recovered back if the collector understands from the payer that the tax is regarded as illegal, and that suit will be instituted to compel the refunding. *Erskine v. Van Arsdale*, 15 Wall. 75; *Guy v. Washburn*, 23 Cal. 111; *Bank v. Chalfant*, 51 Cal. 369.

When a protest is relied upon, nothing very formal is requisite. *Cooley, Tax'n*, 568; *Meek v. McClure*, 49 Cal. 628; *Boston & S. Glass Co. v. City of Boston*, 4 Metc. (Mass.) 181; *Carleton v. Ashburnham*, 102 Mass. 348.

PER CURIAM. This action was commenced in December, 1883, to recover certain special taxes, which were alleged to have been levied without authority of law, and to have been paid under protest to the defendant, as tax collector of Custer county. The defendant answered, alleging that the tax was levied by the board of county commissioners of the county of Custer, under the provisions of an act of the legislative assembly of the

territory entitled "An act to authorize the county commissioners of Lemhi and Custer counties to issue and negotiate bonds, and for other purposes." The answer further averred that prior to the levy of the tax in question steps had been taken by the commissioners of Custer county to have said bonds engraved and printed in accordance with the provisions of the act, and that certain members of the board had endeavored in good faith to negotiate and sell the same. The answer admitted that the bonds were not negotiated, and hence it follows that at the time of the levy, and up to the time of answering, no portion of the bonds or interest thereon was necessarily to be provided for by taxation. Judgment for plaintiff in trial court, and defendant appealed.

Counsel for appellant contend that the levy was authorized by section 3 of the act mentioned, which is as follows: "For the payment of the interest and principal of said bonds, the boards of county commissioners of the respective counties shall, at the time of the levy of other county taxes, include therein a levy of sufficient tax upon all the taxable property in the county to pay the interest, and such part of the principal, if any, as will, according to the terms thereof, become due during the ensuing year." This section authorized the commissioners to levy sufficient tax to pay the interest accruing on the bonds, and such part of the principal, if any, as would, according to the terms thereof, become due during the then ensuing year. It is a well-settled principle of law that taxes cannot be levied or collected at any other time, or in any manner, nor for any other purpose, than that designated by law. *Desty, Tax'n*, 464. Applying this rule, we think the levy to provide for the payment of interest or principal of any such bonds before they were issued or negotiated was premature, and cannot be upheld. The act provided that the bonds, when issued, should bear 6 per cent. interest, and should not be negotiated or sold at less than their par or face value. With this limitation on the authority of the commissioners, it was impossible to know that the bonds could be negotiated until the sale was accomplished, and it therefore follows that the levy of the special tax was unauthorized and void. *Desty, Tax'n*, 102. Statutes authorizing the levy of special taxes should not be so construed as to extend

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their meaning beyond the clear import of the language employed.

The second question is whether the plaintiff is in a position to recover the tax so levied and paid by him. In *Ers-kine v. Van Arsdale*, 15 Wall. 77, the court say: "Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." We think the allegation in the complaint that before paying said taxes the defendant was notified in writing that the taxes were claimed to be illegal and void, and that suit would be commenced against him to recover the same, is sufficient, and that the complaint, as a whole, supports the judgment. *Cooley, Tax'n*, 568.

Judgment affirmed.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

SYNNOTT *et al.* v. SHAUGHNESSY.

(March 2, 1885.)

SALE BY AGENT—VALIDITY—COMMISSIONS FROM BOTH PARTIES.

1. Where a person employs another to sell a mine, agreeing to pay such agent as commission any amount received over a certain price, and the agent negotiates a sale in accordance with the agreement, the fact that the agent received a commission from the purchaser at such sale will not affect its validity. BUCK, J., dissenting.

TRIAL—FINDINGS OF FACT—WHEN RESPONSIVE TO ISSUES.

2. Where, in an action to set aside the sale of a mine for alleged fraud of defendant purchasers in concealing the value of the mine, an issue was whether or not defendant before the sale had discovered a large and valuable vein or body of ore in the claim, a finding that the evidence did not show or tend to show that defendant had discovered, or knew of the existence of, any vein or body of ore, is sufficiently responsive.

Appeal from district court, Alturas county.

Action by John Synnott and another against Michael Shaughnessy to set aside a deed. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Angel & Sullivan and John R. McBride, for appellants.

Wherever the interposition of a middle-

man or go-between is used to effect a contract, then brokerage exists. Whart. Ag. § 697; Story, Ag. §§ 28, 31, 109.

While a purchaser of property, in the absence of any relation between the parties thereto other than that of vendor and vendee, may not be compelled to disclose any fact affecting the value of the property, known exclusively by him, he is in such case only permitted to be silent. If he speak either as to a matter of fact or opinion, he must speak the truth. 2 Pom. Eq. Jur. §§ 901-903, and notes; Kerr, Fraud & M. pp. 42, 45, 98; Bigelow, Frauds, pp. 5, 33, 27; 1 Story, Eq. Jur. §§ 192, 212, 214; *Roseman v. Canovan*, 43 Cal. 110; *Smith v. Countryman*, 30 N. Y. 669; *Torrey v. Buck*, 2 N. J. Eq. 366.

An appropriation of the fruits after wrongful act of an agent is a ratification of such act, and makes the party liable to the same extent as if his acts had been expressly authorized. *Murray v. Bininger*, *42 N. Y. 107; *Bishop v. Montague*, Cro. Eliz. 824; *Craig v. Ward*, *42 N. Y. 387; *Wakeman v. Dalley*, 51 N. Y. 34; *Garner v. Mangame*, 93 N. Y. 6431; *Lee v. Village of Sandy Hill*, 40 N. Y. 443; Kerr, Fraud & M. pp. 111, 112, 137; 1 Pars. Cont. 73; Story, Ag. §§ 308, 452, 456; *Krumm v. Beach*, 96 N. Y. 404, 405.

When a purchaser enters into any side contract or arrangement with the agent or broker of the seller, unknown to the latter, by which they mutually or either of them procure a benefit to themselves, such an arrangement *per se* renders the sale fraudulent, and avoids it at the option of the seller. Whart. Ag. §§ 244, 245; Story, Ag. (5th Ed.) § 211, and note 2; *Ballman v. Loomis*, 3 Cent. Law J. 263; Bigelow, Frauds, pp. 227-229; *Moore v. Mandlebaum*, 8 Mich. 433.

When, in the contract of sale, there is a concealment of any material fact by any collusion between the agent or broker of the seller and the purchaser which affects the vendor of the property, whether the agent be a gratuitous one, or has compensation or any understanding, express or implied, by which the agent or broker is to profit by the sale, without the knowledge and consent of the seller, the contract and sale are void *per se*, and will be set aside on the petition of the vendor. Bigelow, Frauds, p. 403; *Panama & S. P. Tel. Co. v. India Rubber G. P. & Tel. Works Co.*, 14 Moak, Eng. R. 759; *Rankin v. Porter*, 7 Watts. 389, 390; *Torrey v. Buck*, 2 N. J. Eq. 366; *Petroleum Co. v.*

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Hur, L. R. 5 P. C. 221; Moore v. Mandlebaum, 8 Mich. 433.

Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal by an agent, any lack of perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. Bigelow, Frauds, *supra*; Pom. Eq. Jur. p. 486, § 954; Michoud v. Girod, 4 How. 503; Norris v. Tayloe, 49 Ill. 17; Marye v. Strouse, 5 Fed. Rep. 483; Kerr, Fraud & M. pp. 175, 176, 195.

Rosborough & Merritt and Prickett & Lamb, for respondent.

To set aside a contract on the ground of misrepresentation, it must be of something material, constituting some motive to the contract, something in regard to which reliance is placed by one party in the other, and by which he is actually misled; not a matter of opinion merely, equally open to the examination of both parties. Smith v. Richards, 13 Pet. 29; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Brown v. Bledsoe, 1 Idaho, 746.

MORGAN, C. J. The cause was tried before the court at the June term, 1883, of the district court for Alturas county. Judgment was for the defendant and the complaint dismissed. Plaintiffs moved for a new trial, and the motion was denied. Plaintiffs appeal both from the judgment and from the order denying a new trial.

The case shows that on the fifth day of July, 1881, the plaintiffs were the owners and in the possession of the Eureka mine, situated in Mineral Hill mining district, in Alturas county, in the territory of Idaho. On the said fifth day of July, 1881, the said defendant, by his agent, E. A. Wall, purchased the said mine from the plaintiffs John Synnott and Peter Welch for the sum of \$2,200; that on the same day plaintiffs executed and delivered to the defendant a good and sufficient deed of conveyance. On the twenty-fourth day of May, 1882, the plaintiffs bring this action and ask the court to declare this deed fraudulent, null, and void, and set it aside and put the plaintiffs again in possession of said property. Plaintiffs aver—*First*. That on the third day of July, defendant, by his agents and employes, discovered on said Eureka claim a large and valuable vein or body of ore, from 18 inches to four feet in thickness, extending about seventy feet continuously along said vein, which rendered said claim of great value, to-wit, of the value of one

hundred thousand dollars. Defendant denies. *Second*. Plaintiffs aver that defendant, by his agents, fraudulently and falsely concealed the said vein or ore body from the plaintiffs. Defendant denies. *Third*. Plaintiffs aver that defendant, by his agents and servants, falsely and fraudulently represented and stated to these plaintiffs that no other ore body, or vein of ore, existed in said mining claim, except such as were found by and known to these plaintiffs, as shown in their own tunnels as aforesaid, when defendant well knew, etc., that said vein did exist. Defendant denies. *Fourth*. Plaintiffs aver that said false and fraudulent representations were made by defendant's agents and servants to plaintiffs, to induce them to sell said mining claim at far below its real value, to-wit, for the sum of two thousand two hundred dollars; and that said false and fraudulent representations, so made by the agents and servants of defendant, did induce plaintiffs to believe that no such ore body existed, and that said mining claim was not worth more than \$2,200, and that said plaintiffs were thus induced to sell and convey said claim for said last-mentioned sum, when, in fact, said claim was then worth one hundred thousand dollars. Defendant denies. *Fifth*. That immediately prior to the discovery of said ore vein or ore body the said plaintiffs had employed one Harry Porter as agent to find them a purchaser for said mining claim, at the price of two thousand five hundred dollars, and that, relying upon the honesty of said agent, they agreed to give said Porter ten per cent. of said purchase price as a compensation. Defendant denies. *Sixth*. That while so employed the said Porter first made the discovery of said vein and ore body aforesaid, which was unknown to plaintiffs. Defendant denies. *Seventh*. That said Porter concealed the same from plaintiffs, and surreptitiously, fraudulently, and collusively, and for the consideration of one thousand dollars, informed the said defendant of the existence of said large vein or ore body, and undertook and agreed to conceal the same from plaintiffs, and to assist said defendant in the purchase of said Eureka claim at two thousand dollars, or a price greatly below its real value; that by such fraudulent acts of said Porter, as well as the misrepresentations and concealments, they were induced, etc. Defendant denies. These are all the material issues raised by the pleadings. Upon substantial affirmative

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proof of all the material averments of fraud on the part of either Wall, the agent of defendant, or on the part of Porter, alleged to be their own agent, plaintiffs claim the right to recover. If they have failed in both, the case fails. The principal errors assigned are (1) that the court has failed to find on all the material issues; (2) that the findings are not supported by the evidence; (3) that the findings do not support the judgment.

The first two propositions are so interwoven and intimately connected that they will be discussed together. The first material issue is, did the defendant, by his agents and servants, on or about the third day of July, 1881, or before the sale, find a large and valuable vein or body of ore, from 18 inches to 4 feet in thickness, extending about 70 feet continuously along said vein, which rendered the mine of great value? In reply to this, the court, in its finding of fact No. 12, say: "The evidence does not show or tend to show that Wall or Porter, or any other person, had discovered or knew of the existence of any vein or lode of ore in place on the Eureka mining claim, other than such as had been found by and was known to Synnott and Welch (the vendors) in their excavations at any time prior to the sale and execution of the deed." Objection is made to the use of the words, "the evidence does not show or tend to show." The fact that they had discovered the vein or lode of ore in question before the sale must be proven by the evidence. If the evidence does not show it, nor tend to show it, then, so far as the purposes of the trial go, they had not discovered it, nor did they know of its existence. No one would fail to understand fully the meaning of the court, which was that neither Wall nor Porter, nor any other person, knew of the existence of the vein or body of ore described. We think the finding substantially met the issue presented. The statement of a fact in language such that men of ordinary knowledge, as well as those learned in law, would understand from it that the fact did or did not exist, would seem to be sufficient. The statement is such that it leads us to the inevitable conclusion that the fact alleged did not exist. See *People v. Hagar*, 52 Cal. 189; *Coveny v. Hale*, 49 Cal. 552; *Emmal v. Webb*, 36 Cal. 204. The fact itself, however, is positively stated in the last half of the fifteenth finding, which is as follows: "Neither the defendant nor any agent of his had ever discov-

ered or knew of the existence of any vein or lode in said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale." This is a statement of fact, pure and simple, and completely meets the issue tendered. Objection is made to the use of the terms "vein or lode of ore in place" and "vein or lode." The words "vein," "lode," and "ledge" are used as synonymous terms, in the common parlance of miners, in the laws of congress, and in the decisions of courts in mining states and territories. Section 2320, Rev. Laws U. S., uses the terms as follows: "Veins or lodes of quartz, or other rock, in place, bearing gold, silver," etc. Section 2322: "Locations made on any vein, lode, or ledge situated on the public domain," etc. Section 2323: "Where a tunnel is run for the development of a vein or lode."

Mr. Justice MILLER, of the United States circuit court for the district of Colorado, and Justice HALLETT, sitting with him, in the case of *Stevens v. Williams*, 1 Morr. Min. R. 566, 573, clearly define what a vein, lode, or ledge is, as follows: "In general, it may be said a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries in the general mass of the mountains; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth, or higher up, affect its character as a vein, lode, or ledge." This is a perfect definition of the terms "vein," "lode," and "ledge," as understood in mining countries, and also demonstrates the fact that the terms are synonymous. That the terms "vein" or "ore body," as used in the complaint, mean, and were intended by the pleader to mean, the same as if the words "vein or lode of ore," in place of the words "vein or lode," had been used, is abundantly indicated by the words which follow in the complaint, namely, that the defendant, etc., by his agents and employes, had, on third day of July, 1881, discovered on said Eureka mining claim, remote from where these plaintiffs had been at work, a large and valuable vein or body of ore, from 18 inches to 4 feet in thickness, extending for about 70 feet continuously along said vein.

The context clearly indicates that the pleader intended to allege that defendant had so discovered a vein or lode of ore in place, and did not mean by that pieces of float ore, however large or small they may

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have been, which had broken loose and become detached from the mother lode, and floated down the hill, which is commonly, indeed, universally, called "float" in the mining regions.

The meaning of the terms as used is further indicated by the allegation which follows, to-wit, the existence of which rendered said mine of great value, to-wit, of the sum of \$100,000 and upwards, of the existence of which said vein or body of ore these plaintiffs were wholly ignorant. The pleader well knew that the discovery of float ore did not render the mine of such great value. The experience of men in mining regions teaches them that the discovery of "float" may lead to the ultimate discovery of a vein or lode of ore in place, which would render the mine valuable. They have also learned by sore experience, and after the expenditure of large sums of money, that it frequently leads to the discovery of nothing of any value.

Further evidence that the pleader considered the words "vein or body of ore" synonymous, and, as used, were intended to mean the same thing, is found in the second clause of the complaint, where the terms are used interchangeably, as they allege that defendant represented that no other ore body or vein of ore existed, and further on in same clause that no such body or vein of ore existed. Further on the pleader again returns to "vein or body of ore," clearly showing that the pleader himself considered the terms synonymous. These findings of fact are, we think, entirely responsive to the issue, and completely negative the allegation. Are these findings supported by the evidence?

Porter testifies that on Sunday before the fourth day of July, 1881, he was on the Eureka claim, and was going up the hill on the trail, and picked up a small piece of float, about half as big as a hen's egg, and found three or four more very small pieces. "I made no further search until the fifth of July, (which was the day of the sale to Wall.) I went up with John Gilman. Did not then find any solid vein where it came from. I followed it up, (that is, the float,) and found one piece for Col. Wall about six inches through and eight inches long, about fifty feet from the trail. I did not think it made the claim more valuable to any large extent. If I had, I should have bought it myself, as I was in condition so I could have bought it. That was all the workings, and what was found outside, altogether. There was no concealment of

this float at all; it laid right there. I showed that float to John Gilman the same afternoon. I was trying to get him to buy it." This was all the ore found by Wall or Porter, outside the tunnels of the owners, prior to the sale. He says that piece, 6x8, was the largest piece that was found. "It was in open ground, nearly bare, and was in plain sight. These two places where I found this float were about 175 feet from the cabin of Synnott and Welch. I think I saw Mr. Welch walking over the same ground where the ore was before the sale."

Col. Wall testifies: "The only evidence of a vein that I saw at any time previous to the purchase was small fragments of broken ore which may have come from that vein or from any source, nor was there any ore that I saw at any point on the claim that was visible to any person, in place, in the vein or near the vein. In fact, there was no ore discovered in place in the vein at all until after several days' work had been done with a number of men; merely fragments of ore that had been detached from the lode and drifted down the hill. This work was all done after the purchase."

John Gilman swears he saw a few pieces of weather-beaten float; that Porter was with him; picked up a piece and showed him. "There had been no work done there; saw no excavation whatever; saw no vein at all."

This is substantially all the testimony there is as to defendant, his agent, Wall, or Porter, knowing anything about ore being found before the sale. It is evident it falls far short of sustaining the allegations as to discovering a vein or body of ore, and abundantly supports the findings 12 and 15 above quoted.

The second material averment is that defendant, by his agents and servants, fraudulently and falsely concealed the said vein or ore body from the plaintiffs. In response to this issue the court finds: "No. 15. No concealment of any material fact concerning said mining claim was ever made by the defendant or by any agent or employe of his. Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode in said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale." This finding is completely responsive to the issue made by the allegation, and is sup-

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ported by the evidence as already demonstrated, as it needs no argument to show that the defendant or his agents could not conceal a vein or ore body which they had not discovered, and of the existence of which they had no knowledge.

The third averment is that defendant, by his agents and servants, falsely and fraudulently represented to plaintiffs that no other ore body or vein of ore existed in said mining claim, except, etc., when defendant well knew it did so exist. In response the court say: "Finding 14. No false or fraudulent representation concerning the Eureka mining claim was ever made to said vendors, or to any one else, by the defendant, or by any agent or employe of his." This finding being in response to the averment which assumed that defendant had discovered and knew of the existence of the said vein, which assumption not being supported by the evidence, it follows that this finding is so supported.

The first, second, and third averments having been found against the plaintiffs, the fourth averment is no longer an issue; but it is responded to in the seventeenth finding, which states that Synnott and Welch were not induced to rely upon, and did not rely upon, any representation, opinion, or act of the defendant, or of any agent of defendant, concerning said mining claim, in selling or disposing of the same, or estimating its value or price.

The fifth averment is that, immediately prior to the discovery of said vein or ore body, plaintiffs had employed one Harry Porter as agent to find them a purchaser for \$2,500; that they would give him 10 per cent. of that sum as compensation; that he then discovered the ore body; that he agreed to conceal it for \$1,000 from plaintiffs, and did conceal it from them, but showed it to defendant's agent, Wall, and agreed to assist Wall in purchasing the mine for a price greatly below its real value. The court below having found that no such ore body was ever discovered by Porter, Wall, or any one else, before the sale, and the evidence conclusively showing that such finding was correct, the whole question of discovery, fraudulent concealment, fraudulent representations concerning it, is finally disposed of. It remains to inquire whether Porter's receiving the \$1,000 from Wall, the agent of defendant, in any way affected the validity of the sale.

The character of the arrangement between Porter and the plaintiffs is thus stated by Synnott and Porter in their testimony. Synnott states that he first told Porter that if he would find a purchaser at \$2,500, they would give him 10 per cent. of the sum. Porter said he was trying to sell the Homestake. When he got through with that he would try to find a purchaser for the Eureka. This was about the twenty-fifth of June, 1881. He then comes down to the fifth day of July, 1881, the day on which the sale was made, and narrates the sale and conveyance, as follows: "Wall (agent of defendant) came to us on the fifth day of July and offered us \$2,000 for the mine. After some consideration we agreed to take it, and it was arranged we should go to Bullion after supper and make the deed. Then Gilman came to us and offered us \$1,800 and one-tenth of the mine, or \$2,200 cash. Gilman then told us Porter had made a big find on the Eureka. I said, 'Where?' Gilman said, 'You walk over it;' pointing up the trail. I said I knew better; I did not believe it. In the evening, after supper, we went down to Wall's office. Porter told Wall that Gilman had again been to see them, and offered them \$200 more, and they said they could not afford to lose it. Wall then agreed to give us \$2,200. We took it and made the deed."

Synnott then returns to the arrangement with Porter, and says: "It may have been in June we had tried to sell it. The least we ever offered to sell the mine for was \$2,000. Whether that was in May or June I don't know." "Question. When and how long was Porter in your employ? Answer. As I have stated, it was about the twenty-fifth of June; it may have been a few days after that that we spoke to Porter; that would be perhaps ten or twelve days until the sale was consummated. Q. Was he in your employ until the sale was made? A. We considered so. The sale was made on the fifth of July. Q. Do you say that he continued in your employment that long? A. I have stated how we employed Porter, and you will have to infer from that. We promised to give Porter ten per cent. on \$2,500, and Mr. Porter told us he could not get but \$1,800. We told him the least we could take was \$2,000, and we could not afford to pay him anything out of that. That was the understanding between us until the time of the

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sale. He was to get nothing out of two thousand dollars. We could not afford to pay him anything. There was no other arrangement. The next thing we knew was, Porter brought Col. Wall on the ground on the 5th. We did not consider we owed Porter anything out of the \$2,200. Never offered him anything, as we got the extra \$200 through Gilman. Q. How do you make that out? Who caused you to make the sale? A. I suppose Porter; he made the sale, and we supposed he got the money from Col. Wall. Q. All that Porter did you considered a gratuity, for which he was entitled to no pay? A. He was entitled to no pay from us."

Porter, in his testimony, states: "Synnott and Welch gave me a sort of verbal bond if I should sell the property at such a figure they would give me a certain amount. The arrangement was that they should give me all over two thousand dollars that I could get for the ground. That was in June, 1881; I think about the middle of June. I was to have whatever I could get over two thousand dollars. I was acquainted with the mine and its workings, and the showing as to ore. I made efforts to sell the mine under this arrangement. Made a sale to Col. Wall, the agent for Shaughnessy. The deed was made to Shaughnessy, I believe. Col. Wall went to them about it; and bought it from them; made the trade with them. I went and got Col. Wall to look at the property. I brought the parties together. I had stated the terms upon which the mine could be bought, to Col. Wall. I took Wall to see the property, and told him if he bought the property from them I wanted him to respect my option. He agreed to do it, and agreed to give me \$1,000 for my option, or one-fourth of the mine. Question. State, now, particularly, what was the agreement upon your part and upon the others in regard to that option or verbal bond? Answer. I was to have all I could get over two thousand dollars. They wanted to get two thousand dollars for the ground. They did not want me to sell the mine at two thousand dollars and then give me any ten per cent. They wanted two thousand dollars, and if they could get that, they were satisfied, and I could have all over. There was no agreement between us that I should have a fixed per cent. on a fixed price."

This was all the testimony on the matter of the arrangement between Porter

and the plaintiffs. This testimony indicates that there may have been, at one time, an arrangement that Porter was to find a purchaser at \$2,500, and Porter to have 10 per cent. thereof, although Porter swears positively that there was not. The evidence was conflicting, and the court below finds that there was such an arrangement, and that afterwards said arrangement was changed to what was termed a verbal option that Porter was to get the plaintiffs \$2,000, and he to have all he could get over that sum. The precise time at which the first and last of these two arrangements were made is not stated by either Porter or Synnott. Porter testifies that the latter arrangement was made about the twenty-fifth of June, and was not changed afterwards. Synnott testifies that it might have been May or June. All the talk about this matter occurred before Wall went to look at the mine, and before he had any conference with Porter, as appeared by the evidence. Porter brought the parties, Wall and plaintiffs, together, and they made their own contract; Porter simply having before stated to Wall that their price was \$2,000, and the parties made their own trade. The fact that Wall finally paid them \$200 more than they had agreed to take, does not change the relation between Porter and plaintiffs.

It is laid down as the law that if an agent act openly, and with the consent of both owner and purchaser, he may contract for and receive a commission from both. *Finerty v. Fritz*, 1 Morr. Min. R. 439, and cases cited. And again, if the extent of the agency be merely to bring the parties together, and does not involve the duty of negotiating for either, the agent is termed a "middle-man," and may contract for and receive commissions from both. *Finerty v. Fritz*, Id. 440; *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Herman v. Martineau*, 1 Wis. 151. This is true also if each have agreed to pay the agent a commission, with or without the other's consent, if his duty is simply to bring the parties together. *Whart. Com. Law Ag.* § 327; *Rupp v. Sampson*, 16 Gray, 398; *In re Owens*, 7 Ir. R. Eq. 235; affirmed, Id. 424.

It is evident from the testimony of Wall, Porter, and Synnott, all the parties who had anything to do with the sale and conveyance of the mine on the fifth of July, that the trade was made under the last arrangement, as Synnott states that he

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"did not consider that Porter was to have anything from us; we expected he would get his pay from Wall. We never paid him anything; never offered him anything. Porter never demanded anything from plaintiffs. Wall promised to respect Porter's option. He did so, and paid him the \$1,000 agreed upon." If this arrangement had been reduced to writing, no one would question for a moment the perfect propriety of the arrangement. It would then have been a bond to sell and convey at a fixed price on the part of plaintiffs, and on the part of Porter it would have been an option to purchase at a fixed price. It was precisely what Porter termed it,—a verbal option or verbal bond,—and, when in writing, a very common method of undertaking to find a purchaser for a mine, or to buy one. Would this option be less proper or less binding upon the parties if verbal instead of in writing? Clearly not. The only danger in such case would be the liability of the vendor to demand more, and the liability of the purchaser to refuse to respect the option, the former of which occurred in this case. What was the obligation of Porter? It was evidently understood by plaintiffs that Porter would get his pay from Wall. He was at perfect liberty to get all he could above \$2,000. He could, with perfect propriety, become the purchaser himself.

This whole subject is discussed clearly and at length in case above cited, *Finerty v. Fritz*. In that case the bond was in writing. The court say: "The bond in question was one of those ordinary title-bonds so extensively employed in the mining regions of this state, [Colorado,] by means of which those desiring to speculate in mines before purchasing the same outright, procure from the owners an option to buy, on payment of a stipulated price within a fixed period of time; the obligor binds himself to execute a deed to the obligee on performance of the condition. No obligation is executed by the obligee. If the contract proves advantageous to the obligee, he pays the purchase money and receives a deed, otherwise he suffers the time for performance to lapse. * * * The obligee may contract a sale of the property on his own account, and at any price he can obtain." In this case Porter might have purchased the mine openly from Synnott and Welch for himself. The evidence clearly shows that Synnott and Welch

fixed the price upon their own knowledge of the mine. They had worked upon it over a year; had run four tunnels in different places where they thought the showing good. They had opportunity to know, and believed they did know, more about the mine than any other person. They had been trying to sell it to different persons for some months, and had failed. The highest offer ever made them was that of Gilman, which was \$2,200, and that was the day of the sale. The same amount was given them by Wall. It is just as apparent that Wall bought on his own judgment. He might have failed to find a vein, as plaintiffs had done. It is reasonable to suppose that Synnott and Welch had seen the same float themselves, (except the larger piece,) and did not regard it as indicating that the mine was of any more value on account of it. They manifested no interest in it when informed by Gilman. Synnott said he knew better. When Porter accepted the proposition of plaintiffs to sell for \$2,000, with the expressed understanding that he was to have all he could get over that sum, he was then under no obligations to reveal anything he discovered to the plaintiffs. The equities in the case do not seem to be clearly with the plaintiffs, as the learned counsel contend. The plaintiffs sold the mine for \$2,200, on the fifth of July. On the seventh, two days after, they knew, as Synnott testifies, that Porter was to get the \$1,000 from Wall. A few days after that the vein was discovered. The plaintiffs were there and knew all these facts. The defendant proceeded with labor and skill for 10 months, employing a number of hands, until he has spent \$25,000, including the purchase money. He has sold all the ore taken out by plaintiffs, and all he took out himself in his workings, and realized \$2,700. Plaintiffs then bring suit and ask that defendant be required to account to them for this \$2,700; that they be allowed to return to defendants the \$2,200 and receive a deed for the mine. The cause of justice and good conscience is not apparent.

Judgment affirmed.

BRODERICK, J., concurred.

BUCK, J., (*dissenting*.) In the discussion of this question I shall not consider that branch of the case which is founded upon the law which requires the vendee not to mislead the vendor. While I have been

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unable to find any authorities that hold that the words "ore body" are synonymous with or the equivalent of the words "lode," "vein," or "ledge," and therefore have some doubt as to whether the finding that no lode or vein of ore was known, or had been discovered, is responsive to the allegation that the defendant had discovered a lode or body of ore; yet I desire to pass by that matter, which may, perhaps, be more technical than practical, and consider that portion of the action which has its foundation in the law of agency.

The complaint alleges, among other things, that said Porter (after entering the employment of plaintiffs) surreptitiously, fraudulently, and collusively, for a consideration, to-wit, \$1,000, paid to him by the defendant, in violation of his said employment of these plaintiffs, and in fraud of their rights, entered into the employment of the defendant, and undertook and agreed to assist him (the defendant) in obtaining the Eureka mining claims from these plaintiffs, by purchase at a price of \$2,200, or a price greatly below its real value, and that by reason of said false, fraudulent, and collusive acts of Porter, and the misrepresentations and concealments of defendant, the plaintiffs were induced to part with the property in question.

I presume it will be admitted that if this allegation is true the plaintiffs are entitled to the relief demanded in the complaint. This seems to me to be the more comprehensive and the most important branch of the case. The large ore body has, in the progress of the trial of the case, as is usual, attracted the most attention; but the gravamen of the action, it seems to me, lies in this charge of betrayed confidence, which may be true, even if, as a matter of fact, no ore vein had ever existed within the mine. This branch of the case makes the relation of Mr. Porter to the plaintiffs and defendant a vital issue. That issue is, was he an agent of plaintiffs? If not an agent, was he a principal contracting with the plaintiffs for the purchasing the mine? If not an agent of plaintiffs, was he an agent of defendant? If not an agent of defendant, was he a party in interest with the defendant? If not, was he then the agent of both plaintiffs and defendant? And, if so, was he a factor, broker, or middle-man? The law of the case is different in the several relations, and cannot

be determined until this relation is adjudicated. The plaintiffs have a right to demand a finding of fact determining this matter. I am unable to find such a one in the decision of the case by the court below.

The second alleged finding of facts details a conversation between plaintiffs and Porter, whereby a proposition of employment is tendered by plaintiffs and responded to by Porter, and closes with the finding as a fact "that Porter was not invested with any authority to effectuate a sale or bind the plaintiffs or the title to the mine." The vital question, however, —did he have any authority, and if so, what was it?—is not determined.

The fifth alleged finding of facts states that plaintiffs informed Porter that they would sell the mine at \$2,000, but that out of said sum they could pay no commission; but there is no finding, there or elsewhere, as to whether Porter agreed to act as their agent in selling it at that price, or whether he agreed to buy it.

The findings are so indefinite that different minds arrive at different conclusions as to what was the relation of the parties.

Again, looking into the evidence for the purpose of ascertaining whether the finding that Porter was not invested with authority to sell or to bind the mine, it seems that all the evidence on that point is directly at variance with the finding. In determining the authority of Porter, on the theory that he was employed by plaintiffs, we must look at what he was employed to do, and not what he did under the employment. Synnott, one of the plaintiffs, testified, "I told Porter if he would sell the Eureka for \$2,500 we would give him ten per cent. Porter replied, if he got through trying to sell the Homestake he would try and sell ours." Again, Synnott says, "I told him I would give ten per cent. if he sold the mine," etc. Again, Porter himself says, "Synnott and Welch gave me a sort of verbal bond if I would sell the property," etc. He adds, "I made a sale to Wall." On page 64 of Transcript Porter says, "They told me if I could sell for them and bring them \$2,000, that was all they asked." On page 63 he says: "I had authority to sell the mine from about the middle of June. I made sale of it on the fifth of July." It is claimed that it appears from what he did that he had no authority to sell. But the charge is that he did not do as he had agreed to do, and it would be a dangerous practice, if, on such

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a charge, we should determine what he was authorized to do by what he actually did. I am unable to see that this finding of fact is supported by the evidence; it seems rather to be directly contrary to the evidence of the contracting parties.

If I understand the opinion of the majority of the court, just read, it is based upon the theory that the findings are sufficient to show that Mr. Porter had a contract or verbal agreement with plaintiffs whereby he had what is sometimes called an option to sell, and that, under said authority, he had a right to sell and to appropriate to himself all that he might get over \$2,000. The words of the parties are that he is to sell. Nothing is said of an option. Porter says that he called it a verbal bond. I am unable so to construe their contract. The stipulation that he was to have all over \$2,000 if he should sell, (if such there was,) was simply the measure of his compensation. It could not alter his relations to the plaintiffs, or his obligations to them. Assuming the findings to show such a contract, I am unable to see that Porter stood in any other relation than agent of plaintiffs. If I understand the nature of the contract, often made by miners, which is referred to as bonding a mine, it is an agreement between two principals, to the effect that one will sell to the other at a stipulated price within a given time. In *Fiberty v. Fritz*, 1 Morr. Min. R. 439, cited in the opinion of the court, such a contract is held to be a sale. The agreement between plaintiffs was not such a bonding, for Porter himself testifies that, "I never made a bargain to buy the property, or an arrangement to buy it." On page 78 of Transcript he says, "They or I could have made a sale at any time." If words are to be interpreted according to their ordinary import, Porter was employed to assist plaintiffs to sell the mine, first, at a compensation of 10 per cent. on the purchase price, if sold; afterwards, desiring to increase his compensation, he told the plaintiffs he could only sell the mine for \$1,800. This was not true. He, in fact, did sell it for \$3,200. He, however, as Synnott testifies, left them with the impression that he could not do better up to the time of the sale. The plaintiffs did, indeed, get \$2,200 in consequence of a third party, Gilman, offering them that amount. By chance, they protected themselves to that amount against the duplicity of their own employe. Through the representation of Porter that he could not sell for

more than \$1,800, and being greatly in need of money, the plaintiffs were induced to agree to take \$2,000. This agreement, however, did not relieve Porter of his obligation as an agent to deal honestly with his principals, and give them all the knowledge that he possessed concerning the value of the mine. He testifies that he concealed the find for the reason that had they known of it they would not have sold for that price.

Again, it is claimed that if the findings show employment of Porter by plaintiffs, he was simply a middle-man to bring the parties together, and that he could lawfully take pay from either. I understand the authorities to be that, while a middle-man may sometimes take pay from both seller and purchaser, he must always deal with the utmost fairness with each. An analysis of the term affords the best explanation of the legal obligations of the parties: a man standing in the middle between two; in the center. "Center" is defined to be a point equally distant from the extremities. The middle-man must be and remain equally removed in interest from the two for whom he contracts. If he varies from this, even in the estimation of a hair, and gives to one knowledge or advantage which he withholds from the other, he loses his position as a middle-man, and, in the realm of equity, the law will hold him responsible for the position which he really assumes, rather than that which he advertises to occupy. Can it be said that Mr. Porter stands equidistant between the plaintiffs and defendant, when he testifies that "I did not inform the plaintiffs of the fact of my finding ore? I reported it to Col. Wall." And, again, "I told Col. Wall I wanted one-fourth of the mine," and that he actually received \$1,000 in lieu of the quarter interest therein.

In *Walker v. Osgood*, 98 Mass. 351, *WELLS, J.*, says: "Plaintiff's employment as a broker, even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him." To a certain extent, and for certain purposes, by the understanding and usage of business and the nature of his employment, a broker is authorized to act for both parties; but what he does in any relation he does as an indifferent person, and not in the interest of either party. It is claimed

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on the part of the appellants that there is no finding as to the fraud of defendant or his collusion with Porter.

In *Harris v. Burns*, 51 Cal. 528, the court say if the trial court fail to find on an issue of fraud raised, the judgment will be reversed.

In *Le Clert v. Oullahan*, 52 Cal. 254, the court says: "Upon the issue of fraud thus tendered the findings are entirely silent. The cause is not, therefore, in a condition to be decided." In the case at bar it is claimed that if there is no direct finding as to fraud such probative facts are found as necessarily determine the question of fraud. If this is true, it must be that it does so by alleging all the facts, circumstances, and acts of the parties connected with the transaction, in any way bearing upon the question of fraud. But an analysis of the findings will show that, while they set out as facts the conversation of the parties as to the contract of the parties, the evidence of Porter bearing on this question is entirely omitted. He says: "I did not inform plaintiffs about the finding of the ore, for the reason that I did not think it to be to my interest. I was working for my own interest, and not theirs." Also the evidence of Mr. Synnott: "Porter told us the most he could get was \$1,800. That was the understanding between us until the sale."

If Porter was in the employment of plaintiffs he had no right to work for his own interest and not theirs. If there was fraud, it arose from this very working for his own interest to the injury of his employers; and if defendant was in collusion with this working for his own interest instead of his employers', the fraud attaches to him also. Hence the defect in the findings upon the question of fraud.

In *Norris v. Tayloe*, 49 Ill. 17, and reported in 1 Morr. Min. R. 383, is a case so nearly like the one at bar that it seems to me to determine this controversy, provided the findings should establish the facts. The principles involved in this case are fully discussed. Whether they do apply, or what principles of law apply to the case at bar, can only be determined when the issues of fact in the case are adjudicated. The question of the agency of Porter, the question of fraud of Porter, and the collusion of the defendant in such fraud, if any existed, are the vital issues upon that branch of the case which I am discussing. I am unable to understand the findings of the court below as determining

these issues, and I am therefore obliged to dissent from the opinion of the court as just read.

SCHENK *et al.* v. BIRDSEYE *et al.*

(March 2, 1885.)

JUDGMENT—ENTRY IN VACATION—VALIDITY.

1. Where, in an action on a judgment, the record on appeal shows that the cause was heard and evidence taken in open court, and that, by agreement of parties, it was taken under advisement, to be decided in vacation, an objection that the judgment rendered was void because entered in vacation is untenable, as by Civil Practice Act, § 29, final judgment may be entered in term time or vacation.

SAME—ACTION ON — SUFFICIENCY OF COMPLAINT.

2. The complaint in an action on a judgment alleged that the judgment was joint as to all defendants, and several as to defendant B.; that B. had been personally served with summons in Brooklyn, N. Y.; that he appeared by counsel; that judgment was duly rendered against him; that the city court of Brooklyn was a court of record; and that, under the constitution and laws of New York, it had jurisdiction of the subject-matter of the action. *Held* facts sufficient to constitute a cause of action against B.

Appeal from district court, Lemhi county.

Action by Allen Schenk and others against Joseph W. Birdseye and others on a judgment. From a judgment for plaintiffs, defendant Birdseye appeals. Affirmed.

Charles A. Wood, for appellant.

In an action upon a joint contract, whenever the court has jurisdiction of the subject-matter, service of process upon one of the joint contractors will give the court jurisdiction of the person served, and a court may have jurisdiction of the person of one defendant, and not of the others; but it would be impossible for a court to have jurisdiction of the subject-matter as to one defendant, and not as to the others. Freem. Judgm. § 120.

Johnson & Onderdonk, for respondents.

Where a cause of which the court has jurisdiction is tried at chambers, by consent of the parties, the judgment rendered therein is not necessarily void for want of a trial in open court. *Ex parte Bennett*, 44 Cal. 84; *Ogburn v. Connor*, 46 Cal. 353.

If one of several joint debtors resides or is served with process within the territorial limits of the jurisdiction of the city court of Brooklyn, the action may proceed to judgment, and a recovery had in form against all, but to affect only the individual property of the defendant so

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served, and property owned jointly by all. *Hoag v. Lamont*, 60 N. Y. side page 96; *People v. Superior Court of New York*, 19 Wend. 119.

A several judgment may be properly rendered whenever a several action can be sustained. *Harrington v. Higham*, 15 Barb. 524; *Parker v. Jackson*, 16 Barb. 33.

In an action against defendants, jointly indebted, where only one is served, a several judgment may be entered against him. *Hirschfield v. Franklin*, 6 Cal. 607.

PER CURIAM. This is an appeal from a judgment entered against the defendant Joseph W. Birdseye in Lemhi county. The record brought here shows that the cause was heard and evidence taken in open court, and that, by agreement of parties, the cause was taken under advisement, to be decided in vacation; and that it was so determined, and the findings and judgment signed by the trial judge were filed and entered by the clerk. This is now claimed to be error. We think section 29 of our civil practice act fully authorizes this proceeding. Counsel for appellant contends that the complaint is not sufficient to support the judgment. The action is founded on a judgment recovered against this defendant in the city court of Brooklyn, in the state of New York. As appears from the complaint herein, the judgment sued on was joint as to Birdseye and others, and several or personal as to Birdseye. The complaint alleges that Birdseye had been personally served by summons in the city of Brooklyn, and that he appeared in the action by counsel, and that, thereafter, judgment was duly given. It is also alleged that the city court of Brooklyn was a court of record, and that, under the constitution and laws of the state of New York, it had jurisdiction of the subject-matter of the action. This seems to us sufficient in this respect; and, as there is no bill of exception or statement, there is no other question for consideration.

Judgment affirmed.

MORGAN, C. J., and BRODERICK and BUCK, JJ., concurring.

RIBORADO et al. v. QUANG PANG MIN. CO.
(March 2, 1885.)

MINES AND MINING—REGULATIONS—EXISTENCE.

1. Where a mining regulation is shown to have existed, such regulation is presumed still to exist until the contrary appears.

APPEAL—REVIEW—DEFECTIVE RECORD.

2. Where the record on appeal does not contain all the evidence adduced in the court below, an objection that a finding of fact is not supported by the evidence will not be sustained.

TRIAL—FINDINGS OF FACT—WHEN RESPONSIVE TO ISSUES.

3. Where the complaint alleges that defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiff, a finding that defendants washed out the dam, and filled up the ditch to such an extent as to prevent its use for a year, is sufficiently responsive to the issue.

Appeal from district court, Lemhi county.

Action by Diego Riborado and another against the Quang Pang Mining Company for an alleged injury to plaintiffs' ditch and dam. There was judgment for plaintiffs. From an order denying its motion for a new trial, defendant appeals. Affirmed.

Charles A. Wood, for appellant.

The right to the use of the waters of a creek cannot be acquired in any manner by appropriation, against prior riparian owners or claimants. *Stone v. Bumpus*, 46 Cal. 218; *Sims v. Smith*, 7 Cal. 148; *Ralston v. Plowman*, 1 Idaho, 595.

The owner of mining ground has a right to prohibit the erection, construction, or maintenance of any cut, ditch, or embankment upon his ground, and to remove the same, or any other obstruction placed or constructed thereon without his express permission, unless the right is given by some mining custom or regulation. *Correa v. Frietas*, 42 Cal. 339; *Titcomb v. Kirk*, 51 Cal. 289.

As the mining law of a district must not only be established, but in force, at the time when its operation is claimed, it is void whenever it falls into disuse or is generally disregarded, and the question whether it is in force at a given time is a matter of evidence to be decided by the jury. *Harvey v. Ryan*, 42 Cal. 627.

Huston & Gray, for respondents.

Plaintiffs' ditch being on the mining ground of defendant's grantors, with their implied consent for a period of nine years before defendant became the owner of the mining claim, plaintiffs had a title to said ditch by prescription. *American Co. v. Bradford*, 27 Cal. 360; *Crandall v. Woods*, 8 Cal. 136; *Smith v. Logan*, (Nev.) 1 Pac. Rep. 678; *Water Co. v. Crary*, 25 Cal. 504; *Cave v. Crafts*, 53 Cal. 135.

The right of defendant's grantors was fixed by their appropriation. *Kidd v.*

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Laird, 15 Cal. 161; Smith v. O'Hara, 43 Cal. 371; Higgins v. Barker, 42 Cal. 233; McKinney v. Smith, 21 Cal. 374; Water Co. v. Powell, 34 Cal. 109; Lobdell v. Simpson, 2 Nev. 277; Proctor v. Jennings, 6 Nev. 83; Barnes v. Sabron, 10 Nev. 217.

An erroneous finding upon an immaterial point will not justify granting a new trial. Lovell v. Frost, 44 Cal. 471.

Nor for an error favorable to the defendant. Wilkinson v. Parrott, 32 Cal. 102.

That the judgment is broader than the facts alleged and found will justify is no ground for a new trial. Shepard v. McNeil, 38 Cal. 72; Moore v. Murdock, 26 Cal. 514.

BUCK, J. Appeal from an order overruling motion for a new trial. This is an action for damages by Diego Riborado et al., Plaintiffs, against The Quang Pang Mining Company, Defendants, for an alleged injury by defendants to the ditch and dam of plaintiffs. The plaintiffs' ditch, for about 1,000 feet is upon the mining claim of defendants. The plaintiffs' dam or dams, built for the purpose of turning water from Sharkey creek into it, are situated off and outside of the Discovery claim, owned and worked by defendants, upon old diggings, washed out and abandoned. The defendants' claim, known as the "Discovery Claim," is the prior location, and the plaintiffs' ditch was dug across it without any express license. It was rather tolerated than permitted by defendants' grantors, with the understanding that defendants should work their claim "just as if no ditch was there." The ditch of plaintiffs was commenced in 1868, and they claimed the right to put it across defendants' claim, and maintain it there, by virtue of the following miners' regulation adopted in 1866, to-wit: "Each claim shall have the right to drain through any other claim or claims, but shall confine his dumpings to his own ground." The appellants claim that this regulation was void for non-user. There was no evidence that said regulation had either fallen into disuse or had been superseded by any other. On the contrary, the evidence shows that the mining district is still in existence, and that the two claims in dispute had been worked almost, if not quite, continuously all the time since said ditch was made. If there is any custom or regulation modifying this regulation of 1866, the defendants should have proven it on the trial. King v. Edwards, 4 Morr. Min

R. 484. In the absence of such proof, the written regulation, once established, is presumed still to exist and be in force.

In the assignment of errors it is claimed that the fifth finding is unsupported by the evidence. That finding is as follows: "That in 1879 the defendants washed out what was called the lower dam of plaintiffs, and set fire to and burned the upper dam." The error to this finding is alleged to be that the evidence shows that the plaintiffs' lower dam was washed out in 1878, and never afterwards repaired; that the dam burned was the remnant of the old dam; and that there is no evidence of any damage to plaintiffs from said burning. After a careful study of the evidence we are unable to say that there is error in this finding. The evidence brought up is in such a confused condition, abbreviated and often in broken sentences, wanting substantives and predicates, that it is quite impossible to determine as to many matters given in evidence. It is admitted upon the argument that there was a good map of the grounds in dispute in the court below. This map is not here. The locations of these dams were explained to the court below by reference to the map, which is not in the transcript. It is therefore impossible for us to say that the finding was not supported by evidence. To the further objection to this finding, to-wit, that there is no evidence of damage from said burning, it is sufficient to say that the evidence of plaintiffs sets the damage of 1879 at \$350. This damage resulted from cutting out the dam, and loss of time.

The second error assigned is that the seventh finding, to-wit, that in 1881 defendants washed out plaintiffs' dam and filled plaintiffs' ditch with tailings to such an extent as to ruin their season's work, is contrary to the pleadings and unsupported by evidence. The evidence of plaintiffs upon that subject was: "In 1881 the pole flume so placed filled up the ditch level with sand. They washed away everything. Lost all the summer's water." "The pleadings allege that in 1881 the defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiffs." We think the finding that defendants washed out the dam and filled up plaintiffs' ditch to such an extent as to prevent their using it for a year is fairly responsive to the allegation that they cut and injured it. The appellants assign as error the conclusion of law that the defendants are liable to plaintiffs for the

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amount of damages unnecessarily done by them in the years 1879, 1880, and 1881. This finding is general, and sustained by the fifth finding of fact, to-wit: That in the year 1879 defendants washed out what was called the lower dam of plaintiffs and set fire to and burned the upper one. Allowing, as was claimed upon the argument, that the evidence shows that the lower dam was washed out in 1878 and never afterwards replaced, which does not seem clear to us, yet the burning of the upper dam would be sufficient to sustain the finding. This dam was not on the Discovery claim. It was on ground abandoned and worked out and open to all. There is some pretense that defendants were washing the old tailings, but there is no evidence that they had any claim there that would justify their washing away or destroying plaintiffs' dam.

It is also claimed that the following conclusion of law is erroneous, to-wit: The plaintiffs have the right to convey said water over the mining ground of defendants, by ditch and flume, to their mining ground below; subject, however, to the right of defendants to work their mining ground over which said ditch runs, doing no unnecessary damage; subject, also, to the defendants' right to recover damages from plaintiffs for such easement, if any occurred. We think this general proposition of law is clearly sound. The mining regulation quoted above has the force of law, and section 486 of our Code of Civil Procedure makes it evidence in actions concerning mining claims. It is claimed that the law as laid down by the court was irrelevant, and not responsive to the findings of fact. Possibly this may be true, yet we can see no injury which its enunciation has done the defendants. Admitting that the sixth and seventh findings do not bring the case within this law, still we are of the opinion that the fifth finding of fact sustains the conclusion of law, and the judgment is therefore affirmed.

MORGAN, C. J., and BRODERICK, J., concurring.

LUFKINS v. COLLINS et al.

(March 2, 1885.)

TRIAL—INSTRUCTIONS—CLAIM AND DELIVERY.

Where, in an action of claim and delivery, the court grants an instruction that, "when property sold in good faith is at the time in

custody of a third person, notice to him of the sale is sufficient to constitute a delivery as to subsequent purchasers," the granting of another instruction that, "to constitute such delivery, it is necessary that the seller, purchaser, and third party should all agree," is erroneous, in that the two are inconsistent.

Appeal from district court, Alturas county.

Action of claim and delivery by H. Lufkins against C. H. Collins and another. From a judgment for plaintiff, defendants appeal. Reversed.

Kimball & Haywood, for appellants.

G. L. Waters, L. Vineyard, F. Ganahl, and Prickett & Lamb, for respondent.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person who has himself assisted in deceiving. *Anderson v. Armstead*, 69 Ill. 452; *Stewart v. Munford*, 91 Ill. 58; *Mayer v. Erkhardt*, 88 Ill. 452; *Nichols v. Pool*, 89 Ill. 491; *Lewis v. Lanphere*, 79 Ill. 187; *Kinnear v. Mackey*, 85 Ill. 96; *Sebright v. Moore*, 33 Mich. 92; *McNeil v. Bank*, 46 N. Y. 325; *Moore v. Bank*, 55 N. Y. 41; *McStea v. Matthews*, 50 N. Y. 166; *Dewey v. Field*, 4 Metc. (Mass.) 381.

BUCK, J. This was an action of claim and delivery, tried at the June term of the district court, 1884. The action was brought to recover the possession of six mules, claimed to have been bought by plaintiff of Adams & Cunningham by bill of sale, dated November 22, 1882. The defendants claimed title to the property by virtue of a bill of sale from the same vendors, dated November 21, 1882. At the time the first bill of sale was executed and delivered to defendants, the property was in the care and custody of the plaintiff on the road-bed of the Oregon Short-line Railroad, then being constructed. The bill of sale was made at Pocatello, Idaho, and the property was about 50 miles from there. The 6 mules were a portion of 71 animals, included in the sale to defendants. Lufkins, the plaintiff, was in charge of said animals, as foreman of Adams & Cunningham, the vendors. On the morning of the day succeeding the sale to defendants, Mr. Stevens, one of the firm of Stevens & Collins, and Mr. Adams, one of the vendors, traveling towards the place where the animals were, met the plaintiff, Lufkins, and Mr. Adams informed him (the

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plaintiff) that they had sold the stock to defendants, and defendant Stevens then and there hired the plaintiff to continue in charge of the stock as the foreman of the defendants. The plaintiff then agreed to accept said employment, and then entered into the services of defendants.

The said stock was scattered along said road-bed some 20 or 30 miles, the principal portion being at the forty-third mile station. During the said twenty-second day of November, the plaintiff, Lufkins, and defendant Stevens, with Mr. Adams, traveled over the line to said forty-third mile station, where all the stock was turned over. During the evening, while the stock was coming in, Adams & Cunningham executed to plaintiff the said bill of sale, dated on the 22d, in which they sold all "their right, title, and interest" to the six mules in dispute, the said stock being a part of the 71 head enumerated in the bill of sale to defendant made the day before. The plaintiff took possession of said six mules before they had been turned over to defendants, and defendants afterwards took them from plaintiff, and still hold them under claim that the title to the property passed to them, defendants, on the morning of the 22d, when plaintiff, having them in his possession, first received notice of the sale of said stock; the plaintiff, on the contrary, claiming that the title passed to him on obtaining possession of the stock on the evening of the 22d, the defendants having up to that time never had the property in manual possession under said bill of sale.

The court gave the following instruction to the jury on the request of the appellants: "When property sold in good faith is, at the time, in custody of a third person, notice to him of the sale is sufficient to constitute a delivery, as to subsequent purchasers or attaching creditors." This instruction is the law upon that point. *Benj. Sales*, p. 672, § 675, note d; *How v.*

Taylor, 52 Mo. 592; *Coffield v. Clark*, 2 Colo. 101; *Dempsey v. Gardner*, 127 Mass. 381, 383. The court also gave, at the request of respondent, another instruction, in which the following language is used: "But, in order to constitute such delivery, it is necessary that the seller, purchaser, and third party, should all agree." To this modification of the former instruction the appellants excepted, and assign the same as error. The modification, being a portion of a long instruction asked for on the trial, probably was given without observing that it was a substantial contradiction of the other instruction. It seems to be unsupported by the authorities, and, being a contradiction in terms as to the law of the case, it falls within the rule that "the giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other," and also that "an erroneous instruction is not cured by another instruction upon the same subject which is correct, unless the former is specifically withdrawn." *Mackey v. People*, 2 Colo. 13; *Rice v. Olin*, 79 Pa. St. 391; *Thomp. Charg. Jur.* § 69; *People v. Campbell*, 30 Cal. 312.

The bill of exceptions contains several exceptions to the ruling of the court in the matter of instructions to the jury, and the admission of evidence, which would be interesting matters of consideration; but the views of the court upon the instruction already discussed being decisive of the case, the limited time at the disposal of the court will prevent a more extended discussion of them.

Judgment reversed, and new trial granted.

MORGAN, C. J., concurs.

BRODERICK, J. I do not question the law as stated in the syllabus of this case. I think it correct; but I cannot assent to all that is said in the opinion.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1886.

MOTHERWELL *et al.* v. TAYLOR.

(January 25, 1886.)

APPEAL—SUFFICIENCY OF BOND—DISMISSAL.

1. Where an appeal is taken both from the judgment, and from an order denying a motion for a new trial, an undertaking reciting that it is given "on such appeal" is void for uncertainty, and both appeals will be dismissed.

SAME—FILING BOND ON HEARING MOTION TO DISMISS.

2. In such case the filing of two good and sufficient undertakings on the hearing of the motion to dismiss will not cure the defect.

Action by James P. Motherwell and others against Frank Taylor to enforce a trust. From a judgment for defendant, plaintiffs appeal. Appeal dismissed.

L. Vineyard, for appellants. *F. E. Ensign*, for respondent.

HAYS, C. J. This is a motion by respondent to dismiss the appeal from the order denying motion for a new trial, also from the judgment of the court below, on the ground, among other things, that the undertaking is insufficient and void. The appeal and the undertaking in this case are substantially like those in *Mathison v. Leland*, 1 Idaho, 712; *Eddy v. Van Ness*, ante, 93, 6 Pac. Rep. 115. The appellant seeks in each of these cases to appeal from the order denying a new trial, and from the judgment therein.

The undertaking in this case, among other things, sets out that whereas the plaintiffs appeal to the supreme court of the territory of Idaho from the judgment and decree made and entered against said

plaintiffs in said action, etc.; and that the plaintiffs also appeal to said supreme court from the order of said district court overruling plaintiffs' motion for a new trial in said action; and then undertakes to pay all damages awarded against them on appeal, or on a dismissal thereof, not exceeding the sum of \$300. It was held by this court in the case of *Mathison v. Leland*, supra, that such an undertaking covers but one appeal, and that it was impossible upon inspection to determine to which appeal it applied, and that neither the appeal from the order or from the judgment was well taken, and therefore the appeal was dismissed. It was held in *Eddy v. Van Ness*, supra, that such an undertaking was void, and therefore there was no undertaking in either appeal, and in that case also the appeal was dismissed.

Upon the hearing of motion to dismiss appeal appellants presented to this court two good and sufficient undertakings, approved by a justice of the supreme court, and asked that the same be filed pursuant to section 657 of the Code. In the case of *Emery v. Langley*, 1 Idaho, 694, the undertaking was simply insufficient, while in this case, following the former adjudications of this court, the undertaking is void. We are aware the practice has been different in California from what it is in this territory; but, after an examination of the authorities cited, are satisfied that the courts of that state are guided more by precedent than by sound legal principle in this class of cases. It seems from the former adjudications of this court that a dis-

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inction has been drawn between the insufficient undertaking and the one that is void. We must therefore hold that the filing of sufficient undertaking at the hearing of motion to dismiss will not avail the appellants.

The appeal is dismissed, without prejudice to another appeal.

BUCK and BRODERICK, J.J., concur.

JONES v. QUANTRELL *et al.*

(January 25, 1886.)

APPEAL—NOTICE TO ADVERSE PARTY—DISMISSAL.

Where, in an action to foreclose a mortgage against the joint makers of the same, judgment is entered against them jointly, and one defendant appeals, but does not serve notice of appeal to his codefendant, the appeal will be dismissed, as such codefendant is an "adverse party," within the meaning of Code, § 643, providing that notice of appeal must be served on the adverse party.

Appeal from district court, Alturas county.

Action by T. R. Jones against A. D. Quantrell and H. Ward to foreclose a mortgage. From a judgment for plaintiff, defendant Ward appeals. Appeal dismissed.

A. F. Montandon, for appellant.

Defendant may appear specially to file a motion to quash a summons. *Deidsheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, Id. 569; *Lyman v. Milton*, 44 Cal. 631; *Kent v. West*, 50 Cal. 185; *Mining Co. v. Sheplar*, 53 Cal. 245; *Lander v. Fleming*, 47 Cal. 614; *Eldridge v. Kay*, 45 Cal. 49; *Lung Chung v. Railroad Co.*, (U. S. Dist. Ct. Or.) 19 Fed. Rep. 254; *Railway Co. v. Nicholls*, 8 Colo. 188, 6 Pac. Rep. 512; *Harkness v. Hyde*, 98 U. S. 476.

Defendant did not waive his special appearance in his motion to quash by thereafter filing a qualified demurrer, having therein prefaced and expressly reserved the same. The intent with which said demurrer was filed was therein made manifest. *Deidsheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, Id. 569; *Lyman v. Milton*, 44 Cal. 631; *Kent v. West*, 50 Cal. 185; *Harkness v. Hyde*, 98 U. S. 476.

Though the motion to quash service and summons and demurrer to complaint were filed on the same day, the former will be presumed to have been first in point of time. *Iron Co. v. Worthington*, 2 Wash.

T. 472, 7 Pac. Rep. 882, 886; *Taylor v. Horde*, 1 Burrows, 106.

An exhibit cannot be considered on demurrer. *Johnson v. Insurance Co.*, 3 Wyo. 140, 6 Pac. Rep. 729; *City of Los Angeles v. Signoret*, 50 Cal. 298.

All material facts constituting the cause of action must be alleged. *Jerome v. Stebbins*, 14 Cal. 459; *Stringer v. Davis*, 30 Cal. 320; subdivision 2, § 230, Code Civil Proc. Idaho.

Kingsbury & McGowan, for respondent.

No special appearance is allowable in a case, except to raise jurisdictional questions. If a party so far appears to call in to action the powers of the court for any purpose except to decide upon its own jurisdiction, it is a full appearance. *Clark v. Blackwell*, 4 G. Greene, 441; *Grantier v. Rosecrance*, 27 Wis. 488; *Anderson v. Coburn*, Id. 558; *Curtis v. Jackson*, 23 Minn. 268.

HAYS, C. J. This was an action brought to foreclose a mortgage given by defendants to respondent on property situate in Alturas county. The complaint, among other things, sets out that the defendants gave their joint notes to respondent for \$850, with interest thereon. To secure the payment of said notes they made, executed, and delivered their joint mortgage on property therein described. It appears that this action to foreclose the mortgage was duly commenced, and defendant Quantrell appeared in the court below. Defendant Ward, through his attorney, appeared specially, and moved the court to vacate the service of the summons on account of alleged defective service, and also filed and served a demurrer to the complaint. The motion and demurrer were each overruled, and judgment of foreclosure entered; also judgment entered for any deficiency that might be found due after applying the proceeds from sale of mortgaged premises. The defendant Ward appeals from said judgment, and from the whole thereof. Quantrell does not appeal, and did not appear in this court. The notice of appeal was addressed to the plaintiff alone. Upon the hearing of the case respondent asks to have the appeal dismissed, and denies the jurisdiction of this court on the ground that Quantrell was an adverse party to appellant, and that no notice of appeal was given to him.

The Code provides that any party aggrieved may appeal. By the term "any

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party" we understand any person who is a party to the action. The party or person appealing is known as the appellant, and the adverse party as the respondent. The appeal is taken by filing with the clerk of the court in which judgment is entered a motion stating they appeal from the judgment, or some specified part thereof, (section 643, Code,) and serving a similar notice on the adverse party.

The question now arises, is Quantrell an adverse party within the meaning of this section of the Code, under the circumstances of this case? It was held in *Senter v. De Bernal*, 38 Cal. 637, that every party whose interest in the subject-matter of appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is an "adverse party," within the meaning of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener. Such, in substance, has been held by many other authorities. Such being the law, we must hold that Quantrell is an adverse party from the facts as they appear in this case, as he may be seriously affected by the reversal or modification of the judgment. He should therefore have been served with the notice of appeal. As it was not so served, and he has not appeared in this court, the appeal must be dismissed. *Parker v. Denny*, 2 Wash. T. 360, 7 Pac. Rep. 892; *Luco v. Commercial Bank of San Diego*, (Cal.) 8 Pac. Rep. 274; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Mills v. Brown*, 16 Pet. 525.

It is so ordered.

BUCK and BRODERICK, JJ., concur.

PEOPLE v. O'CALLAGHAN.

(January 25, 1886.)

HOMICIDE—INDICTMENT—DEGREE OF OFFENSE.

1. Under the statute defining murder in the first degree to be any kind of "willful, deliberate, and premeditated killing," a conviction of murder in the first degree is not warranted under an indictment alleging a killing with "malice aforethought."

SAME—VERDICT—MODIFICATION ON APPEAL.

2. Where an indictment for murder in the first degree is defective, in that it does not allege that the killing was deliberate and premeditated, as required by the statute, and the verdict is guilty in the first degree, such indictment being sufficient to charge the second

degree, on appeal the verdict will be deemed a verdict of guilty in the second degree, and the judgment of the court below will be modified accordingly.

Appeal from district court, Bingham county.

E. J. O'Callaghan was convicted of murder in the first degree, and appeals. Modified.

Smith & Wright, for appellant. *D. P. B. Pride*, Atty. Gen., and *H. M. Bennett*, for the People.

BRODERICK, J. The defendant was indicted, tried, and convicted of murder in the first degree, and sentenced to be executed. From this judgment he appeals, and assigns as error that the indictment is not sufficient to support the verdict and judgment. The indictment charges substantially that the defendant feloniously, willfully, and of his malice aforethought did make an assault on Thomas Breen; that the defendant feloniously, willfully, and of his malice aforethought shot and wounded said Breen, and from the effects of the wound he died.

This is the modern common-law form for charging murder, and the first question for consideration is whether, under our statutes, the omission to charge the offense substantially in the language of the statute defining murder in the first degree is fatal to the judgment. The first definition of murder by our statute is as follows: "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." This is a general description, and embraces all murder known to our law, whether of the first or second degree. Following this provision is a definition of express and implied malice, and then a more particular definition of murder in the first degree, which reads: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree."

It will be observed that the indictment

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does not charge that the killing was done with deliberation and premeditation. We have been referred to many respectable authorities which hold that the common-law indictment for murder sufficiently charges murder in either degree, but the adjudications upon this question are by no means uniform. It has been considered in some cases that the expression, "with malice aforethought," is synonymous with "deliberation and premeditation." In *People v. Ah Choy*, 1 Idaho, 317, our court seems to have adopted this view; but it is difficult to understand from this case what the indictment really contained. However, it was assumed in this, and one other case we find, that such an indictment sufficiently charges murder in the first degree; and we doubt not that prosecuting officers in drawing indictments have generally followed the practice thus sanctioned. If these adjudications, unsatisfactory as they are, had been made in civil actions, fixing and establishing rules of property, and property rights had accrued under them, we would hesitate to open the question; but in the case we are considering, and in the class to which the rule would apply, we take it there are no claims to vested rights which any one will care to assert. It is a well-established principle of criminal pleading that the substantive facts necessary to constitute the offense charged must appear in the indictment with sufficient certainty to enable the party to defend against the charge and the court to pronounce judgment. Indeed, it is fundamental that the party shall be informed by the indictment of the "nature and cause of the accusation." This indictment contains no averment that the killing was perpetrated by means of poison, or lying in wait, or by torture, or in an attempt to commit any of the felonies specified in the statute quoted. It is admitted that the claim to convict for murder in the first degree was based upon evidence tending to show that the killing was willful, deliberate, and premeditated. It is therefore this kind of killing that we must consider in this case.

At the common law the offense of murder was complete whether the killing was premeditated or was the result of felonious assault, with malice aforethought; yet since our statute has divided murder into the first and second degree, and requires that the killing shall be shown to be deliberate and premeditated, (that

is, intended,) in order to constitute murder of the first degree, we think such premeditated killing must be charged in the indictment as well as proved by the evidence, in order to sustain a conviction for the higher offense. In other words, since the statute has narrowed and qualified the general definition of murder by a distinct and substantive definition of murder of the first degree, excluding therefrom certain homicides which would be murder at the common law, we think it follows that an indictment for murder as at common law would not necessarily include the charge of murder in the first degree. In this view we are sustained by the later and better authorities. 2 Bish. Crim. Proc. 564-585; *State v. McCormick*, 27 Iowa, 402; *Fouts v. State*, 4 G. Greene, 500; *Fouts v. State*, 8 Ohio St. 109; *Kain v. State*, Id. 306; *State v. Brown*, 7 Or. 198; *State v. Brown*, 21 Kan. 38; *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872; *Kelly*, Crim. Law, 3448, and cases cited; *Hagan v. State*, 10 Ohio St. 459; *State v. Feaster*, 25 Mo. 327.

It is true that under the rules of criminal procedure, as now generally understood, where the statute has carved two or more offenses out of the same act, and a party is indicted for the highest offense, or grade of offense, he may be convicted, if the evidence will warrant it, of any lower offense, or grade of offense, that is sufficiently charged in the indictment, (*People v. Shotwell*, 27 Cal. 400;) but we are not aware of any class of cases where courts have allowed a conviction for a higher offense, or grade of offense, than that charged, except in murder cases, and we cannot accept the doctrine that a party tried for any crime can be convicted of an offense of which he is not fairly charged.

Respondent contends that this indictment is sufficient under the amendment to the criminal practice act, (Thirteenth Sess. Laws, 97,) which is as follows: "The indictment shall contain the title of the action, and the name of the court to which the indictment is presented, and the names of the parties, and shall be sufficient if it charge the offense substantially in the language of the statute prohibiting the crime, and in such a manner as to enable a person of common understanding to know what is intended." By this statute the legislature has not undertaken to dispense with the averments necessary to inform the party of the

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offense charged, but has only simplified the manner of charging the facts. Before a party is placed upon trial for a felony or other offense he is entitled to have the offense pleaded, not necessarily in the technical language of the common law, but substantially in the language of the statute defining the offense, and in such a manner as to enable a person of ordinary understanding to know what is intended, and for what offense he is to be tried. This statute modifies the intricate and exacting common-law rules of criminal pleading, and seeks to establish a plain rule more in harmony with the advanced notions of criminal jurisprudence. This the legislature had the power to do, and this, in our judgment, is what was intended.

The appellant asks that the instructions given by the court of its own motion be reviewed. The instructions thus given are not here by bill of exceptions, and cannot be reviewed in this court. *People v. Biles*, ante, 103, 6 Pac. Rep. 121.

The indictment sufficiently charges murder in the second degree, and we are of the opinion that under and in virtue of the general power given to modify we should sustain the verdict, and treat it as a verdict of murder of the second degree, which is included in the first, and modify the judgment accordingly. We are not without precedents and authority in reaching this determination. *Fouts v. State*, 4 G. Greene, 500; *State v. McCormick*, 27 Iowa, 414; *Johnson v. Com.*, 24 Pa. St. 387.

This case is distinguished from *Hogan v. State*, 30 Wis. 428, and *People v. Campbell*, 40 Cal. 129. In these cases the jury found the defendants guilty as charged, but did not find the degree; hence the court could not say whether they were found guilty of murder or manslaughter.

In the case at bar the defendant was found guilty of murder, and the evidence sustains the verdict, and we do not think justice would be promoted by ordering a new trial, or by remanding the cause. It is therefore considered and adjudged by the court here that the judgment of the court below be, and is hereby, modified so as to say that the defendant, E. J. O'Callaghan, be confined in the territorial prison of the territory of Idaho, at hard labor, during his natural life.

HAYS, C. J., and BUCK, J., concurring.

PEOPLE v. BARNES.

(January 25, 1886.)

INCEST—INSTRUCTIONS—DEFINITION OF OFFENSE.

1. Under Rev. Laws 1875, c. 10, § 129, providing a penalty for persons who, being within the degrees of consanguinity within which marriages are declared to be incestuous and void, shall commit fornication with each other, error cannot be predicated on an instruction, given in the prosecution of an indictment drawn under this section, that persons violating it are guilty of incest.

SAME—CONSENT OF BOTH PARTIES.

2. The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto.

CRIMINAL LAW—MOTION TO NONSUIT.

3. On a criminal prosecution, error cannot be predicated on the overruling of defendant's motion for a nonsuit, on the ground of insufficient evidence, as such motion is unknown in criminal practice; the remedy in such case being to request an instruction directing the jury to acquit.

WITNESS—IMPEACHMENT.

4. On a trial for incest, error cannot be predicated on the refusal of the court to permit an answer to be made to the question put by defendant to a witness, "You may state, if you know, whether the prosecutrix is a truthful girl," as such question calls for the opinion of the witness.

Appeal from district court, Alturas county.

Zacharia Barnes was convicted of incest, and appeals. Affirmed.

Angel & Sullivan and *Alanson Smith*, for appellant.

Incest requires the consent of both parties. *De Groat v. People*, 39 Mich. 124; *People v. Jenness*, 5 Mich. 305, 321; *People v. McDonald*, 9 Mich. 150; *People v. Harri-dan*, 1 Parker, Crim. R. 344; *State v. Shear*, 51 Wis. 460, 8 N. W. Rep. 287; *Croghan v. State*, 22 Wis. 444; *Noble v. State*, 22 Ohio St. 541; *State v. Thomas*, 53 Iowa, 214, 4 N. W. Rep. 908; *Speer v. State*, 60 Ga. 381; *State v. Caldwell*, 8 Baxt. 576; *Baumer v. State*, 49 Ind. 544.

D. P. B. Pride, Atty. Gen., for the People.

BUCK, J. The defendant was convicted on an indictment for an offense under section 129, c. 10, Crimes and Punishment Act, p. 353, of our Revised Laws of 1875. The section reads as follows: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each

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other, shall, on conviction, be punished by imprisonment in the territorial prison not less than one nor more than ten years." The indictment specifies the offense charged therein as a felony, and in the charging part uses substantially the words of the statute.

In the argument on appeal three errors—one of instruction to the jury, one of ruling upon the admission of evidence, and one of the refusal to nonsuit the prosecution—were especially insisted upon. In the bill of exceptions the alleged errors in instructions of the court are specified in the following words: "(5) The court erred in refusing to give the instructions asked for by the defendant. (6) The court erred in giving the jury the instructions asked for by the prosecution."

The particular error in the charge of the court set out in appellant's brief, and argued on appeal, is in the giving the following instruction: "The defendant is indicted for the crime of incest. Under the laws of this territory persons being within the degrees of consanguinity within which marriages by law are declared to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, are guilty of incest." It is claimed that the offense here charged is not incest, and that defendant was tried for an offense not charged in the indictment, and the jury misled by this instruction. We are able to see in this instruction nothing more than a recitation of the elements of the offense set out in the statute, and as charged in the indictment, with the addition of the name of the offense as it would have been designated at common law. An inspection of the record, however, shows that this definition of the offense was asked for by the defendant. It is hardly necessary to say that one cannot complain of an error, even had it existed, which was made at his own request.

The error in the admission of evidence, as specified in the bill of exceptions, was in the refusal by the court to allow the following questions to be answered: "Question. (1) You may state if you know whether Maggie Barnes is a truthful girl. (2) You may state whether Maggie has repeatedly told falsehoods." The authority relied upon by appellant as sustaining his exceptions to the ruling of the court in refusing answers to these questions is an alleged ruling of the court in the famous case of *Sharon v. Sharon*, 79 Cal. 633, not

produced upon the argument, and section 897 of our Code of Civil Procedure. That section provides that "in every case the credibility of the witness may be drawn in question by evidence affecting his character for truth, honesty, or integrity." This section adds nothing to the well-established rules of impeaching the credibility of witnesses. Greenleaf says that the credit of witnesses may be impeached by general evidence affecting their credit for veracity. The evidence introduced must be competent, and its introduction regulated by well-established rules. The first question calls for the opinion of one witness as to the truthfulness of another, and the second as to the knowledge of one witness as to particular falsehoods told by another. The first is clearly an invasion of the province of the jury, who are the judges of the credibility of witnesses; and the second is contrary to the well-established rule that, for the purpose of impeaching the credit of witnesses, the examination must be confined to general reputation, and is not permitted as to particular facts. 1 Greenl. Ev. (14th Ed.) § 461.

The third alleged error urged by defendant is "that the court erred in refusing defendant's motion for a nonsuit." In criminal practice the motion to nonsuit is not the appropriate remedy for defendant in case of a failure of proof. If the prisoner cannot be convicted, he is entitled to a verdict of acquittal. There can be no nonsuit as in civil cases. 1 Bish. Crim. Proc. § 961; *People v. Bennett*, 49 N. Y. 137. "In this case the court hold that after the trial is commenced the verdict of the jury must be pronounced, but this may be done under the advice and direction of the court." In that case the motion was made to discharge the prisoner on the ground that there was no case for the jury. The appellate court say the trial court had no power to grant the precise motion made,—the jury must pronounce the verdict. Section 373 of our criminal practice act provides that "if, at any time after the evidence on either side is closed, the court deem the same insufficient to warrant a conviction, it may advise the jury to acquit the defendant; but the jury shall not be bound by such advice, nor shall the court, for any cause, prevent the jury from giving a verdict except as provided by sections 360, 361, and 365," which do not apply to the case at bar. It is apparent that the motion to nonsuit was properly overruled. It was, however, held in

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People v. Bennett, above cited, that, although the motion to discharge the prisoner could not have been granted in the form in which it was made, to the end that substantial justice might be done, it might be regarded as a request that the court advise the jury to acquit. Adopting this suggestion in the case at bar, we may consider whether the ground upon which it was made was well taken. It is asserted by appellant and admitted by respondent that the prosecuting witness, the person with whom the defendant committed the offense of fornication, was defendant's daughter, an infant, under 12 years of age; and that under our statute she was incapable of giving consent to the alleged illicit intercourse. The point made by defendant in the motion for nonsuit was that the consent of both parties to the illicit intercourse was not necessary to constitute the crime of incest, and that, the prosecuting witness being of that tender age of which the law repudiates the possibility of consent, the element of mutual consent was wanting, and the defendant should have been acquitted.

This involves the legal proposition whether fornication, as known at common law, may be committed by one person without the concurrent criminality of the other party to the act. The arguments of the attorneys upon this question were exhaustive, and brought to the attention of the court a large number of authorities of adjudicated cases in which directly opposite conclusions were reached. Bouvier defines "fornication" to be "the unlawful knowledge by an unmarried person of another." This definition does not imply that carnal knowledge must necessarily be mutual. 2 Bish. Crim. Law, §§ 11, 24, defines it to be "the voluntary sexual intercourse of one person with another." There must be a voluntary consent of the will on the part of the one; but may not the other party to the act be the victim of force or fraud, or a child so young that the law regards her incapable of giving consent? The terms used in the statute are, "Persons being within the degrees of consanguinity," etc., "who shall commit fornication with each other." Evidently the term "fornication" is used in the ordinary, common-law meaning. We have been unable to find any definition of that term in the common-law authorities which necessarily implies a consenting mind in both parties to the act. It is maintained that the words "with each

other," used in the statute, imply that the offense is committed only when both participants therein do so with a willing mind. Many of the adjudicated cases sustaining this theory seem to be founded upon such a construction of the language used. We are unable to adopt this construction. We are rather of the opinion that the better reason is found with the opposite authorities, which hold that neither the language of the statute, nor the true definition of the terms employed, imply that a mutuality of consent is necessary to constitute the crime of incest. In support of our conclusions we cite Bish. St. Crimes, § 660; Whart. Crim. Law, § 1751; State v. Ellis, 74 Mo. 385; Mercer v. State, 17 Tex. App. 452; Alonzo v. State, 15 Tex. App. 378.

We find no error in the record, and the judgment below is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

MONTANDON v. WALKER.

(February 8, 1886.)

APPEAL—REVIEW—FILING OF REPORT OF REFEREE—PRESUMPTIONS.

Where, on appeal from a judgment entered upon the report of a referee, the record does not disclose the time of the filing of the report, it will be presumed that it was filed within the time prescribed by the statute.

Appeal from district court, Alturas county.

Action by A. F. Montandon against Louis W. Walker for professional services. From a judgment for defendant, entered upon the report of a referee, plaintiff appeals. Affirmed.

A. F. Montandon, pro se.

A judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had. Knight v. Roche, 56 Cal. 15; Brown v. Burbank, 59 Cal. 535; Soto v. Irvine, 60 Cal. 436.

L. Vineyard and Angel & Sullivan, for respondent.

HAYS, C. J. Appellant brought this action in the district court of Alturas county against the respondent to recover a *quantum meruit* for professional services as an attorney at law rendered by appellant for respondent. The complaint sets out three causes of action. The defendant

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answers by a general denial; also attempts a special denial of each of the causes of action. The answer also alleges that all the services set forth in the complaint were performed under a special agreement for a stipulated price, and that the plaintiff had been fully paid therefor. While the answer may have been open to criticism, in not having been as specific in denial as the Code requires, yet it was treated by the parties as sufficient, and no objection made to it in the court below. By consent of parties the cause was duly referred, to be heard, tried, and determined. It was afterwards tried by the referee, and he found in favor of defendant, and judgment was entered accordingly, from which plaintiff appeals to this court. It was contended that the referee did not file his report within 20 days after the close of the testimony in the case. While the statute is doubtless directory, (Haynes, New Trials & App. § 246, and cases there cited,) yet if it is mandatory, no such error appears, and this court must presume that the report was filed in time. Hazard v. Cole, 1 Idaho, 276; Haynes, New Trials & App. § 235.

It is also contended that the referee failed to find on all the material issues. We think this position not well taken, the *onus* being upon the appellant to show that error was committed, and having failed to do so, we think the judgment should be affirmed.

BUCK and BRODERICK, JJ., concurring.

PURDUM *et al.* v. TAYLOR *et al.*

(February 8, 1886.)

APPEAL—REVIEW—BILL OF EXCEPTIONS.

Where an exception to the order of the court sustaining a motion for judgment on the pleadings is not incorporated into the record by bill of exceptions, an objection that the court erred in sustaining such motion will not be considered on appeal.

Appeal from district court, Alturas county.

Action by A. M. Purdum* and another against George W. Taylor and others to foreclose a mortgage. From a judgment for plaintiffs, defendants appeal. Affirmed.

L. Vineyard and James H. Hawley, for appellants.

A pre-emptor of public land cannot mortgage his interest before entry. 1 Jones, Mortg. § 177.

The act of acquiring title by pre-emption is a personal privilege; but the applicant cannot transfer any right arising from his possession so as to vest it in another. Quinn v. Kenyon, 38 Cal. 502; Moore v. Besse, 43 Cal. 514; Bray v. Ragsdale, 53 Mo. 170.

A. F. Montandon and Kingsbury & McGowan, for respondents.

BUCK, J. This action was brought for the foreclosure of a mortgage. The defendants answered, alleging that the premises described in the mortgage were, at the time of the execution thereof, public lands of the United States, upon which he was living as a pre-emptor. Upon the issues thus made, upon the motion of defendant, the court entered judgment on the pleadings. The appeal is from the judgment.

The order granting the motion for judgment on the pleadings was a final decision in the action, to which an exception is deemed to have been taken under section 403 of our Code of Civil Procedure. To make this exception available on appeal it should have been settled in a bill of exceptions under section 406 of the Code, and made a part of the record. Guthrie v. Phelan, ante, 89, 6 Pac. Rep. 107; Same v. Fisher ante, 101, 6 Pac. Rep. 111; Ainslie v. Idaho World Printing Co., 1 Idaho, 641; Graham v. Linehan, Id. 780; Fox v. West, Id. 782; Hemme v. Hays, 55 Cal. 337.

The ruling of the court upon the motion for judgment on the pleadings not being questioned in the record, we have only to look to the complaint to ascertain whether its allegations are sufficient to sustain the judgment. Ray v. Ray, 1 Idaho, 705; People v. Hunt, Id. 433.

We think the complaint is sufficient, and the judgment is affirmed. Hyde v. Harkness, 1 Idaho, 638.

HAYS, C. J., and BRODERICK, J., concurring.

AVELINE *et al.* v. RIDENBAUGH.

(February 8, 1886.)

LANDLORD AND TENANT—RIGHTS OF SUBTENANT—INJUNCTIONS.

In an action to enjoin defendant from interfering with the removal from his premises of certain wood, the property of plaintiffs, it appeared that L., with defendant's consent, had placed the wood in question upon defendant's land; that subsequently L. leased the land from defendant, covenanting not to sublet

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any part of it without defendant's consent; that, soon after the execution of the lease, L. sold the wood to plaintiffs, by the terms of the sale giving them until the expiration of the lease to remove the wood; and that plaintiffs knew of the terms of L.'s lease. *Held*, that the overruling of a demurrer to the complaint was error. Broderick, J., dissenting.

Appeal from district court, Ada county.

Action by Paul Aveline and others against William H. Ridenbaugh to enjoin defendant from interfering with plaintiffs' alleged right of removing certain wood from the land of defendant. From a judgment for plaintiffs, entered upon an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Huston & Gray, for appellant.

When the facts show clearly that the rights involved in the controversy, and the remedies demanded, are purely legal, and completely within the scope of ordinary legal proceedings, the court of equity will itself take the objection at any stage of the cause, and will dismiss the suit, although no objection has in any way been raised by the parties. 1 Pom. Eq. Jur. 114, 115; *Hipp v. Babin*, 19 How. 271, 278; *Parker v. Manufacturing Co.*, 2 Black, 545, 550, 551; *Earl of Oxford's Case*, 2 White & T. Lead. Cas. Eq. 1291, and note.

Replevin is the proper remedy in all cases where the plaintiff has a right to the immediate and exclusive possession of chattels which he wishes to recover. *Cullum v. Bevans*, 6 Har. & J. 469; *Pattison v. Adams*, 7 Hill, 126; *Johnson v. Carnley*, 10 N. Y. 570; *Ilseley v. Stubbs*, 5 Mass. 280; *Badger v. Phinney*, 15 Mass. 362; *Paul v. Huttrell*, 1 Colo. 317; *Richards v. Kirkpatrick*, 53 Cal. 433.

When it is apparent on the face of the bill that a court of chancery has no jurisdiction of the subject-matter of the cause, and that the party aggrieved has an adequate remedy at law, the bill is obnoxious to a demurrer. High, Inj. § 28; *Winkler v. Winkler*, 40 Ill. 179.

Wood & Wilson, for respondents.

If the injury is irreparable, equity will interpose. Hil. Inj. p. 25 *et seq.*; 3 Wait, Act. & Def. pp. 683-685; *Wilson v. City of Mineral Point*, 39 Wis. 160; *Iron Co. v. Reymert*, 45 N. Y. 703; *Watson v. Sutherland*, 5 Wall. 74; *Brown v. Steamship Co.*, 5 Blatchf. 525; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210.

The remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in

equity, to take away the plaintiff's right to the latter. *Bunce v. Gallagher*, 5 Blatchf. 481; *Morris v. Thomas*, 17 Ill. 112.

The remedy at law must reach the whole mischief, and secure the whole right of the party in a perfect manner, or equity will interfere and give such relief. 3 Wait, Act & Def. p. 196; *Scott v. Scott*, 33 Ga. 102.

When the matter is one in which the jurisdiction is concurrent in law and in equity, a court of equity will exercise a sound discretion in assuming it, and will only decline to do so when the remedy at law is as complete and effective as in equity. *Hager v. Shindler*, 29 Cal. 48.

Buck, J. On the sixth day of November, 1885, the defendant, Ridenbaugh, leased to one Sing Lee Tong certain real estate, by an indenture in writing, for the term of one year. Upon said premises said Lee Tong had at the time said lease was executed and delivered, and for some time prior thereto had had thereon, about 2,000 cords of wood, placed there with the consent of defendant.

The lease contained two covenants of importance in this action, as follows: "*First.* And the said party of the second part hereby promises and agrees that he will not let or sublet the whole or any part of said premises without the written consent of the party of the first part. *Second.* It is hereby agreed that if default shall be made in any of the covenants herein contained, it shall be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom." The premises described in the lease are entirely surrounded by other land of the defendant, the lessor, and the only means of ingress and egress thereto and therefrom is by a way which has been used as a public way to said premises for several years.

On the seventh day of November, 1885, the day succeeding that upon which the lease was executed, the lessee, Lee Tong, sold to these plaintiffs all of the wood upon said premises, "and by the terms of said sale gave them until the expiration of said lease to remove said wood from said leased premises." Soon after said sale defendant forbade the use of said premises to plaintiffs, and prohibited them from passing over said way for the purpose of removing said wood, and on the ninth day of November entirely ob-

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structed said way and fenced the same; and, although the privilege of passing upon said road to said premises has been demanded by plaintiffs of defendant for the purpose of removing said wood, the defendant continues to obstruct the same, and prevents plaintiffs from removing said wood from said premises.

On the twelfth day of November, 1885, the plaintiffs commenced this action, setting forth the above state of facts in their complaint, and pray relief: (1) That defendant be restrained from obstructing said road leading to said premises for one year from November 1, 1885; (2) that defendant be required to remove all obstructions to the free use and passage of said road; (3) for other proper relief, and their costs.

To this complaint the defendant interposed a general demurrer. The demurrer being overruled, and judgment entered for plaintiffs, the defendant appeals therefrom, and urges as error the ruling of the court in overruling the demurrer.

There are two questions involved in the appeal, and argued thereon, to-wit: *First*. Does the complaint show equity on the part of plaintiffs; and, *second*, is there no plain, speedy, and adequate remedy at law available to plaintiffs?

It is a fundamental principle of equity jurisprudence that both of these conditions must exist before equity can be successfully invoked in behalf of a litigant. A party may have a cause of action founded upon the present principles of equity, but if the law affords him adequate relief, equity will not interfere. So, on the other hand, the law may be entirely inadequate to his case, yet, if his cause is lacking in equity, he must abide the remedy which the law affords him. 1 Pom. Eq. Jur. § 400; Fackler v. Ford, 24 How. 222.

The plaintiffs knew the tenure by which Lee Tong held the premises. They had full knowledge of the lease, and the covenants that they should not be sublet, and that in case of a breach of any of the covenants the lessor might re-enter and remove all persons therefrom. Notwithstanding this knowledge, the plaintiffs purchase, with the wood, the use of the premises for one year from November 1, 1885, for the purpose of removing the wood therefrom, and of storing the same thereon. This was clearly a subletting of the premises, against the express provision of the lease. Under the covenant to re-

enter, within a day or two thereafter, the defendant, the lessor, took possession of the premises, forbade the plaintiffs to enter, and closed up the road thereto. We are unable to see that the plaintiffs are in a position to claim the interposition of equity in their behalf. To grant a restraining order prohibiting the lessor from controlling the premises after condition broken would be to hold that the lessor may not insist on such covenants as seem to him proper. Such a decision would be contrary to the established doctrines. 2 High, Inj. § 1142; Steward v. Winters, 4 Sandf. Ch. 587; His Imperial Majesty, etc., v. Providence Tool Co., 21 Blatchf. 437, 23 Fed. Rep. 572; Root v. Railway Co., 105 U. S. 189; Grand Chute v. Winegar, 15 Wall. 373. It seems but a suit in replevin in disguise.

It is claimed that Lee Tong did not sublet the premises; that he simply authorized the plaintiffs to remove the wood therefrom at any time within the year. It is alleged in the complaint that plaintiffs are wood merchants. This being so, the peculiar terms of the sale, if they mean anything, mean that the plaintiffs may store this wood upon defendant's premises during the year, and may at any and all times enter thereon to remove the same, cord by cord, or in larger quantities, as their business may require. This makes the premises of defendant the store-house for plaintiffs' stock in trade. By the terms of this contract the plaintiffs are given dominion of defendant's premises for a year from November 1, 1885, for the purpose of their business. This is clearly a subletting, and a breach of the covenants of the lease. The fact that the plaintiffs had full knowledge of the lease and its contents leaves them without excuse. The fact that the lessee, Lee Tong, held the premises under the lease but one day and then transferred them, or the use of them, to plaintiffs, contrary to the express covenants in the lease, with a full knowledge of all the facts, suggests that the plaintiffs were endeavoring to obtain by indirection the use of the premises, when they knew that they could not do so directly from the defendant himself. Even had Lee Tong held the premises as a tenant at will, as he seems to have held prior to the execution of the lease, with the implied consent of defendant to remove the wood within a reasonable time after his tenancy had been terminated, he could not transfer that consent to another. The mere act of letting to a

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stranger would terminate his tenancy at will. *Tayl. Landl. & Ten.* § 112. "If he sells or transfers his tenancy to another, he puts an end to the tenancy." "His relation to his landlord is entirely of a personal character, and he has no interest which he can transfer to another." *Id.* § 62.

In the case at bar the written lease was a merger of all former contracts, whether as tenants at will or otherwise. We think the plaintiffs are bound to take notice of the title of any under whom they claim to exercise dominion over the premises. Under this view of the case it is unnecessary to consider whether plaintiffs had a remedy at law. We think that the complaint shows no equity, and that the demurrer should have been sustained.

Judgment reversed, and cause remanded for further proceedings in accordance herewith.

HAYS, C. J., concurring.

BRODERICK, J., (*dissenting.*) I cannot concur in the opinion of the court in this case. There is no question here as to the ownership of the property. The wood belonged to the Chinaman, who placed it upon the defendant's premises with the knowledge and permission of the defendant. The ground had been used for several years as a wood-yard. At the time the wood was so placed there, and at the time it was sold by the Chinaman to the plaintiffs, and for several years prior thereto, the wood-yard was connected with the public highway by a road passing directly across the defendant's land. These facts are alleged in the complaint herein, and by the demurrer are admitted. It seems to me that, as the defendant permitted the wood to be placed upon his land, it must be presumed that he acted with full knowledge of all the facts and his rights in the premises. If this is correct, he thereby impliedly consented that the wood could be removed within a reasonable time, and he should be held to this implied agreement.

No word is said in the lease about an easement over defendant's premises to the wood. This was probably deemed unnecessary, inasmuch as there had been a way open to the wood-yard for several years.

As I view it, the lease gave the Chinaman no new or additional right, except that it enlarged the time for removing the property. The lease acknowledged compensation for the use of the wood-yard for

one year from its date. By the covenants of the instrument the Chinaman was not to let or underlet the premises, but certainly he was not thereby precluded from selling or disposing of the wood. His right to do this is unquestioned, and, when he did so, it seems equally clear that the purchaser had the right to remove his property, not under the lease, but within a reasonable time, and by reason of the implied right given when the wood was placed there by defendant's consent. It is true that the complaint demands more than the plaintiffs are entitled to. It is alleged that the plaintiffs purchased the wood of the Chinaman, and that by the terms of the purchase the plaintiffs were to have until the expiration of the year to remove it from the premises. By reason of the covenants of the lease this time could not be given without the defendant's consent. Claiming too much is no ground of demurrer. If the plaintiffs were entitled to any relief under the complaint, the demurrer was rightly overruled. The Chinaman could sell the wood and the plaintiffs could purchase. Under the circumstances of this case the right to purchase the property carried with it the right to possess and enjoy the same. *Webber v. Gage*, 39 N. H. 182.

It will be observed that there is no dispute as to the ownership of the wood, or plaintiffs' right to the possession. But it is contended on behalf of the defendant that the case presented by the complainants does not fall within equity jurisdiction, and the reason assigned is, that relief at law, by replevin, would be complete and adequate. It is conceded that, if the remedy at law is sufficient, equity cannot give relief; but it is not enough that the plaintiffs could have obtained possession by replevin. The remedy at law must be "plain, speedy, and adequate," or, in other words, "as practical and efficient to the ends of justice and its prompt administrations as the remedy in equity." *Watson v. Sutherland*, 5 Wall. 78; *Hager v. Shindler*, 29 Cal. 47; *Bruce v. Steamship Co.*, 5 Blatchf. 525.

The complaint also alleges that the plaintiffs were dealers in wood, and this was the only wood they owned from which to supply their customers; that they had contracted with their customers to furnish wood for the winter, which was approaching, and that if the defendant was not restrained and plaintiffs put into immediate possession of their property ir-

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reparable injury would ensue. Certainly this is good ground for equitable interposition. *Wilson v. City of Mineral Point*, 39 Wis. 160. The action at law would not have afforded an adequate remedy in this case. Had such an action been instituted, the defendant, by executing an undertaking, could have retained the property, and the measure of damages, if the property were not sold, could not have extended beyond the injury done to it, or, if sold, to the value of it when taken, with the interest from the time of taking down to the trial. There could have been no compensation for loss of trade, and commercial ruin would probably have been the result before an action at law would have terminated.

Considering the character of the property, and the time required to remove it, and all the facts in relation to the transaction between the parties, it seems clear to me that the remedy in equity could alone furnish adequate relief, and that the demurrer to the complaint was rightly overruled.

MURPHY *v.* FULD *et al.*

(February 8, 1886.)

APPEAL—REVIEW—DEFECTIVE RECORD.

Where, in an action to foreclose a mortgage, the transcript on appeal does not show affirmatively that one of the defendants is a married woman, an objection that a judgment could not be entered against such defendant, in that she is a married woman, will not be considered.

Action by John Murphy against Leon Fuld and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Bruner, Parsons & Bruner and Hawley & Ruick, for appellants.

The judgment must accord with, and be warranted by, the pleadings of the party in whose favor it is rendered. A judgment that is not supported by the pleadings is as fatally defective as one which is not sustained by the evidence. *Bachman v. Sepulveda*, 39 Cal. 688.

When a judgment is rendered upon the default of the defendant, the judgment must follow the prayer of the complaint. *Lowe v. Turner*, 1 Idaho, 107.

The complaint must state specifically the grounds on which a judgment for deficiency is demanded against a married woman; otherwise, a personal judgment taken upon default will be held void. *Wilts. Mortg.*

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Forec. p. 213; *Insurance Co. v. Glover*, (1878,) 14 Hun, 153.

If the wife has signed the mortgage alone, and not the bond, it will be erroneous to demand a personal judgment against her. *Gebhart v. Hadley*, 19 Ind. 270.

A. F. Montandon, for respondent.

No bill of exception being in the record, nor any error assigned, the judgment or decree must stand, unless the complaint will not support any judgment. *Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, Id. 128; *Diehl v. Hull*, Id. 352.

Any part of a description that may be disregarded and leave sufficient to identify the land may be treated as surplusage. *Anderson v. Baughman*, 7 Mich. 69; *Worthington v. Hylyer*, 4 Mass. 205; *Peck v. Malams*, 10 N. Y. 532.

The description in the decree is at least *prima facie* sufficient. *Whitney v. Buckman*, 13 Cal. 536; *De Leon v. Higuera*, 15 Cal. 483; *Hancock v. Watson*, 18 Cal. 138.

HAYS, C. J. This appeal is from the judgment. There is no bill of exceptions in the record. It nowhere appears in the transcript that defendant Rosa Fuld is married; hence the argument on that point cannot be considered. We think the complaint will sustain the judgment.

Judgment affirmed.

BUCK and BRODERICK, JJ., concurring.

CARSON *et al.* *v.* THEWS, County Auditor.

(February 8, 1886.)

TRIAL—FINDINGS OF FACT—RESPONSIVENESS TO ISSUES.

Where the answer to an application for *mandamus* to compel defendant, as county auditor, to draw a warrant in favor of plaintiffs for the construction of a courthouse, alleges that, before plaintiffs presented to defendant the order from the county commissioners for the amount due on the contract, a garnishment was served on defendant in a cause then pending in the district court wherein plaintiffs were defendants, a finding that defendant was served with a writ of attachment in an action then pending in which plaintiffs were defendants, and that such action had proceeded to judgment, and that the judgment remained unsatisfied, is not warranted by the issues.

Appeal from district court, Oneida county.

Mandamus, at the relation of Charles

Carson v. Thews.

Carson and others, to compel William B. Thews, county auditor, to draw a warrant in favor of plaintiffs for the construction of a county courthouse. From a judgment dismissing the writ, plaintiffs appeal. Reversed.

Kimball & Heywood, for appellants.

Mandamus is the proper remedy to enforce the performance of a duty, by the auditor, where, as is the case under the law of this territory, the duty is purely ministerial. High, Extr. Rem. § 104; *Turner v. Melony*, 13 Cal. 621; *Babcock v. Goodrich*, 47 Cal. 488.

The auditor is not the general representative of the county, and can refuse to draw warrants only in case the board exceeded its jurisdiction in making the order. *Babcock v. Goodrich*, 47 Cal. 514.

Counties are created for the purpose of government and the administration of justice, and are charged with civil and political duties, and hence, on grounds of public policy, are not liable to garnishment. *Divine v. Harvie*, 18 Amer. Dec. 194, and notes at page 200; *Merrell v. Campbell*, 49 Wis. 535, 5 N. W. Rep. 912; *Merwin v. Chicago*, 45 Ill. 133; *Mayor, etc., v. Rowland*, 26 Ala. 498; *Wallace v. Lawyer*, 54 Ind. 501; *City of Memphis v. Laski*, 9 Heisk. 511; *McDougal v. Board*, 4 Minn. 184, (Gil. 130.)

D. P. B. Pride, Atty. Gen., for respondent.

BRODERICK, J. In the court below judgment was rendered against the plaintiffs, and they appealed from the judgment. The complaint alleges in substance that the plaintiffs were co-partners; that on and prior to December 22, 1882, they had a contract with the county of Oneida to construct a courthouse for said county; that in pursuance of the contract they constructed the building; that on the twenty-seventh day of February, 1883, the board of county commissioners accepted said building from plaintiffs; that on the first day of March, 1883, the said board held a meeting, and the plaintiffs presented their account to the commissioners for the construction of the building; that the commissioners passed upon and allowed said account of plaintiffs, and found due thereon the sum of \$3,060 25, and made and entered an order that warrants be issued to the plaintiffs for the amount allowed.

It is further alleged that the plaintiffs, on the first day of March, 1883, presented said order to the defendant, the auditor

of said county, and demanded the issue of the warrants, and that the auditor refused, and still refuses, to issue the same. The complaint demanded the issuance of a writ of mandate commanding the defendant to issue and deliver to the plaintiffs the warrants described in the complaint, and an alternative writ was issued.

The defendant answered, and denied that the plaintiffs were co-partners, and denied that they contracted with the county for the construction of a courthouse; and further answering averred, in substance, that immediately upon the completion of said contract and its acceptance by said board of county commissioners there was served upon defendant a garnishment by the sheriff of Oneida county in a cause then pending in the district court of said county, wherein the Salmon River Mining & Smelting Company was plaintiff and Charles Carson was defendant, whereby defendant was prohibited and prevented from drawing and delivering the warrants in favor of the said Charles Carson & Co., and was directed and commanded to deliver said warrants to said sheriff; that the garnishment was served before the presentation of the order of the board of commissioners by Charles Carson, and before he requested defendant to issue and deliver the warrants to him.

Upon the issue thus joined the cause was tried, and the court found the following facts and conclusions of law: "(1) That the defendant William B. Thews was, on or about the twenty-fourth day of February, 1883, served with a writ of attachment in the case of Salmon River Min. & S. Co. v. Carson, and the warrants mentioned in the complaint in this action were attached in his hands pursuant to said writ. That this attachment was made prior to the demand of plaintiffs herein upon said Thews to have said warrants issued and delivered to them. (2) That said action of the Salmon River Mining & Smelting Company against Charles Carson has since proceeded to judgment, and said judgment still remains unsatisfied. (3) That the plaintiffs Charles Carson and J. K. Fowler were not co-partners, under the firm name of Charles Carson & Co. or any other name, at the time mentioned in the complaint. (4) That said above-named warrants mentioned in plaintiffs' complaint were the individual property of Charles Carson and were subject to levy under the attachment in the case of Salmon River Min. & S. Co. v. Carson."

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The court finds the following conclusions of law: "(1) That William B. Thews, recorder of Oneida county, Idaho, was and is under no legal obligation, and it was not his duty, to deliver said warrants to plaintiffs herein, but that it was and is his duty to deliver the same to the sheriff of Oneida county, to be by said sheriff sold in satisfaction of the judgment in said case of the Salmon River Mining & Smelting Company against Charles Carson. It is therefore ordered that the writ herein be dismissed absolutely."

There are two questions presented by this appeal: *First.* Are the findings of fact responsive to the issues made by the pleadings? *Second.* Do the findings support the conclusions of law drawn from the facts?

It is well settled that our system requires a finding upon every material issue. This applies, not only to the issues raised by the allegations of the complaint, but also to the issues raised upon affirmative defenses in the answer.

The defense pleaded and relied upon herein, and the one upon which the court below based its findings and judgment, is in the averment that in another action, wherein the Salmon River Mining & Smelting Company was plaintiff and Charles Carson defendant, the question involved in this action had been adjudicated and finally settled. Are the allegations of the answer in this regard sufficient? We think not. Our system of pleading is liberal; yet it requires that the ultimate facts upon which a party expects to rely upon the trial of his cause must be pleaded. To plead another action pending, by merely alleging that a cause had been commenced and was pending, is not sufficient under our practice.

There is here no averment in the answer that Carson was summoned in the former action, or that he ever appeared voluntarily or otherwise, or that a judgment had been rendered against him. In short, there is not an allegation that sufficiently shows that there was another action pending in which the court had acquired jurisdiction over Carson, nor that the questions involved in the case at bar had been adjudicated. Hence findings 1, 2, and 4 are without the issues. These findings of fact not being supported by the pleadings, it necessarily follows that the conclusions of law based thereon are unsupported, and the judgment erroneous.

For these reasons we think the judgment should be vacated, and the cause remanded for further proceedings. As the cause may be retried in the court below upon amended pleadings, and may there be finally settled, we have not inquired into the merits of the controversy, and express no opinion thereon.

Judgment reversed, and cause remanded to the court below for further proceedings in accordance with the views herein expressed.

HAYS, C. J., and BUCK, J., concurring.

TAYLOR v. STEVENSON *et al.*

(February 15, 1886.)

CONSTITUTIONAL LAW—PRISON COMMISSION ACT—VALIDITY.

13th Sess. Laws Idaho, p. 154, creating a prison commission, to consist of the governor, treasurer, and one other person whom they may select, being in conflict with Rev. St. U. S. § 1857, providing that all territorial officers shall be appointed by the governor, by and with the consent of the legislative council, is void.

Appeal from district court, Ada county.

Application by Samuel F. Taylor for a writ of mandate to compel E. A. Stevenson and others, as governor, comptroller, and treasurer, to audit and allow the bill of plaintiff, as sheriff, for transporting two prisoners to the penitentiary. An alternative writ was issued, to which defendants demurred. From a judgment for defendants, entered upon an order sustaining the demurrer, plaintiff appeals. Reversed.

Smith & Wright and *H. M. Bennett*, for appellant. *D. P. B. Pride*, Atty. Gen., and *Silas W. Moody*, for respondents.

BRODERICK, J. This action was commenced in the district court of Ada county to have the governor, comptroller, and treasurer audit and allow the bill of plaintiff as sheriff of Bingham county for transporting two prisoners, under sentence, from Blackfoot, Idaho, to the territorial prison, at Boise City, at the rate of 70 cents per mile, the compensation being claimed under the provisions of an act entitled "An act to provide for the keeping, discipline, and management of the territorial prisoners." 11th Sess. Laws, 303.

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This statute was approved February 10, 1881. An alternative writ of mandate was issued, and the defendants voluntarily appeared and demurred to the writ. The demurrer was treated as a motion to quash, and was sustained by the court. The plaintiff excepted and appealed, and here assigns as error the ruling upon the demurrer. The first three sections of the act under which this claim to compensation is made confers certain powers and imposes certain duties upon the governor, treasurer, and United States marshal as to the discipline, management, and maintenance of the territorial prisoners. Section 4 of the act fixes the compensation for the officers conveying the prisoners from the several counties to the territorial prison, and provides in substance that the governor, comptroller, and treasurer, or any two of them, shall audit the accounts, and the comptroller shall draw his warrant upon the territorial treasurer, and deliver the same to the officer entitled thereto, and the treasurer shall pay the same.

The defendants contend that this act is repealed, and that plaintiff's claim must be presented and audited under a subsequent statute. The thirteenth legislative assembly enacted what is known as the "Prison Commission Act," which was by its terms to repeal all acts in conflict therewith on and after the first day of April, A. D. 1885. Many of the provisions of this act materially differ from and are in conflict with the former act; indeed, it seems to us that the provisions of the two acts are so clearly repugnant to each other that they cannot stand together.

The principal question presented by this appeal, and the only one we need consider and determine, is whether the act known as the "Prison Commission Act" is a valid enactment. If so, then it follows that the act of 1881 is repealed; but if the act of 1885 is not valid, then it follows that the act of 1881 is still in full force, and is the law of the territory upon the subject to which it relates. The first section of the act of 1885 reads as follows: "Section 1. The governor and territorial treasurer of Idaho territory, and one other resident thereof that they may select, are hereby appointed prison commissioners for Idaho territory, with power and authority for (in behalf of this territory) the safe-keeping, maintaining, and working of all territorial prisoners now under sentence in

this territory, and all who may hereafter be sentenced by the courts of this territory to labor in the penitentiary prior to March the first, A. D. 1891. Said commissioners shall have power and authority to contract with the authorities of any state or territory in the United States for the keeping, maintaining and working of the prisoners of the territory, or any part or number of them: provided, that when a contract is made in another territory or state that the price or cost of keeping and maintaining of said prisoners shall not exceed twenty-five cents per day for each prisoner, in addition to the amount allowed contractors for the labor of said prisoners."

The contention on behalf of plaintiff is that this section is in contravention of the provisions of the organic act. The provision relied upon is section 1857 of Revised Statutes of the United States, and is in the following language: "All township, district, and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory; and all other officers not herein otherwise provided for the governor shall nominate, and, by and with the advice and consent of the legislative council of each territory, shall appoint." Congress having the paramount right to legislate for the territories, it must be conceded that if the act of the legislature under consideration is obnoxious to the objection urged against it, the same cannot be upheld or sustained.

It cannot be disputed that this act attempts to create territorial offices, and to appoint two commissioners, who, in conjunction with one other resident of the territory, to be selected and appointed by the two named, should perform the functions of such commissioners for a term of years. This delegation of authority on the part of the governor and legislative council to the two commissioners, to select and appoint another, must be regarded with some degree of misgiving and doubt. All the powers intrusted to government in the territories, as well as in the states, are divided into three departments, the executive, the legislative, and the judicial. It is wisely provided that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and it is ap-

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parent that the perfection of the system requires that the lines which separate and divide these departments shall be clearly defined and closely followed.

It is also true, as a general proposition, that the powers confided by the fundamental law to one of these departments cannot be exercised by another. And where, as in this case, the organic law provides that the governor, by and with the advice and consent of the legislative council, shall appoint the territorial officers, we do not think that the authority can be delegated to another body and the governor thus divested of his prerogative. If this can be done and sanctioned in one instance it may be in others, and by this method, or in the exercise of the two-thirds legislative rule over the governor's veto, the executive may be deprived of the appointing power which congress has wisely confided to the executive branch of the territorial government. *Hill v. Territory*, 2 Wash. T. 147, 7 Pac. Rep. 63.

We are clearly of the opinion that the act in question is in conflict with the organic law, and therefore void, and that the plaintiff's claim should be audited under the provisions of the act of A. D. 1881. This conclusion has not been reached without a careful consideration of the questions presented, and the effect this determination may have upon the object sought to be accomplished by the legislation attempted. The subject of the proposed law is doubtless within the scope of "rightful legislation," but the purpose must be accomplished by constitutional methods. See paragraph 4, Supp. Rev. St. U. S. 559. It was suggested on the argument, but not urged, that if the "prison commission act" is void, the former act is also invalid. We do not think so. The act of A. D. 1881 does not attempt to create offices, nor to appoint officers, but only confers certain duties upon the governor and treasurer *ex officio*. This the legislature, doubtless, had the power to do, and under the act of congress last cited we think might have gone further and provided for what was intended by the last act of the legislature.

For the reasons given the judgment of the court below is reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion.

HAYS, C. J., and BUCK, J., concurring.

TOULOUSE *et al.* v. BURKETT.

(February 15, 1886.)

APPEAL—REVIEW—DEFECTIVE RECORD.

1. Where the record on appeal does not contain the evidence adduced in the trial court, an objection that a finding of fact is not supported by the evidence will not be sustained.

EXECUTORS AND ADMINISTRATORS—ACTION AGAINST ESTATE—PRESENTATION TO ADMINISTRATOR.

2. An action against the administrator of an estate to declare a vendor's lien on certain property sold by plaintiff to the intestate is not a "claim" that must be presented to the administrator for rejection or allowance before action is brought, within the meaning of Probate Practice Act, § 138, requiring such presentation.

Appeal from district court, Alturas county.

Action by Andrew Toulouse and another against J. M. Burkett, administrator of the estate of Nicholas Boucher, deceased, to declare a vendor's lien on certain mining property of defendant's intestate, and to foreclose the same. From a judgment for plaintiffs, defendant appeals. Affirmed.

Kingsbury & McGowan and *Brumback & Lamb*, for appellant.

A complaint in an action against the administrator of an estate that does not allege that any claim for the amount demanded was presented to the administrator for allowance, and that it was rejected, and that action was commenced within the statutory period after rejection, should be dismissed, as stating no cause of action. Probate Practice Act, §§ 131, 136; Rev. St. pp. 265, 267.

And, if the question of failure to properly allege and prove these statutory steps is raised in the court below, and the objection is not met by amendment and proof, it is fatal to the action. *Hentsch v. Porter*, 10 Cal. 558; *Coleman v. Woodworth*, 28 Cal. 569; *Bank v. Howland*, 42 Cal. 134.

A. F. Montandon, for respondents.

Findings cannot be impeached for being contrary to the evidence, except by motion for a new trial. *Pico v. Cuyas*, 47 Cal. 178; *Rice v. Inskeep*, 34 Cal. 224.

The decree must stand unless the complaint will not support any judgment. *Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, Id. 128; *Diehl v. Hull*, Id. 352.

The nonpresentation of a claim against the estate of a deceased person to the administrator will not necessarily deprive the district court of jurisdiction over the

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same. Organic Act, § 1868; *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Rosenberg v. Frank*, 58 Cal. 400.

An objection to the complaint that defeats only plaintiffs' present right to recover, must be made in the court of original jurisdiction, during the term at which the judgment is rendered, and cannot be made in the appellate court for the first time. *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Bank v. Howland*, 42 Cal. 134.

BUCK, J. The plaintiffs in this action were partners, doing business as miners, in Alturas county, in this territory, and the owners of certain mines mentioned in the complaint. On the fifteenth day of October, 1881, they executed and delivered to Nicholas Boucher, and to his heirs and assigns, a deed of the undivided one-third of said mines, in consideration of \$2,000. The said consideration was not paid at the time said deed was delivered to said grantee, but said indenture of deed contained the stipulation by the grantors that said grantee "agrees to work on said mines, without remuneration, until the same are sold or otherwise disposed of; and should the same be sold, or mineral extracted therefrom be sold, the grantors shall receive the said two thousand dollars' consideration out of the first money received from said sales over and above the value of said services of grantee." The complaint alleges that said conveyance was made and delivered in pursuance of a contract of partnership between the grantors and grantee therein, whereby the partners were each to own one-third of said mines, and be equal partners in working the same; but through accident and mutual mistake, all of said parties being illiterate and of foreign birth, not understanding the English language, the intended contract of partnership, with condition to convey the one-third interest in said mines, was made to convey said interest absolutely, and without fully stating the terms and conditions of said partnership and of said conveyance; that said grantee received the benefits of said contract with plaintiffs on said mines, worked according to said agreement until August 24, 1882, when a contract of sale of said mines was made; that afterwards, the said sale not being made, the plaintiffs and the grantee, Boucher, received \$4,000 forfeit money therefrom, which sum was paid to said Boucher, and by him divided

equally between them, the said Boucher retaining therefrom \$1,333.33; that said forfeit was first paid to said Boucher, and one-third retained by him, against the protest of plaintiffs, who claimed the same as a part of the proceeds of the said mines which should be applied on the said purchase price of \$2,000; that, after the receipt of said forfeit money, said Boucher refused and neglected to work on said mines, and left the same, and continued away therefrom until the first day of June, 1883, when he died, and defendant, Burkett, was duly appointed administrator of his estate. The complaint further alleges that the plaintiffs have performed their part of said agreement of sale and partnership, but that neither Boucher nor his representatives have performed their part thereof, but have refused so to do, and still refuse and neglect to fulfill the same; that at the date of the commencement of this action there was 546 days' labor due from defendant on said contract. Wherefore plaintiffs pray that said deed be rescinded; that said contract be reformed to comply with the real understanding of the parties; that said defendant, as administrator of the estate of said Boucher, be decreed to reconvey said one-third interest to plaintiffs, and, in case said relief cannot be granted, the vendor's lien on said premises be foreclosed and sold to pay the amount ascertained to be due plaintiffs in consequence of a breach of said contract; that plaintiffs have a personal judgment against defendant for any deficiency; and for such further relief as may be agreeable to equity. The defendant answered the complaint, admitting that plaintiffs were the owners and in possession of said mines, as alleged in the complaint, by a failure to deny the same, and the making and delivery of said deed, but denies all the other material allegations of the complaint, and prays that the suit be dismissed at plaintiffs' costs. The case was tried by the court, and the findings of fact sustain the allegations of the complaint, with the exception of findings that there was no mistake in the execution of the said deed; that the plaintiffs were entitled to two-thirds of 500 days' labor from said Boucher, or on his behalf, from said mines, and that the said labor is of the value of four dollars per day, amounting to \$1,333.33.

As conclusions of law the court find: (1) "That two thousand dollars is due plaintiffs from said estate of Boucher, and is a lien upon the interest in said mine

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described in said deed." (2) "The \$1,333.33 due plaintiffs for labor, as aforesaid, is a part of the purchase price of said mine, and is a valid lien on the same." (3) "That, by the commencement of this action, the plaintiffs elected to terminate the contract, and that they are not allowed any other or greater sum than is herein allowed for the failure to perform said contract." (4) "That the \$4,000 forfeit money was received by all the parties, and settled between themselves, and plaintiffs are not entitled to recover the same." (5) "That upon the sale of the property by the administrator he should settle and discharge the costs of this action, and the sum of \$1,333.33 herein declared to be a lien upon said premises."

The defendant appeals from the judgment, and incorporates in the record a bill of exceptions. In the bill, exception is taken to several of the findings of fact by the court as being contrary to the evidence; but as no part of the evidence in the court below is brought up in the record, this court has no means of determining the correctness of the findings of fact. It is also well established that exceptions to findings of fact, on the ground that they are contrary to the evidence, can only be reviewed on a motion for new trial. *Pico v. Cuyas*, 47 Cal. 174; *Rice v. Inskeep*, 34 Cal. 224; Code Civil Proc. § 411; *Haynes*, New Trials & App. § 96.

The second point made in appellant's brief is that the complaint is not sufficient to sustain the judgment, in that it fails to allege that the claim of plaintiffs was presented to the administrator for his acceptance or allowance. Prob. Act, § 128. Upon this objection it has been held in the adjudicated cases that it is not necessary to allege the presentation and rejection of the claim, but that it may be proven on the trial without such allegation. *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568. It is, however, admitted by respondent that no such evidence was in fact given, and it is insisted that the cause of action, as set out in the complaint, is not a "claim," in contemplation of the probate act.

In *Gray v. Palmer*, 9 Cal. 616, in which very elaborate briefs were prepared, and exhaustive arguments were made, to determine the signification of this term, as used in the statute identical with our own, the court say: "It would seem clear from the different sections of the act, construed together, as well as from the nature and reason of the case, that the

words 'claimant' and 'claim' are used as synonymous with 'creditor' and 'legal demand for money.'"

In *Fallon v. Butler*, 21 Cal. 24, a suit to foreclose a mortgage, Judge FIELD says: "The term 'claims' in the probate act only has reference to such debts or demands against the decedent as might have been enforced in his life-time by personal actions for the recovery of money, and upon which only a money judgment could have been rendered."

The adjudicated cases, and the reason of the law, indicate the rule to be as suggested by Justice FIELD, above cited: that in cases purely equitable, or in which a purely equitable relief is sought, the cause of action set out in the complaint does not constitute a "claim" which must be presented to the administrator, under section 138 of our probate act, before an action may be maintained. This is held to be the rule in actions for the foreclosure of mortgages and liens where personal judgments over are not sought.

In the case at bar the plaintiffs were in the possession of the property in dispute, and had a vendor's lien thereon, for the unpaid purchase price. The real object of the suit was to foreclose this lien. It is true, the plaintiffs demanded a personal judgment over against the administrator. The test, however, is not what a litigant demands, but what he is entitled to receive. His prayer for general relief enabled the court to grant such relief as was agreeable to equity.

The only remaining point is that the plaintiff Toulouse was permitted to testify, against the objection of defendant and contrary to section 898, subd. 3, of our Code of Civil Procedure, as to the ownership and possession of the mines conveyed at the time the deed was made. An inspection of the pleadings shows that such ownership and possession was alleged in the complaint, and not denied in the answer. The testimony referred to could not have injured defendant, as it went to facts admitted in the pleadings.

We find no error in the trial below, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

PETITION FOR A REARGUMENT.

(March 3, 1886.)

BUCK, J. On February 15th, the decision of the court herein was announced, con-

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firming the judgment appealed from. On the 23d the appellant filed his petition for a reargument. As a basis for the petition, it is set out that the court was mistaken in stating that the allegation of ownership and possession of the premises in dispute set out in the complaint was admitted in the answer, by a failure of defendant to deny the same, and on the further ground that the cases of *Gray v. Palmer*, 9 Cal. 616, and *Fallon v. Butler*, 21 Cal. 24, are practically overruled in *Ellis v. Polhemus*, 27 Cal. 354, and in *Pitte v. Shipley*, 46 Cal. 162. The allegation of ownership and possession of the premises in dispute are denied in terms, but admitted in fact in the answer. The defendants allege in their answer that the quitclaim deed set out in the complaint contained the exact understanding of the parties, and that there was no mistake or misunderstanding. If this be true, the defendants stand in the relation of vendee of the plaintiffs, the vendors in the deed. This action is brought to foreclose the vendor's lien for alleged unpaid purchase money. In such an action the vendee is estopped from denying his vendor's title. While in some actions the vendee may dispute his vendor's title, the doctrine is (*Bigelow, Estop.* 415) "that, until the grantee has paid for the land, he holds, in respect to the payment, a relation of duty to the grantor similar to that of tenant and landlord. The grantee cannot escape the payment of the purchase price by disclaiming the title of his grantor." In the case at bar the defendant admits that whatever rights he has to the premises he has by virtue of purchase from plaintiffs, and in an action to foreclose the vendor's lien for purchase price, admitting as he does the purchase, the issue is, is there purchase money due? He cannot disavow his vendor's title on that issue. *Bigelow, Estop.* 414. The effect, therefore, of the defendant's answer is to deny the plaintiffs' allegation of ownership in form, and to admit it in fact.

It is claimed in the petition, also, that the California cases cited in support of our decision as to the word "claim" have been substantially overruled in later cases. In support of this statement the petitioner cites *Ellis v. Polhemus*, 27 Cal. 354, and *Pitte v. Shipley*, 46 Cal. 162. The signification of this term has been under discussion in the California courts since 1858; commencing with *Gray v. Palmer*, 9 Cal. 616, and continued in *Fallon v. But-*

ler, 21 Cal. 24; *Ellis v. Polhemus*, 27 Cal. 354; *Christy v. Dana*, 34 Cal. 553; *Sichel v. Carillo*, 42 Cal. 505; *Pitte v. Shipley*, 46 Cal. 155; and *Estate of McCausland*, 52 Cal. 568. Much that has been said in the discussions of this question has been outside of the issues. We find in them nothing to change our opinion upon this question at issue. It is evident that the courts of that state do not understand that the cases referred to have been overruled. In *Estate of McCausland*, above cited, the court say: "In *Fallon v. Butler*, Mr. Chief Justice FIELD said: 'Whatever signification there may be attached to the word "claim," standing by itself, it is evident that in the probate act it has reference to such debts or demands against the decedent as might have been enforced against him in his life-time, by personal action, for the recovery of money, and upon which only a money judgment could have been rendered.'" This definition, they say, "in our opinion, is correct."

We are unable to see that any benefit would arise by a reargument of the case, and the prayer of the petitioner is therefore denied.

HAYS, C. J., and BRODERICK, J., concurring.

CEDERHOLM *v.* LOOFBORROW *et al.*

(February 15, 1886.)

ABATEMENT — ANOTHER ACTION PENDING — FORECLOSURE OF CHATTEL MORTGAGES.

Under Code, § 468, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon personal property, the dismissal was proper of an action of claim and delivery, begun after the institution and during the pendency of an action to foreclose a chattel mortgage upon the same property.

Appeal from district court, Alturas county.

Action by J. L. Cederholm against H. Loofborrow and another to foreclose a chattel mortgage. During the pendency of this action, plaintiff commenced an action of claim and delivery against the defendants for the recovery of the same property. The cases were consolidated, and tried to a referee. The referee reported that a decree of foreclosure be entered, and that the action of claim and delivery be dismissed, and judgment was entered accordingly. From that part of the judg-

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ment directing a dismissal of the action of claim and delivery, plaintiff appeals. Affirmed.

Kingsbury & McGowan, for appellant.

Goods are not in custody of the law until in possession of some officer or servant of court, under or by virtue of some writ or order. 6 Wait, Act. & Def. p. 617; *Buckley v. Buckley*, 9 Nev. 379.

L. Vineyard, for respondents.

HAYS, C. J. Defendants gave plaintiff a chattel mortgage which became due on the first day of December, 1884. On the fourth day of December plaintiff commenced an action to foreclose the same. On the next day he demanded possession of the mortgaged property, which was refused. Three days later he brought an action of claim and delivery for possession of the property. Defendants answered in each suit. The causes coming on to be heard were consolidated for the purpose of trial, and then, by consent, were referred to a referee to take testimony, make findings of fact and conclusions of law, and to report such judgment as he deemed proper and just. Afterwards, the referee filed his report, wherein he finds as facts that the plaintiff was authorized to take possession of the mortgaged property at the time demand was made; that demand was made for possession of the property and possession refused; that at the time of demand there was due and unpaid on the mortgage \$365.18. The referee reported in his conclusions of law that decree of foreclosure be entered for the amount due on the mortgage and order of sale of mortgaged property; that the second action for the possession being brought while the property was under the control and jurisdiction of the court in the former action, and under circumstances which would prevent the plaintiff from using the possession of said property for the only purpose for which he had any right to the possession, to wit, to sell the same, should be dismissed at plaintiff's costs without returning the property, as it appears to be in possession of the officer whose duty it will be to sell the same under the equitable decree to be rendered and entered herein. Judgment was entered in accordance with the conclusions of the referee, from which judgment for costs the plaintiff appeals to this court.

Section 468 of our Code provides: "There can be but one action for the recovery of any debt or the enforcement of

any right secured by mortgage upon real estate or personal property." Section 341 of the Code provides for the appointment of a receiver in action to foreclose mortgages. It is evident the legislature intended to do away with a multiplicity of actions, as they have fully provided for the protection of all rights in one suit; and where the plaintiff, as in this case, chose to enforce his rights by foreclosure, that action becomes exclusive. *Eastman v. Turman*, 24 Cal. 382.

The plaintiff's remedy in the first suit was full and complete. He was not only entitled to have a foreclosure of the equity of redemption and a sale of the chattels, but, also, to have the property fully protected from conversion or destruction until the same should be sold. *Freeman v. Freeman*, 17 N. J. Eq. 44; 3 Wait, Act. & Def. 423. If plaintiff failed to ask for sufficient relief in his foreclosure proceedings, that was a fault of which he cannot complain. We are aware that it has been held in many states that the two actions could be maintained, but we think they did not have such statutory provisions as are found in this territory. *Jones, Chat. Mortg.* § 758, and cases there cited.

For these reasons we think the second action was rightfully dismissed at plaintiff's costs, and the judgment should be affirmed.

BUCK and BRODERICK, JJ., concurring.

PEOPLE v. BERNARD.

(March 3, 1886.)

CRIMINAL LAW — INSTRUCTIONS — COMMENTS ON TESTIMONY.

1. Under Criminal Practice Act, § 354, providing that the court, in charging the jury, may state the testimony and declare the law, error cannot be predicated on an instruction in a criminal prosecution that there was evidence tending to show that defendant fired a revolver, and inflicted upon deceased a wound, from which he died.

HOMICIDE—INSTRUCTIONS.

2. On a trial for murder, error cannot be predicated on an instruction that, to justify the homicide, "there must be danger of personal injury, or the fear of personal injury, to that extent that the only means to avoid the loss of life or great personal injury is to kill the assailant."

Appeal from district court, Nez Perces county.

Salt Lake Brewing Co. v. Gillman.

One Bernard was convicted of manslaughter, and appeals. Affirmed.

Brumback & Lamb, for appellant. *D. P. B. Pride*, Atty. Gen., for the People.

BRODERICK, J. The defendant was accused of the murder of John J. Enright, was tried, and convicted of manslaughter, and sentenced to hard labor in the territorial prison for eight years. From this judgment he appeals. The first point made on his behalf on the appeal is that the court erred in giving the jury the following instruction: "Evidence has been given tending to show that the deceased, John Enright, entered the printing office of the defendant for the purpose of taking therefrom his blankets, and that while there he addressed to defendant certain language which you remember, and thereupon the defendant got down from the printing stool and ordered him, Enright, out of his office; that said Enright not going on such order, the defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died." The criticism on the foregoing instruction is on the latter part of it; that is, it is claimed the court erred in saying to the jury: "The defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died." Under our statute (criminal practice act, § 354) the court, in charging the jury, may state the testimony and declare the law; this is what was here done. We cannot by any rule of law subdivide this instruction in the manner contended for, but we must take and consider the entire paragraph, and thus determine whether or not it was misleading. Certainly, under our practice and the circumstances of this case, it was not error for the court to tell the jury that there was evidence tending to prove the facts as stated in this instruction.

The second alleged error complained of is the giving of the following instruction: "There must be danger of personal injury, or the fear of personal injury, to that extent that the only means to avoid the loss of life, or great personal injury, is to kill the assailant." Section 26 of crimes act fully warrants this instruction. Had this section of the statute been copied and given as an instruction, the defendant would have had as good ground for complaint as he has against the one given and here objected to.

The third and last alleged error complained of is in giving the following por-

tion of an instruction: "And that he had in good faith endeavored to decline any further struggle before the fatal shot was fired." It is apparent from the reading that this is not a full or complete sentence. It is selected and taken from a charge which, in the main, is unobjectionable. As the facts appear to us, these lines might have been omitted from the paragraph, but we are unable to see how any substantial right of the defendant could have been prejudiced by them. The meaning of the court below cannot be fairly ascertained by a partial view of what the jury was told was the law by which they should be governed in determining a question of fact. To arrive at such meaning we must look at the entire charge upon the point to which it relates. This rule is recognized in numerous decisions. *People v. Nelson*, 56 Cal. 81, and cases cited; *People v. Welch*, 49 Cal. 182; *People v. Doyell*, 48 Cal. 93; *U. S. v. Snow*, 4 Utah, 280, 9 Pac. Rep. 501. Section 482 of the criminal practice act provides that we must give judgment here without regard to technical error or defects which do not affect substantial rights. The statute authorizes the entire instruction from which the words objected to are taken to be given in a proper case, and we understand that it is supported by the general doctrine. *Whart. Hom.* 485, and cases there cited.

From an examination of the evidence and the entire record we are satisfied the defendant could not have been injured by these instructions, or either of them, and that he had a fair trial, and was rightly convicted. Judgment affirmed.

HAYS, C. J., and BUCK, J., concur.

SALT LAKE BREWING CO. *v.* GILLMAN *et al.*

(March 3, 1886.)

APPEAL FROM JUSTICE'S COURT — SERVICE OF NOTICE.

Code Civil Proc. § 665, provides that any person dissatisfied with a justice's judgment may appeal therefrom to the district court, at any time within 30 days after the rendition of the judgment, by filing a notice of the appeal with the justice, and serving a copy on the adverse party. Section 669 provides that such appeal is not effectual until an undertaking is filed. *Held*, that an appeal from justice's judgment rendered October 2d was well taken, where it appeared that the notice and undertaking were filed with the justice on the 6th, and a copy of the notice on the adverse party

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on the 15th; the order of the filing of the undertaking and the service of the copy being immaterial.

Appeal from district court, Alturas county.

Action by the Salt Lake Brewing Company against John Gillman and others. There was judgment in a justice's court for plaintiff, and defendants appeal to the district court. From an order overruling plaintiff's motion to dismiss such appeal, it appeals. Affirmed.

Kingsbury & McGowan, for appellant.

The notice of appeal must be served before the undertaking is filed. *Hastings v. Halleck*, 10 Cal. 32; *Hewes v. Manufacturing Co.*, 62 Cal. 518; *Shissler v. Crooks*, 1 Idaho, 369; *People v. Hunt*, Id. 371; *Clark v. Lowenberg*, Id. 654.

F. E. Ensign, for respondents.

The order of filing or serving notice of appeal or filing undertaking on appeal is immaterial where all the steps necessary to perfect the appeal are taken within the 30 days specified in the statute. *Coker v. Superior Court*, 58 Cal. 177; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. Rep. 6, 509.

The word "may" means "must" or "shall" only in cases where the public interests and rights are concerned, and where the public or third persons have a claim *de jure* that such should be the construction given to the word. *Malcom v. Rogers*, 15 Amer. Dec. 467, notes; *Turnpike Co. v. Miller*, 5 Johns. Ch. 112; *Malcom v. Rogers*, 5 Cow. 188; *Martin v. Mayor, etc.*, 1 Hill, 547; *Rogers v. Wing*, 5 How. Pr. 50; *Railroad Co. v. Coburn*, 6 How. Pr. 224; *In re Buffalo & B. Plank Road Co. v. Commissioners of Highways of Town of Lancaster*, 10 How. Pr. 239; *Baldwin v. Mayor, etc.*, 41 N. Y. 411; *Fisher v. Hall*, 41 N. Y. 424; *Mason v. Fearson*, 9 How. 259; *Supervisors v. U. S.*, 4 Wall. 446.

BRODERICK, J. On the second day of October, 1885, the plaintiff recovered judgment against the defendants before a justice of the peace in Alturas county. On the sixth day of same month the defendants filed with the justice their notice and undertaking on appeal, and on the fifteenth day of the same month they served upon the plaintiff a copy of the notice of appeal. The transcript and papers on appeal were transferred to the district court, and the plaintiff there moved to dismiss the appeal on the ground that the district court had not acquired jurisdiction of the same, as no undertak-

ing on appeal had been filed since the notice of appeal was served. The motion was overruled and denied, and from the order of the district court the plaintiff appeals to this court.

It is contended on behalf of the plaintiff that the appeal was not taken in the manner required by law, and in support of this proposition we are referred to *Shissler v. Crooks*, 1 Idaho, 369; *People v. Hunt*, Id. 371; *Clark v. Lowenberg*, Id. 654. These decisions were made upon the statute which provides for "appeals in general," or perhaps, more correctly speaking, for appeals from the district to the supreme court. This statute differs essentially from the one we are now called upon to consider and construe, and hence the cases cited, while doubtless correct upon the questions there presented, have no application to the case at bar.

By section 665 of the Code of Civil Procedure it is provided that "any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party." Section 668 provides in substance that upon receiving the notice of appeal, and on payment of the fees of the judge or justice, and filing an undertaking as required in the next section, and after settlement of the statement, if any, the judge or justice must, within five days, transmit to the clerk of the district court, with the papers in the case, a transcript of the docket entries. By section 669 it is further provided that "an appeal from a justice's or probate court is not effectual for any purpose, unless an undertaking be filed with two or more sureties," etc.

It may here be observed that this statute, unaided by any other, prescribes the mode or manner of appeal from judgments rendered in probate and justice's courts. Three things are made indispensable: the filing of the notice of appeal, the service of a copy of the same on the adverse party, and the filing of an undertaking; and all these things must be done within 30 days from the rendition of the judgment, and are jurisdictional; but the statute does not prescribe the order in which these several steps must be taken. Here the notice of appeal and undertaking were filed four days after the judgment was rendered.

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This did not effectuate the appeal until the notice was served as required by law. The notice was served nine days after the filing, and it will be seen that all these acts were done within the statutory time, and we cannot think that the mere order in which they were done is material. It has been, in effect, so held under the statute from which ours was copied. *Coker v. Superior Court*, 58 Cal. 177; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. Rep. 6, 509.

The plaintiff insists that by reason of the filing of the undertaking on appeal prior to the service of notice that he was denied his statutory right of objecting to the sufficiency of the sureties. It is true the statute provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, but we are inclined to believe that this statute is only directory, and that an insufficient undertaking may be objected to when a substantial defect is ascertained, or that the defect or irregularity may be waived. *Rabe v. Hamilton*, 15 Cal. 32. It will be seen that the statute does not require notice to be given of the filing of the undertaking; service of notice of appeal is the requirement, and this need not necessarily be done before the undertaking is filed. The statute does not require it. In construing a statute we must look to the language used, and endeavor, if possible, to ascertain the intention of the legislature; and applying this rule to the statute in question we are unable to see that anything more was intended than that the appeal should be perfected within 30 days from the rendition of the judgment.

It may here be observed that no showing was tendered in the court below that on account of accident or mistake the plaintiff had been deprived of the right to object to the sufficiency of the undertaking. No claim was made that the undertaking was for any reason insufficient, or that any injury would likely result; but the plaintiff rested its application on the cold question of jurisdiction. Whether, if it had chosen to pursue the other course suggested, it would have been availing, we do not here decide. On this question we refer, however, to the following authorities: *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Stark v. Barrett*, Id. 364; *Hayne*, New Trials & App. par. 214, p. 649; section 668, Code Civil Proc.

After as careful consideration of the

question presented by this appeal as we have been able to give, we are satisfied that the ruling of the court below was correct. The judgment and order are therefore affirmed.

HAYS, C. J., and BUCK, J., concurring.

GAFFNEY v. HOYT *et al.*

(March 3, 1886.)

PARTNERSHIP—EVIDENCE TO PROVE—COMMON REPORT.

1. Evidence of common report is admissible to prove a partnership, where it appears that such report was known to the parties sought to be charged.

JUDGMENT—MODIFICATION—STRIKING OUT ONE DEFENDANT.

2. Where, in an action to charge several defendants as partners, the answer denies the partnership and the several liability of the persons sought to be charged, error cannot be predicated on the action of the court in setting aside the judgment as to one of the parties defendant, as by Code Civil Proc. § 352, the court may, in its discretion, render judgment against one or more of several defendants.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

3. Error cannot be predicated on the refusal of the court to grant a new trial on the ground of newly-discovered evidence where it appears that the alleged evidence is entirely irrelevant to the issues made by the pleadings.

Appeal from district court, Alturas county.

Action by Bartley Gaffney against M. L. Hoyt, W. B. Dodridge, C. E. Wurtelle, and George Y. Wallace to recover money deposited by plaintiff with defendants as bankers, under the firm name of M. L. Hoyt & Co. From a judgment for plaintiff, and from an order setting aside the judgment as to defendant Wurtelle, defendants Hoyt, Dodridge, and Wallace appeal. Modified.

Kingsbury & McGowan, for appellants.

In a joint action against copartners as such, on a contract, the action must stand as to all or none. Pars. Partn. 108; *Fetz v. Clark*, 7 Minn. 217, (Gil. 159;) *Carlton v. Chouteau*, 1 Minn. 102, (Gil. 81;) *Foerster v. Kirkpatrick*, 2 Minn. 210, (Gil. 171;) *Johnson v. Lough*, 22 Minn. 203; *Bliss*, Code Pl. §§ 325, 327; *Hooper v. Farwell*, 3 Minn. 106, (Gil. 58;) *Whitney v. Reese*, 11 Minn. 138, (Gil. 87;) *Hil. New Trials*, p. 446, § 2; *Id.* p. 452, § 13; *Sneath v. Griffin*, 48 Cal. 438.

The court cannot, without notice to defendants or consent of plaintiff, make a

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new judgment, not under the pleadings nor on the verdict. *Bachman v. Sepulveda*, 39 Cal. 688; 1 Suth. Dam. 207; *Stearns v. Aguirre*, 7 Cal. 443-449; *Curry v. Roundtree*, 51 Cal. 184; 2 Lindl. Partn. 482, and notes; 2 Greenl. Ev. § 483.

The other defendants whom the judgment is ordered to stand against have a right to object to any one jointly bound with them being released without any notice to them. *Freem. Judgm.* §§ 231-233; *Greenl. Ev.* § 112; *Chase v. Torrey*, 20 Vt. 395; *Nuckolls v. Irwin*, 2 Neb. 60.

Angel & Sullivan, for respondent.

Novation must be express, and it must appear that the original debtor was in express terms released by the creditor, and a new debtor substituted in his place. *Add. Cont.* p. 527; *Pars. Cont.* p. 219, note c; *Butterfield v. Hartshorn*, 26 Amer. Dec. 741; *McLaren v. Hutchinson*, 18 Cal. 80; *Gyle v. Schoenbar*, 23 Cal. 538; *Bonnemer v. Negrete*, 35 Amer. Dec. 217.

The acceptance by the creditor of an order on a particular fund for the amount of his debt is not sufficient to constitute a novation, unless the original debtor was by express agreement discharged. *Adams v. Power*, 48 Miss. 461; *Lynch v. Austin*, 51 Wis. 287, 8 N. W. Rep. 129.

Judgment may be given for or against one or more of several defendants. *Section 351, Code Civil Proc.*; *Rowe v. Chandler*, 1 Cal. 167; *Ingraham v. Gildermester*, 2 Cal. 89; *Kritzner v. Warner*, 4 Cal. 231; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, Id. 402; *Fox v. West*, 1 Idaho, 782.

BUCK, J. About July, 1883, M. L. Hoyt & Co., doing business as bankers at Shoshone, Alturas county, Idaho territory, received on deposit of the plaintiff, Bartley Gaffney, \$914.20. Shortly after, to-wit, August 3, 1883, the said company sold their said business to Ross Cartee, and gave notice to their depositors to "look to said Cartee for the payment of any money due them from said bank, from the date of said notice." That afterwards, the said Cartee having failed, the plaintiff demanded payment of the said firm of Hoyt & Co. of his said deposit, which demand being refused he commenced this action for the amount claimed to be due. The amended complaint was filed July 11, 1884. It alleged the partnership of defendants, the deposit of the money, the demand of payment, and the refusal to pay; and demanded judgment for the amount due, with costs. The defendants filed their

answer August 1, 1884, and interpose a general denial. Neither pleading is verified. The cause was tried by a jury, and they returned a verdict for plaintiffs of \$1,027.69, and judgment was entered thereon, against all the defendants, on the third day of July, 1885. The defendants gave notice of motion to set aside the verdict and judgment, and for a new trial, on the ground of accident and surprise, insufficiency of the evidence to sustain the verdict, newly-discovered evidence, and because the verdict was contrary to law. On the tenth day of October, 1885, the court granted the motion to set aside the verdict as to Wurtelle, overruled the motion as to the other defendants, and reformed the judgment. From the order overruling the motion for a new trial, and from the modified judgment, the defendants appeal, and incorporate a bill of exceptions to the order overruling the motion for a new trial, and a statement, into the record. In the specifications of errors the appellants assign as error: "*First*, insufficiency of the evidence to prove that the defendants were partners; *second*, that the evidence was sufficient to establish that the plaintiff consented to change his deposit account from Hoyt & Co. to Cartee; *third*, that the court erred in admitting, against the objection of defendants, testimony of common report as to the copartnership of defendants; *fourth*, that the order reforming the judgment is against law."

In the brief of appellant 15 assignments of error are set out; but, as no errors will be considered on appeal that were not set out in the specifications of error in the statement of the case and in the bill of exceptions, we shall consider only those above enumerated.

The first and third assignments of error, to-wit, that the evidence was insufficient to prove that the defendants were partners, and error in admitting evidence of common report to prove partnership, may be considered together. The rule seems to be established, as the result of numerous adjudicated cases, that common report can only be admitted to prove the partnership of the different members of a firm when it is accompanied with evidence that such report was known to the party sought to be charged. 5 Wait, Act. & Def. 114, and numerous cases there cited; *Bowen v. Rutherford*, 60 Ill. 41; *Brown v. Crandall*, 11 Conn. 92; *Halliday v. McDougall*, 20 Wend. 81.

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In the case at bar, the admission of Hoyt in his deposition introduced in evidence, and the admission of Wallace as testified to by Mr. Angel, were sufficient to justify the verdict of the jury as to their partnership. Parties plaintiff are not held to the same degree of strictness in proving the partnership of defendants as they are in proving their own partnership when they bring the action as partners. As to defendants Dodridge and Wurtelle there seems to have been no evidence of their connection with the firm except common report, and indeed Wurtelle seems to have been unconnected with the firm even by common report. While this evidence was competent, yet, without the additional evidence that the report was known to Dodridge and Wurtelle, we think it was not sufficient to warrant a judgment against them.

Upon the hearing of the motion for a new trial the court set aside the verdict and judgment as to Wurtelle, and overruled it as to the other defendants. It is insisted by appellants that it was error to modify the judgment by striking out one of the parties. The defendants, by their answer, put in a general denial, and thus deny the partnership, and also their several liability. They are in no way jointly interested in their defense. Upon their motion for a new trial they severally insist that the evidence is insufficient to establish either their joint liability as partners, or their several liability as individuals. The court, in its discretion, sustained the motion as to defendant Wurtelle, and overruled it as to the others. Section 352, Code Civil Proc., provides "that in actions against several defendants the court may, in its discretion, render judgment against one or more of them." It is claimed upon the argument that thus diminishing the number of defendants increases the burden of those remaining; but defendants themselves deny joint as well as several liability. If they were not partners with defendant Hoyt, they should not be held. The burden should rest upon him and his partners. If any of the defendants were likely to be prejudiced through the want of evidence on the part of plaintiffs to prove who all of the partners were, the defendants were in a position to furnish the evidence as to the actual members of the firm, and thus distribute the burden where it rightfully belongs. We think the court below had authority to modify the judgment. Mathe-

son's Adm'r v. Grant's Adm'r, 2 How. 279.

The next alleged error is the overruling of the motion for a new trial on the ground of newly-discovered evidence. Evidence was admitted by defendants tending to show that plaintiff drew two checks upon Mr. Cartee after Hoyt & Co. had transferred their interest in the bank, and it is claimed that the drawing of said checks was evidence showing that the plaintiff accepted said Cartee for said deposits, and thus released Hoyt & Co. The plaintiff, in rebuttal, denied the signing of said checks, which evidence defendants claim was surprise to them, and they produced the affidavit of said Cartee, on the motion for new trial, to the effect that he (Cartee) would testify that plaintiff, Gaffney, actually signed said checks. The answer contains no allegation that plaintiff accepted said Cartee, and released Hoyt & Co. from said deposit. The answer contains a simple denial of the partnership, the deposit, the refusal to pay, and the indebtedness. These constitute the issues. Evidence of release of Hoyt & Co. and acceptance of Cartee would be entirely outside of the issues, and therefore irrelevant and inadmissible. Clearly it was not error to refuse a new trial upon the discovery of evidence entirely irrelevant to the issues made by the pleadings.

An inspection of the evidence shows that there was no testimony of the liability of either Wurtelle or Dodridge, except that of common report, which was not of itself sufficient to justify the verdict against them. *Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. Rep 483.

We think the judgment should be further modified by striking therefrom the name of Dodridge as defendant, and affirmed as to defendants Hoyt and Wallace, and that the cause be remanded for a modification in the court below in accordance herewith.

HAYS, C. J., and BRODERICK, J., concurring.

HOUSER *et al.* v. AUSTIN *et al.*

(March 3, 1886.)

EQUITY—PRACTICE—SUBMISSION OF ISSUES.

1. On the trial of a cause in equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.

REFORMATION OF MINING LEASE—INSTRUCTIONS.

2. In an action to reform a mining lease, by including in it certain ground alleged to

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have been omitted by mistake, error cannot be predicated on an instruction, on the ground that it does not state that the evidence must show the mistake beyond a reasonable doubt, that "if it is clearly established that the verbal understanding of the parties included the ground in dispute, and that the same was omitted from the writing by mutual mistake, a case is made out for a reformation of the written lease," where it appears that the court had already charged that such mistake must be shown beyond a reasonable doubt.

SAME—EVIDENCE.

3. In an action to reform a mining lease, by including in it certain ground alleged to have been omitted by mistake, it appeared that the lessors desired to limit the area of the lease; that the ground in dispute was suggested by A., one of lessees, as the limit; that a lease was written out, and handed to the lessees, who kept it for a week; that it was then altered in some minor details; and that A. was familiar with the premises. *Held* evidence insufficient to warrant a judgment of reformation.

SAME—INSTRUCTIONS—ESTOPPEL.

4. In such case an instruction that "if the jury find that the lessors told the lessees that the lease extended to the ground in dispute, and the lessees, so believing, went to work therein with the knowledge of the lessors, and the lessors received a royalty from the ore sold therefrom, then the lessors would be estopped from claiming that the lease did not include the land in dispute," is error, in that it fails to state that the party to be estopped must have had knowledge that his representations were false, and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly acted on the statement.

Appeal from district court, Alturas county.

Action by Samuel T. Houser and others to restrain William Austin and others from occupying, mining, or extracting ore from certain premises owned by plaintiffs. From a judgment for defendants, plaintiffs appeal. *Reversed*.

Huston & Gray and R. Z. Johnson, (John T. Morgan, of counsel,) for appellants.

The court erred in submitting to the jury special issues, before the equitable issues in the action had been disposed of, and before the right of respondents to recover or to any damages or relief had been determined. *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, *Id.* 660, 671; *Arguello v. Edinger*, 10 Cal. 160; *Harrison v. Bank*, 17 Wis. 351; *Estrada v. Murphy*, 19 Cal. 249, 272, 273.

Courts of equity will not reform written instruments unless the mistake or fraud alleged is admitted or proved beyond a reasonable doubt. 2 Pom. Eq. Jur. § 859,

and note page 326; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Sawyer v. Hovey*, 3 Allen, 331, 333; *Lyman v. Insurance Co.*, 17 Johns. 373; *Nevins v. Dunlap*, 33 N. Y. 680; *Hearne v. Insurance Co.*, 20 Wall. 490; *Howland v. Blake*, 97 U. S. 626; *Ivinson v. Hutton*, 98 U. S. 82; *Insurance Co. v. Nelson*, 103 U. S. 544, 548; *Andrews v. Insurance Co.*, 3 Mason, 10; U. S. v. *Monroe*, 5 Mason, 577.

Conduct or representation to work an estoppel must be with knowledge of the facts by the party sought to be estopped. *McGarrity v. Byington*, 12 Cal. 431; *Morrison v. Caldwell*, 5 T. B. Mon. 426; *Stuart v. Luddington*, 1 Rand. (Va.) 403; *Brewer v. Railroad Corp.*, 5 Metc. (Mass.) 478; *Finnegan v. Carragher*, 47 N. Y. 500; *Herm. Estop.* 413, 415, 439; *Bigelow, Estop.* 480, 531, 548.

The other party must have been ignorant of the truth, and must have honestly relied and acted upon the statement or act which is claimed to work the estoppel. *Hefner v. Vandolah*, 57 Ill. 520; *Herm. Estop.* 343; *Steel v. Smelting Co.*, 106 U. S. 456, 1 Sup. Ct. Rep. 389; *Brant v. Iron Co.*, 93 U. S. 327, 337; *Corning v. Factory*, 40 N. Y. 203.

Lyttleton Price and Arthur Brown, for respondents.

The issues being both legal and equitable, a trial by jury is an absolute right. *Hipp v. Babin*, 19 How. 278; *Lewis v. Cocks*, 23 Wall. 470; *Tabor v. Cook*, 15 Mich. 322.

When there is a substantial conflict in the evidence, the supreme court will not disturb the decision of the court below. *Haynes*, New Trials & App. 234, 288, and cases cited; *Doe v. Vallejo*, 29 Cal. 390.

The rule is the same where the degree of proof is beyond reasonable doubt as where a preponderance is enough; as in criminal cases. *People v. Ashnauer*, 47 Cal. 100; *People v. Manning*, 48 Cal. 335; *People v. Gill*, 45 Cal. 285; *People v. Simpson*, 50 Cal. 304; *People v. Montgomery*, 53 Cal. 577.

If appellants are not entitled to recover upon their whole case, errors in instructions as to respondents' case will not be regarded. *Enright v. Railroad Co.*, 33 Cal. 233; *Hebrard v. Mining Co.*, *Id.* 290; *Barth v. Clise*, 12 Wall. 401; *Meguire v. Corwine*, 101 U. S. 112; *Whitney v. Wyman*, *Id.* 397.

BUCK, J. On the fourth day of March, 1884, the plaintiffs filed their complaint

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herein, alleging that they were the owners as tenants in common of certain mining ground in Alturas county, Idaho territory, known as the "Elkhorn Lode;" that on the third day of October, 1883, by an agreement in writing, they authorized and licensed defendants Austin and Ervin and one Grant to work and mine, and take and extract, ore from a certain portion thereof, particularly bounded and described in said agreement, upon terms expressed therein; that defendants Austin and Ervin commenced work thereon under said agreement about the third day of October, 1883; that said Grant made a pretended sale of his interest under said agreement to defendant Ross about the said first day of December, 1883, and claims no interest under the same; that plaintiffs Houser, Holton & Hale were non-residents of this territory, and plaintiff Lewis was absent therefrom during December, 1883, and January, 1884, and that neither of them had any knowledge of the alleged wrongful acts of defendants set out in said complaint; that about December 1, 1883, defendants fraudulently taking advantage of said license to gain admission to said mines without authority or knowledge of plaintiffs, or either of them, wrongfully entered upon a certain portion of said Elkhorn mine outside of the boundaries of the ground described in said agreement, and wrongfully removed pay ore therefrom, of the value of \$10,000; that the portion of ground so wrongfully entered upon by defendants is very rich in mineral-bearing ore, and defendants threaten to continue their said trespass to plaintiffs' irreparable injury, and plaintiffs believe they will so do unless restrained by order of the court; that soon after plaintiff Lewis returned to the territory he notified defendants to desist from said trespass, and they refuse so to do; and that defendants are insolvent; and pray that defendants may be enjoined from entering upon such portion of said Elkhorn mine as is outside of the boundaries set out in their said agreement, and for general relief.

The defendants, answering, deny the trespass, and allege the verbal agreement or contract existing prior to the written one set out in the complaint included the ground in controversy; that the written agreement was intended to contain the same, and that the plaintiff Lewis fraudulently informed them that it did contain the same; that he put them in possession of

the same, and received the two-fifths of the ore extracted therefrom as per condition of the written agreement; and that defendants accepted said agreement believing that it included the mining ground in dispute. Defendants also file a cross-complaint, alleging that they received said agreement believing and understanding that it contained the ground in dispute, that the plaintiffs so represented to them falsely, and that they relied on said representation. They further allege, among other matters, that they entered upon said premises under said agreement, and discovered a rich body of ore thereon of the value of \$200,000, which they were prevented from extracting by plaintiffs' injunction herein; that plaintiffs had extracted the same and appropriated the same to their use, and that in consequence of said injunction restraining them from working said ore, they had been put to additional expense in the amount of \$2,000, in opening other ore bodies under said agreement; and prayed that said agreement might be so reformed as to include the ground in dispute; that they (defendants) be adjudged owners, and entitled to all the said Elkhorn lode on the dip thereof having its apex within the premises described in said agreement, and the right to mine and remove the same, and for other and equitable relief.

The plaintiffs, answering, deny the material allegations in the amended cross-complaint, and ask that it be dismissed, at defendants' costs, and for further and equitable relief.

Upon the trial of the case a jury was requested by the defendants to try the cause, and, under objection of plaintiffs, the court impaneled a jury, and of his own motion submitted to them the following special questions: "Question 1. Did the lessees in the lease, or defendants, enter upon the premises in dispute, and mine and extract ore, with the knowledge, consent, and by authority of plaintiff Lewis, or did they enter without his knowledge, consent, or acquiescence? Answer. They entered and extracted ore with his knowledge, consent, and acquiescence. Q. 2. Did the plaintiffs, or either of them, by themselves or their agents, receive or retain the two-fifths royalty knowing that the ore was extracted by the defendants and Grant from the premises in dispute? A. They did receive it knowing it to be from the ground in dispute. Q. 3. Did the original verbal agreement for the lease include

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the premises in dispute, viz., all ground north-east of the east tunnel, and was it omitted from the writing either by mutual mistake or fraud of the plaintiffs? A. It did, and was omitted by mutual mistake." "Q. 5. What is the value of the ore the three defendants could have extracted between date of service of injunction, March 8, 1884, and July 1, 1884? A. \$53,160. Q. 6. And what was the extra damage by being driven out, and compelled to drive new tunnels to reach ore? A. \$1,500." To the admission of the last two questions, to-wit, 5 and 6, defendants objected on the ground that the equitable issues should be first settled, and assign the submission of all of said questions at the same time to the same jury as error. In support of this alleged error the appellants cite *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, Id. 660; *Arguello v. Edinger*, 10 Cal. 160; *Harrison v. Bank*, 17 Wis. 361; and *Estrada v. Murphy*, 19 Cal. 249. In *Arguello v. Edinger*, supra, the action was ejectment, and the issue was whether a verbal contract of sale, with delivery of premises, could be set up as a defense thereto. In sustaining such a defense Justice FIELD says: "If, upon hearing the evidence, the court should determine that there was ground for relief, it would decree specific performance. If it should refuse the relief, it would call a jury to determine the issues upon a general denial." The case was tried, however, upon the general denials, the demurrer to the equitable defense having been sustained. This question of practice was not at issue, and the suggestion of the court was but *obiter*. In *Weber v. Marshall* the action was also ejectment, and the answer contained both legal and equitable defenses. Special issues involving the various issues, legal and equitable, were all submitted to the jury together, against the objection of plaintiffs, who excepted thereto, and saved their exception in the record. The court, by BALDWIN, J., say the submission of all these defenses to the jury was irregular; and add that if the equitable and legal matter is not kept distinct, confusion, embarrassment, and delay will ensue. They fail to say, however, that the doing so is more than irregularity; and state with especial clearness that a new trial is granted for error in the decree based upon the findings of the jury. In *Lestrade v. Barth* the same issues in an action of ejectment were submitted, and FIELD, J., says that in *Weber v. Marshall* such practice was held to be

irregular; but as no objection was taken in the court below, the irregularity will not influence the decision in the case at bar. In *Estrada v. Murphy* the practice does not seem to have been at issue, but Justice FIELD indicates that it should be, as he had done in *Arguello v. Edinger*. In *Harrison v. Bank*, 17 Wis. 350, an action involving the reformation of a contract, with issues both legal and equitable, submitted to a jury without objection, DIXON, C. J., says that the correct practice in such cases no doubt is to try the equitable cause first, and afterwards the legal; but, as that practice was not adopted, we see no absolute impracticability in the course pursued.

To the expressions contained in the above authorities it is replied by respondents that the submission of special issues in cases essentially equitable is a matter of discretion with the court; that the findings of the jury thereon are simply advisory, and not binding upon the conscience of the court; and that the utmost doctrine of the adjudicated cases is that such a practice is but an irregularity, which has never been adjudged to be sufficient ground to reverse a judgment.

The doctrine of the advisory character of such a practice seems fully determined in *Basey v. Gallagher*, 20 Wall. 678. Justice FIELD there says, in a case in which the same practice was adopted as in the case at bar: "The court is not bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience, and not to control its judgment." In *Lestrade v. Barth* it is said that this practice is only adopted when the evidence is very contradictory and the question turns on the credibility of witnesses. The only reason given why this practice is not proper is that confusion, embarrassment, and delay may ensue. We are unable to see that any of these objections exist in the case at bar. In the only case (that of *Weber v. Marshall*) in which the practice has been actually adjudicated, it was held simply an irregularity not sufficient to justify a new trial. We have graver doubts of the expediency of submitting equitable issues to a jury at all than we have apprehension of confusion or delay in submitting both legal and equitable issues to a jury at the same time. We are of the opinion that the practice rests in the discretion of the court.

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The appellants assign as error the giving of the following instruction: "If it is clearly established, to the satisfaction of the jury, that the verbal understanding and agreement of the parties included all the ground lying north-easterly from the east tunnel, and that the same was omitted from the writing by mutual mistake, then the defendants made out a case entitling them to a reformation of the written lease to make it conform to the verbal agreement, and the jury should find on that issue accordingly." This is claimed as error because it does not say that these facts should appear beyond a reasonable doubt. We cannot determine the correctness of an instruction by segregating it from the entire charge, and considering it alone. In the second instruction the court charged the jury that written instruments cannot be reformed upon a probability nor preponderance of evidence, but only upon a moral certainty of error. In the first instructions the jury are told that mistake must appear beyond a reasonable doubt. This is repeated in instruction No. 3. We think the charge is clear and explicit as to the doctrine of reasonable doubt.

The third alleged error is: The finding of the jury, adopted by the court, that the original verbal agreement for the lease included the ground in dispute, and that it was omitted by mutual mistake, is not supported by the evidence; and that there is no allegation of mutual mistake in the pleadings upon which to base such evidence or finding." We think the allegations in the pleadings are sufficient to sustain the findings, and shall consider the sufficiency of evidence. This seems to be the important question in the case.

In reviewing the evidence we may be aided by segregating the admitted from the disputed facts. Mr. Ervin, the chief witness for the defense, one of the parties defendant, testifies: "I am very familiar with the hill, [the *locus in quo*.] Have been around it three years. I first knew east tunnel in May, 1882, [18 months before the lease was executed.] Austin had procured a lease which was not satisfactory to us with reference to the ground and the number of men. The ground I wanted was below discovery croppings, which was not included in the first paper. Before the lease was made I had examined only the surface ground. I was acquainted with the other side of the mountain, and tolerably familiar with

lessee's tunnel. I asked Lewis to be allowed to work more men, and he said: 'I cannot do this. I have given you all you wanted. You may strike something where you would make \$100 a day,' etc. The restriction on the number of men was all that remained unsatisfactory at the time. Austin was gone five or ten minutes when he went with the paper." I. I. Lewis, one of the plaintiffs, testified "that he gave a lease to Austin, one of the defendants, who after keeping it a week returned with it, and said his partners wanted more ground than was described therein. He [Austin] said they wanted the ground to the east tunnel. I made the erasures in the first paper, and interlined it to read: 'On a straight line from shaft No. 3 to mouth of east tunnel,' [as appears in the original lease.] I had copies made of the lease as amended. Austin went away, and on the next day returned with Ervin and Grant. Austin introduced Ervin to me. We signed the papers. Ervin remained a short time, and talked about the ground." From this evidence, undisputed, we find that the plaintiffs were particularly anxious to limit the work of defendants to three men, and within a prescribed area; that the matter of the east tunnel as a limit was suggested by Austin, one of the lessees; that the original lease was in the possession of lessees for a week before it was altered; that Austin was familiar with the premises in which the mine was situated, and all of it; that Grant worked on the Elkhorn mine, of which the leased premises were a part; that after keeping the original lease a week, with every opportunity and motive to examine the ground, they had it reformed, extending the original limits; that at the time the reformed lease was delivered to them they were all present; that Ervin remained some time after he had received a copy as amended, and talked about the enterprise with Mr. Lewis; and that he and the other lessees had an opportunity and abundant leisure to examine its contents; and that after all this, as Ervin testifies, the restriction on the number of men was all that remained unsatisfactory at the time.

There is in the record much contradictory evidence. Mr. Lewis swears that the lease was read and compared by the parties, which Mr. Ervin fully denies. But without stopping to weigh conflicting evidence, and accepting the above testi-

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mony of Mr. Ervin as true, we may presume that he has omitted nothing which would be of benefit to the defendants' case.

It is argued that the conduct of the plaintiffs in paying money to the witness Grant, with the apparent purpose of hiring him to be absent at the trial, which purpose is not denied or explained by plaintiffs, together with the manner in which the affidavits upon which the injunction was granted were obtained, are presumptions against the plaintiffs' case sufficient to justify the finding of the jury. The sentiments of the court are entirely in accord with those expressed by the attorneys for respondents as to the reprehensible character of such practices. Fortunately for the reputation of the profession, we find no cases in the American reports where it has been necessary to consider the weight of this class of presumptions in the trial of causes, and we are glad to be able to say that no attorney or counsel of record connected with this case is responsible for such a necessity now. Best on Evidence (section 411) says that in the case of *Annesley v. Earl of Anglesea*, 17 How. State Tr. 1430, in which the defendant caused the plaintiff to be kidnapped and sent to sea, and afterwards endeavored to take away his life upon a false charge of murder, one of the judges say that these facts spoke more strongly in proof of plaintiff's case than a thousand witnesses. The case was undoubtedly an aggravated one, and the doctrine stated with exceptional force. 1 Phil. Ev. *639, says: "Where a person is proved to have suppressed any species of evidence, the presumption will arise that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance." Apply this rule, and admitting that the evidence of Grant if present would have fully corroborated that of Ervin, we are of the opinion that the facts, as admitted by Ervin and corroborated by Grant, would not be sufficient to authorize the reforming of the lease. The fact that defendants were well acquainted with the ground, and had ample opportunity to know the precise language of the lease,—opportunities which they ought to have improved, if they did not,—leaves a doubt in the mind of the court, which they think is a reasonable one, that any mistake was made as to the terms of the lease or the premises described in it. In

Hearne v. Insurance Co., 20 Wall. 490, the court say: "The party alleging mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt in the mind of the court as to either of these points; the mistake must be mutual and common to both parties. It must appear that both have done what neither intended." To the same effect are *Cox v. Woods*, 67 Cal. 317, 7 Pac. Rep. 722; *Mead v. Insurance Co.*, 64 N. Y. 453; *Wachendorf v. Lancaster*, 61 Iowa, 509, 14 N. W. Rep. 316, and 16 N. W. Rep. 533; *Fowler v. Adams*, 13 Wis. 459; *Lake v. Meacham*, Id. 355; 2 Pom. Eq. Jur. § 859; 1 Story, Eq. Jur. §§ 152-157.

The respondents argue that it being admitted that the apex of the ore body in dispute is within the area described in the lease, the lessees have the right to follow the vein outside their side lines into the disputed ground. After an examination of the authorities cited in support of this theory, we are of the opinion that the lease gives the defendants a license to remove ore from within the prescribed limits, and does not constitute a grant which authorizes the defendants to follow the vein outside of the area described in the lease.

The appellants urge that the fourth instruction was error, to-wit: "If the jury find that Lewis told the lessees that their lease extended to the east tunnel, and the lessees so believing went to work therein with the knowledge of the plaintiffs, and developed an ore body; and that plaintiffs received their royalty from the ore sold therefrom; and that the defendants expended a large amount of labor thereon, so that at the time of the commencement of this suit there was ore of the value of ten thousand dollars on the dump extracted by them,—then Lewis and the plaintiffs would be estopped and prevented from claiming that the lease did not include the ground in the east tunnel."

The appellants claim that this instruction is error in that it fails to state that the party to be estopped must have had knowledge that his conduct or representations were false, and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly relied and acted upon the statement or act which is claimed to work the estoppel. We think the authorities clearly establish that this instruction is error. While under a mutual mistake, under the circumstances of

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this case, the interest of the defendants in the ore upon the dump at the time they received notice of the mistake would probably be determined by the terms of the lease, yet we think the adjudicated cases would not extend the estoppel beyond that limit. *Brewer v. Railroad Corp.*, 5 Metc. (Mass.) 478; 6 Wait, Act. & Def. 683, 689, 703, 707, 714; *Morrison v. Caldwell*, 5 T. B. Mon. 426; *McGarrity v. Byington*, 12 Cal. 431; *Stuart v. Luddington*, 10 Amer. Dec. 550, 552; *Finnegan v. Carraher*, 47 N. Y. 500; *Herm. Estop.* §§ 413, 415, 439; *Bigelow, Estop.* §§ 480, 531, 548; *Reynolds v. Insurance Co.*, 6 Amer. Rep. 337; *Hefner v. Vandolah*, 57 Ill. 520; *Steel v. Smelting Co.*, 106 U. S. 456, 1 Sup. Ct. Rep. 389; *Brant v. Iron Co.*, 93 U. S. 326; *Corning v. Factory*, 40 N. Y. 203.

Judgment reversed and cause remanded for a new trial.

HAYS, C. J., concurring. BRODERICK J., expressing no opinion.

SETTLE *et al.* v. WINTERS *et al.*

(March 5, 1886.)

CONTRACT—CONSTRUCTION.

1. The contract by which defendants entered into possession of plaintiffs' mine recited that "this indenture of lease, with privilege of purchase, witnesseth that the parties of the first part [plaintiffs] remise, grant, and lease to the parties of the second part" [defendants] the mine in question. There was also a provision that, in default of the payment of the consideration at the expiration of a certain time, the parties of the second part would surrender the premises to the parties of the first part; but, in case payment was made within such time, the parties of the first part were to make a conveyance of the mine to the parties of the second part. *Held*, that such contract was a lease with an option to purchase, and not a contract of sale. BUCK, J., dissenting.

SAME—PART PERFORMANCE—EFFECT.

2. In such case the fact that defendants paid plaintiffs more than half of the consideration named in the instrument before the expiration of the time therein mentioned will not affect such construction, where it appears that such amount was part of the proceeds of ore taken from the mine, such payment being deemed a royalty or rent for the use of the mine. BUCK, J., dissenting.

SAME—OFFER TO PAY AFTER EXPIRATION.

3. Nor, in such case, will an offer to pay the full amount of the consideration, made five months after the expiration of the time mentioned in the agreement, affect such a construction. BUCK, J., dissenting.

Appeal from district court, Alturas county.

Action by George F. Settle and another against John B. Winters and others to restrain defendants from interfering with plaintiffs' mine, and for an accounting. From a judgment for plaintiffs, defendants appeal. Affirmed.

On the nineteenth day of September, 1882, the respondents, who are the plaintiffs herein, entered into a contract in writing with the appellants, who are the defendants herein, as follows:

"This indenture of lease, with privilege of purchase, made and executed this nineteenth day of September, A. D. 1882, by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho territory, parties of the first part, and John Winkelbach, of said Rocky Bar, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, as follows, to-wit: The said parties of the first part, hereby grant, demise, and lease to the said parties of the second part the following described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to-wit: All of that certain quartz-lode mining claim known as the 'Vishnu,' and consisting of an undivided eight hundred feet; also all of that certain quartz-lode mining claim consisting of fourteen hundred (1,400) feet on that certain vein of quartz containing the precious metals known as the 'Idaho,' and being the discovery claims on said Idaho ledge; also twelve hundred (1,200) feet on the Golden or Sierra quartz ledge; also twelve hundred (1,200) feet more or less, on the Chauncy quartz lode or mine; also the 'Montana Tunnel' and tunnel right. All of the above mines and quartz lode claims commence at Quartz gulch, and run thence easterly towards Dixie gulch,—the 'Vishnu,' eight hundred feet, (800;) the 'Idaho,' fourteen hundred feet, (1,400;) the 'Sierra' or 'Golden,' 1,200 feet; and the Chauncy, 1,200 feet, more or less,—and are situated on the north side of Bear creek, on Idaho hill. Also four hundred feet (400) in the Wizzard King quartz lode, commencing at Dixie gulch, and running westerly four hundred

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feet; also the mill-site at the mouth of Quartz gulch, with blacksmith-shop and cabin thereon. All of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho territory; the 'Vishnu' being highest on Idaho hill, and below it the Idaho, and next below the Golden or Sierra and the Chauncy, being all the group of mines on said Idaho hill south of Quartz gulch. Also that certain engine and boiler, known as the 'Idaho Engine and Boiler,' now lying on said Idaho mill-site: From the twenty-seventh day of November, 1882, on the expiration of a certain lease of the Vishnu and Idaho mines, executed and delivered by the parties of the first part to Thomas Kitto, Charles Davey, and S. Parkinson; or, in the event of the assignment of said lease to the parties of the second part before the said twenty-seventh day of November, 1882, then from the date of such assignment until the twenty-seventh day of November, 1883, upon the following terms and conditions: The said parties of the second part, so long as they shall deem fit to hold said property, and to mine and extract ore therefrom, and to pay the said parties of the first part one-half of the gross proceeds in manner hereinafter specified; and when the sum of forty thousand dollars (40,000) shall have been paid, either out of the proceeds of the mine or otherwise, by the said parties of the second part to the parties of the first part,—the said parties of the first part hereby covenant and agree, for themselves, their executors and administrators and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them by good and sufficient deed all of the above-described property, free and clear of all incumbrance, upon such payment, provided the said sum of forty thousand dollars (40,000) shall have been paid on or before the twenty-seventh day of November, 1883. And the said parties of the second part hereby covenant and agree to enter upon said properties, and to mine and extract ore from the same so long as they shall find it profitable; to do the work in a proper and workman-like manner, and at their own cost and expense; and to hold and keep said property free and clear of all costs, charge, or lien for the working of the same; and out of the gross proceeds of said mines to pay one-half thereof, as fast as taken out, to said parties of the first

part, in the manner hereinafter specified; and, upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of forty thousand dollars (\$40,000) shall have been paid; and in the event of the said parties of the second part, or their assigns, failing to comply with either or any of the foregoing covenants, or any covenant, promise, or thing herein contained, on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above-described property and premises, and every part thereof; and the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of the said premises upon demand by said parties of the first part claiming their right to re-enter.

"It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right, at all times, of inspecting the said mines above described, and all mining operations and work thereon; that the said parties of the second part shall have the right, at any time, to stop work on said mines when they shall find or deem the same unprofitable; that, in working said ores, at each clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled, and all bullion received, to the said parties of the first part; that, in milling said ores so taken from said property, the said parties of the first part, if they so desire, shall have an equal right with said parties of the second part in milling the ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for one-half the gross proceeds, it being expressly understood that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them; and the said parties of the second part are then to dispose of the bullion to the best advantage, and to pay to the parties of the first part one-half of the proceeds thereof in money, currency, or coin; and upon such payment the parties of the first part will credit said purchase

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price of forty thousand dollars (\$40,000) with the sum so received; and, lastly, that in no event shall the said properties above described, or any part thereof, be held for any claim, cost, charge, or lien for working the same by the said parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their executors, administrators, and assigns, hereby covenant and agree, to and with the said parties of the second part, their heirs and assigns, to convey, by good and sufficient deed, all of the above-described properties, free and clear of all incumbrances, to them, the said parties of the second part, or their assigns, at any time, upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars, (\$40,000,) either out of the proceeds of the mines or otherwise, on or before November 27, 1883, in the manner hereinbefore specified by the said parties of the second part, or their assigns. And it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real, running with and binding the land. In witness whereof the said parties have hereunto set their hands and seals this nineteenth day of September, 1882. [Signed] GEO. F. SETTLE. [Seal.] JACOB REESER. [Seal.] JOHN WINKELBACH. [Seal.] JOHN B. WINTERS. [Seal.] F. GANAHL. [Seal.] Signed, sealed, and delivered in presence of SOL. NEWCOMER."

At the same time the following instrument in writing was executed by appellants and delivered to the respondents: "We, the undersigned, in consideration of the execution and delivery to us of a certain lease with the privilege of purchase of the 'Vishnu' and 'Idaho' mines, and of other property, of even date herewith, by G. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in working said mines to sign the following contract, viz.: 'In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the "Vishnu," "Idaho," and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all rights or claim that I may have in law or equity against the property, or the owners thereof, G. F. Settle and J. Reeser.' Witness our hands and seals this nineteenth day of

September, 1882. [Signed] F. GANAHL. JOHN WINKELBACH. JOHN B. WINTERS. Signed, sealed, and delivered in the presence of SOL. NEWCOMER."

Soon after the execution of this contract the defendants bought in the Kitto lease mentioned in the contract at an expense of about \$5,000, and entered into possession of the properties, and began work thereon, and extracted a large amount of ore.

On the twenty-fourth day of November, 1883, the parties further agreed, in writing, as follows:

"In consideration of the extension of the time of the above instrument until and including December 27, 1883, we hereby consent and agree to take a deed for 1,367 and one-sixth feet of the Idaho ledge instead of 1,400 feet, as covenanted in the above instrument, and to pay interest at one per cent. per month on the balance of the purchase money from now until December 27, 1883, or any time it is paid prior to that date. Witness our hands and seals this twenty-fourth day of November, 1883. [Signed] F. GANAHL. [Seal.] JOHN WINKELBACH. [Seal.] JOHN B. WINTERS. [Seal.]

"In consideration of the above covenants, we hereby extend the time on the within instrument until and including December 27, 1883. Witness our hands and seals, this twenty-fourth day of November, 1883. [Signed] GEO. F. SETTLE. [Seal.] By V. S. ANDERSON. J. REESER. [Seal.]"

That prior to the twenty-seventh day of December, 1883, defendants paid over to plaintiffs \$20,075.04, and on the twenty-ninth day of December, 1883, they paid over \$948.96, making in all \$21,024, as one-half gross proceeds of ore taken out before the twenty-seventh day of December, 1883; and they continued to work a portion of the said mines until the service of injunction in this action, on the eleventh day of February, 1884, the same having been commenced February 4, 1884. Defendants extracted ore from said mines during the time they worked it to the amount of over \$42,000. It is claimed by the plaintiffs that they demanded possession of this property in dispute about the twenty-second day of January, 1884. This is denied by defendants. The trial court found that the demand was made.

The plaintiffs brought this action to restrain defendants from further interfering with the premises in dispute, and for an accounting. The defendants answer the

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same, and also file a cross-complaint, wherein, among other things, they allege the making of the contract; that the same was for the sale of the said premises; that a further extension thereof has been granted; that the same is still in force; and that they have exercised the option to purchase, and paid, as part purchase money thereon, the sum of \$21,024; that they had paid out for the Kitto lease \$5,600, and the further sum of \$34,000 in working and improving the mine; that the defendants were ready, willing, and desirous to complete the contract, and receive the deed, and pay the balance of the purchase money thereon, and had tendered the same to the plaintiffs; that plaintiffs are unable to comply with their part of the contract; that defendants had greatly enhanced the value of the property; that they had expended a large amount of money between the twenty-seventh day of December, 1883, and the commencement of this action; and ask for a specific performance of the contract so far as plaintiffs were able; and that they be enjoined from interfering with the property.

The plaintiffs answer the cross-complaint, and, among other things, deny that defendants exercised any option to purchase. They allege that the work done by defendants was on the "Vishnu" mining claim; deny that defendants have expended a greater sum than one-half the net proceeds of the ore taken out; deny the exhauling of the value of the mine; and allege that defendants have taken from the mine ore of the value of \$45,000. Plaintiffs aver that the money paid by defendants was for rent or royalty, under the terms of the lease, and not otherwise, and is less than one-half of the proceeds of ores taken out. Plaintiffs deny that the option to purchase has in any manner been extended beyond the twenty-seventh day of December, 1883; and allege that all work done after said date was by the wrongful act of the defendants, and without plaintiffs' consent; and allege that on the twenty-second day of January, 1884, they demanded possession of the property. They allege that they were ready, able, and willing at all times, up to the twenty-eighth day of December, 1883, to comply with the terms of the contract; and that defendants knew plaintiffs' title at the time of making the contract. Plaintiffs further allege that the contract was drawn by one of the defendants, Frank

Ganahl, who was an attorney of this court; that there was no other attorney that could be procured; and that said Ganahl represented, promised, and claimed that time was of the essence of the contract; that if the whole sum of \$40,000 was not paid at the expiration of the contract, then defendants would quit, and surrender up possession of the premises; and that he had full knowledge of plaintiffs' title.

The case was tried by the court, and, upon findings of fact and conclusions of law duly filed, judgment was entered in favor of the plaintiffs, from which defendants appeal to this court.

Bennett, Harkness & Kirkpatrick, (Sutherland & McBride, of counsel,) for appellants.

It is immaterial that the parties call the contract a lease if it shows a sale was intended. The intent is to be gathered from the whole instrument, and, when so ascertained, it is to be carried out, though the name given to it and particular clauses tend to show a different intent. *Chase v. Bradley*, 26 Me. 531; *Merrill v. Gore*, 29 Me. 346; *Warren v. Merrifield*, 8 Metc. (Mass.) 96; *District Tp. v. Dubuque*, 7 Iowa, 275; *Salmon Falls Manuf'g Co. v. Portsmouth Co.*, 46 N. H. 249; *Heryford v. Davis*, 102 U. S. 235, 243, 244; *Nightingale v. Barens*, 47 Wis. 389, 2 N. W. Rep. 767; *Aqueduct Corp. v. Chandler*, 9 Allen, 167; *Miller v. Steen*, 30 Cal. 403; *Diggle v. Boulden*, 48 Wis. 477, 485, 4. N. W. Rep. 678.

A covenant to convey on payment of a sum of money is binding, and will be specifically enforced on acceptance of the one to whom the covenant is made, although, by the terms of the contract, he does not bind himself to pay the money. *Corson v. Mulvany*, 49 Pa. St. 88; *Willard v. Tayloe*, 8 Wall. 557; *Ewins v. Gordon*, 49 N. H. 444; *Barnard v. Lee*, 97 Mass. 92.

It is enough that the parties have mutually agreed that their respective acts shall be done at or before a day named, or that the defendants' undertaking is in the form of a bond, and the condition requires certain acts to be done after or contemporaneously with some act to be done by the obligee. *Steele v. Branch*, 40 Cal. 3; *Moote v. Scriven*, 33 Mich. 500; *Gibbs v. Champion*, 3 Ohio, 335; *D'Arras v. Keyser*, 26 Pa. St. 249; *Edgerton v. Peckham*, 11 Paige, 352; *Hall v. Delaplaine*, 5 Wis. 206.

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The vendor cannot treat default alone as terminating the contract, but he must give prompt and unequivocal notice, and make demand. *Miller v. Steen*, 30 Cal. 403; *Decamp v. Feay*, 5 Serg. & R. 323; *Edgerton v. Peckham*, 11 Paige, 352; *Leaird v. Smith*, 44 N. Y. 618; *Clark v. Lyons*, 25 Ill. 105.

Performance, or an offer to perform, is a condition precedent to the right of either party to insist upon performance by the other. *Leaird v. Smith*, 44 N. Y. 618; *Crabtree v. Levings*, 53 Ill. 526; *Swan v. Drury*, 22 Pick. 485; *Warren v. Wheeler*, 21 Me. 484; *Howe v. Huntington*, 15 Me. 350.

Richard Z. Johnson, (*Huston & Gray*, of counsel,) for respondents.

Where time is of the essence, the stipulations of the contract must be complied with. *Pom. Spec. Perf.* §§ 399, 401.

Parol evidence is admissible to show that, at the time of the making of the contract, time was understood and considered to be of the essence of the contract. *Nokes v. Kilmorey*, 1 De Gex & S. 444; *Thorington v. Smith*, 8 Wall. 1; *Stoops v. Smith*, 100 Mass. 63; *Sargent v. Adams*, 3 Gray, 72; *Gerrish v. Towne*, Id. 82; *Almgren v. Dutilh*, 5 N. Y. 28.

Specific performance of a contract will not be decreed when there is a want of mutuality. *Marble Co. v. Ripley*, 10 Wall. 340; *Kerr v. Purdy*, 51 N. Y. 629; *Magoffin v. Holt*, 1 Duv. 95; *Rogers v. Saunders*, 16 Me. 92; *Green v. Covillaud*, 10 Cal. 330.

One who is bound to convey on the payment to him of the purchase price of lands is not required to demand such payment, and may stand on the defensive until it is tendered to him, and cannot be deemed in default in the absence of such tender. *Ten Eick v. Simpson*, 1 Sandf. Ch. 250; *Goodale v. West*, 5 Cal. 339.

Where a vendee of land has obtained possession from the vendor under a contract of purchase, if he refuses to pay the purchase money, and accept the vendor's title, he must surrender the possession; and this, although the vendor has not a good title. *Gilpin v. Watts*, 1 Colo. 479; *Tewksbury v. Magraff*, 33 Cal. 237; *Williams v. Morris*, 95 U. S. 455; *Peralta v. Ginochio*, 47 Cal. 460; *Sawyer v. Sargent*, (Cal.) 7 Pac. Rep. 120.

HAYS, C. J. This case has been prepared with great care, and presented with marked ability on each side. It is conceded that the contract upon which this ac-

tion is based was drawn by one of the defendants, who is a lawyer; that there was no other attorney present, or to be procured, at the time and place where it was drawn. Our first duty is to ascertain what the parties themselves meant and understood by the terms of this instrument; for if the intention is plain and clear, we ought, if possible, to give force and effect to their intent.

Reading this contract, then, in the light of surrounding circumstances, as they existed at the time of drawing and executing the same, we think it must be construed to be a lease with an option to purchase. Did not the defendant who drew the contract so understand it? If not, did he not intend that the plaintiffs, who are unlearned in the law, should? If he did not intend that the plaintiffs should so understand it, why did he begin the instrument, "This indenture of lease with privilege of purchase?" Again, the words are used, "grant, demise, and lease." Then, the usual reservations of a lease are found,—that the parties of the first part shall have the right to inspect the mines at all times. "The parties of the second part agree to enter upon said properties and extract ore so long as they shall deem it profitable." They are to do the work in a proper and workman-like manner, to keep the property clear of all liens for working the same, and to pay one-half of the gross proceeds of the mine, as fast as taken out, to the parties of the first part; and "upon the expiration of the term 'hereby granted,' to surrender up the said premises, with all the improvements, unless on or before the twenty-seventh day of November, 1883, the said sum of forty thousand dollars should have been paid;" and, "upon failure to comply with any covenant, promise, or thing therein contained by the parties of the second part, to re-enter, take possession," etc.

True, the contract provides that the parties of the first part shall credit the said purchase price of \$40,000 with the sum so received, and there are terms used that might be construed into a contract of sale. But in construing a contract it is contrary to well-settled rules to give it a narrow and technical interpretation, based upon some particular word or clause. The intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent, if possible.

At the time of making the contract, and as a part of the transaction, the appel-

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lants executed and delivered to respondents the agreement in writing drawn by defendant Ganahl, in which they mention the contract as a "lease with the privilege of purchase," and they also describe themselves as "lessees." Under the circumstances, how must the respondents have considered the contract, and what did the appellants intend to have them understand? We think the natural interpretation of the words used indicates the intention of the respondents to lease the premises in dispute to appellants, and to give to them the right or option to purchase, at any time during the life of said lease, upon the payment in full of the amount agreed upon. It seems to us that it must have been so understood by all the parties. While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties themselves, or by the circumstances of the case. 3 Pars. Cont. 383; 1 Pom. Eq. Jur. § 455; *Green v. Covilland*, 10 Cal. 317; *Utey v. Lumber Co.*, 59 Mich. 263, 26 N. W. Rep. 488.

Waterman, in his work on the Specific Performance of Contracts, says: "Courts of equity formerly paid but little attention to the mere time at which the stipulations of a contract were to be performed, and carried the doctrine of relief, notwithstanding a want of punctuality, to an extravagant length." "But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions." Section 456.

Equity usually treats time as originally of the essence of the contract when the agreement shows that the parties intended that it should be so regarded. *Wat. Spec. Perf.* §§ 459, 460; *Pom. Spec. Perf.* §§ 399, 401; *Grey v. Tubbs*, 43 Cal. 362; *Benedict v. Lyuch*, 1 Johns. Ch. 370; *Wells v. Smith*, 7 Paige, 22, 31 Amer. Dec. 274, and note; *Will. Eq. Jur.* 294; *Phelps v. Railroad Co.*, 63 Ill. 468.

This rule seems to be well settled, and perhaps the more difficult question for solution now before us is whether time, in this case, has been made essential. The contract provides that it shall run until the twenty-seventh day of November, 1883. It further provides for a conveyance, provided the sum of \$40,000 shall have been paid on or before the twenty-seventh day of November, 1883. It further provides

that upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of \$40,000 have been paid. Again, by the terms of the extension of November 24th, which are: "In consideration of the extension of the time of the above instrument for thirty days, or until and including December 27, 1883,"—it would seem that the parties understood and intended to make time essential; for the respondents extend the time until and including December 27, 1883. Each party is specific in fixing the limit of time. Then, again, we may be aided in reaching a correct conclusion by an examination of the character of the property. Real estate is less stable in this country than in England, hence our courts have been more liberal in extending the rule and allowing the special facts and circumstances of each case to have a more controlling influence. Time is usually regarded as of the essence of the contract, both in England and America, where the character of the property renders it liable to fluctuations in value. *Pom. Spec. Perf.* § 385; *Wat. Spec. Perf.* 460; *Fry, Spec. Perf.* §§ 713, 718; *Green v. Covilland*, 10 Cal. 330; *Jennisons v. Leonard*, 21 Wall. 302; *Goldsmith v. Guild*, 92 Mass. 239; *Christie's Appeal*, 85 Pa. St. 463.

Fry on Specific Performance, § 716, says: "The nature of all mining transactions is such as to render time essential; for no science, foresight, or examination can afford a sure guaranty against sudden loss, disappointment, and reverses; and a person claiming an interest in such an undertaking ought, therefore, to show himself in good time willing to partake of the possible loss as well as profit." The same, in substance, has been stated by many other authors. *Wat. Spec. Perf.* § 460; *Pom. Spec. Perf.* § 385, and note; *Will. Eq. Jur.* 292. We think this a wise rule, and that it should be adhered to, especially in a mining country like ours.

It is claimed by the appellants that respondent Reeser extended the time after the twenty-seventh of December, 1883. The trial court found that no such extension had been made, and the evidence abundantly sustains this finding.

It is also claimed by the appellants that no demand was made upon them by respondents for the possession of the mine. The trial court found the demand was

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made, and we think the evidence preponderates in favor of the finding.

The appellants offered payment in full, in June, 1884; but this being made long after the commencement of the action, and more than five months after the time limited by the parties for such payment, we think, cannot be available for the reasons heretofore stated.

It has been urged with great force that in this case appellants have paid to plaintiffs more than one-half of the agreed price; but it must be remembered that this was all from the moiety of ore, or from the proceeds thereof, stipulated to be paid, and must be treated as royalty or rent for the use of the mine. We think, in the case at bar, a different rule should govern than what would be applied in an ordinary sale of real estate. For then, usually, the value of the realty remains the same; and if the grantor is permitted to retain both payment and realty, great injustice might be done. But in the case at bar each ton of ore taken out depletes the mine so much, and in this case it has been exhausted to the amount of over \$42,000. But it is claimed that the appellants have worked the mine at great loss. By the terms of the contract they were at liberty to abandon the work whenever they should deem it unprofitable. Surely it will not be claimed that equity can be invoked to relieve a party from the result of a bad bargain alone.

Many other questions have been discussed, and many points urged by appellants, and, after a careful consideration of them all, we deem it unnecessary to discuss them at length, as we find no error.

Taking into consideration the contract as we construe it, the evident intent of the parties, the nature and character of the property in dispute, and we think the conclusion is irresistible that time is of the essence of the contract, and that a court of equity, with all its great and varied power, cannot decree a specific performance in this case.

Judgment is therefore affirmed.

BRODERICK, J., concurring.

BUCK, J., (*dissenting*.) Conceding, for the present, that the contract in question is a lease with the option to purchase, when does the lease go into operation, and when is the option to purchase exercised? It seems to be mutual. It is

signed by both parties, and each covenants to do certain acts. As a lease it was partly executed when the defendants entered into possession of the mine. Until the option to purchase was exercised the defendants held as lessees. Whenever they exercised that option by the terms of the instrument they held as vendees. A sale is a contract whereby the ownership to property is transferred. The sale is completed when the possession and title pass from vendor to vendee. In the case at bar the possession was in defendants, but under the lease the title remained in the plaintiffs, the lessors. When the option to purchase was exercised the title passed from the lessors to the lessees, and their relation changed from lessors and lessees to vendors and vendees. The lessees having possession under an agreement to purchase, at a purchase price of \$40,000, the title passed whenever they exercised their option by paying the purchase price, or any part of it. By the terms of the contract all money paid to the plaintiffs was to be credited on the purchase. Whenever, therefore, a credit was so made, a part of the purchase price was paid, and I apprehend the option to purchase was exercised. We cannot call this payment royalty or rent, because, to do so, would contradict the express provisions of a sealed instrument. After the purchase this contract, which, up to that time, had operated as a lease, became, in its legal effect, a mortgage to secure the payment of the unpaid purchase price.

It is said that under the terms of this instrument the defendants could abandon the venture at any time. This provision enables us to appreciate the importance of that provision which makes the money paid purchase price. To induce defendants to continue the venture, and not abandon it, the plaintiffs stipulate that every dollar paid shall be a credit in payment of the mine. Can we say, after, under this inducement, the defendants have expended a large amount of money, and paid plaintiffs more than half the amount of the purchase price, that the plaintiffs may alter or disregard the express covenant which has been the inducement to defendant's outlay, and say this \$21,000 which you have paid us is only rent,—you have not yet paid us any part of the purchase money,—you have never exercised your option to purchase? It is claimed that time is of the essence of this con-

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tract. The general rule for the purchase of land is that time is not of the essence of the contract. It is claimed, however, that mining property constitutes an exception. Certain text writers are quoted as sustaining this exception. An inspection of these references, however, gives us but two or three ancient English cases. No American cases are cited. If this exception is established by adjudication, it is remarkable that upon this coast, in the 40 years of mining, no such has been adjudicated.

The terms used in the contract specifying the time at which the entire purchase price should be made, and when the plaintiffs might re-enter, cannot be said to determine that time is of its essence; for much stronger language has been adjudicated as meaning differently. Conceding, however, for the argument, that this exception exists in the case of mere options for the purchase of mining property, the question remains, is this contract simply an option? It is admitted that it is unusual in its terms, conditions, and covenants, and that it is difficult to construe. If we attempt to construe it on the theory that it is simply a lease, with an option to purchase, the terms used will be unnecessary and confusing. If we consider, however, the circumstances of the parties and the property at the time the contract was executed; that, as seems established by undisputed testimony, the plaintiffs wished to sell and the defendants to buy; that nothing whatever was said of leasing the property, and that the word was first used in the contract itself; and interpret this instrument with the light which these circumstances afford,—we may understand the contract to be, what it is alleged to be, more than a mere option to purchase; that it was intended to secure the defendants in an anticipated large expenditure of money, and to enable them to secure the fruit of their labor by finally obtaining the title to the property; and also to secure the plaintiffs, through the covenants to re-enter, against the loss of any portion of the purchase price. If, indeed, it is conceded that it is generally understood by miners that time is of the essence in the mere option to purchase mines, that fact may account for the unusual covenants in the contract, and indicate that they were intended to guard against that very construction, and protect the defendants against it.

In addition to these considerations, in

considering the relief sought by plaintiffs in enjoining defendants from occupying the disputed premises, we should remember that the plaintiffs covenant in the contract to give defendants a deed, free and clear of all incumbrances, of the premises in dispute. It is admitted that at the time when they claim the \$40,000 should have been paid, and at the time this action was commenced, the property was, and as far as appears is yet, incumbered by a mortgage of at least \$7,000. It is alleged that, after the alleged termination of the lease, demand was made of defendants for the premises. Was a mere demand sufficient? Should not that demand have been accompanied with an offer to fulfill on their part? This action to enjoin defendants and dispossess them of the premises is, in effect, an action for specific performance against defendants. The plaintiffs rely upon the strict letter of the law. They who seek equity must do equity, and I think the rule applies that a party who seeks specific performance must first be prepared to do equity. This the plaintiffs have never done. It is said that the amount of this incumbrance might have been deducted from the contract price; that the plaintiffs intended to pay this incumbrance out of the purchase price. The defendants were not required in the contract to provide for this incumbrance, nor to pay before it was discharged. Over \$21,000 had already been paid, and yet the incumbrance of \$7,000 was unprovided for.

Are the plaintiffs in position to invoke this hard relief against defendants when they have never offered to perform, and have never been in a condition to fulfill, on their part? I think the suggestion that this incumbrance might have been provided against by retaining its amount by defendants is not tenable. This would involve a new contract; plaintiffs claim under the written one set out in the complaint. It is suggested that defendants' tender of the balance due, made six months after the time when the lease terminated, is too late. I think equity will regard the plaintiffs' action as asking for specific performance of the contract, as they allege it to be, and defendants' cross-complaint in response thereto as setting up and praying specific performance, as they understand the contract; that the defendants' tender is made responsive to plaintiffs' demand, and is sufficient in time. I think this view is fully sustained by the authorities cited

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upon the argument, but I have not the time to classify them. For these reasons I cannot assent to the opinion of the court.

UNITED STATES *v.* CAMP.

(March 5, 1886.)

CRIMINAL LAW—REFUSAL TO CHARGE.

1. On a trial for embezzlement, the refusal is proper of defendant's requested instruction that the jury must acquit if they believe from the evidence that the circumstances point as strongly to some other person as being guilty.

EMBEZZLEMENT — EVIDENCE — FINANCIAL CONDITION OF ACCUSED.

2. On a trial for embezzlement, evidence is competent of defendant's pecuniary condition immediately prior to and during the time the offense is alleged to have been committed.

CRIMINAL LAW—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

3. An objection, on appeal in a criminal cause, that the verdict is contrary to the evidence, will not be considered.

Appeal from district court, Ada county.

Norman H. Camp was convicted of embezzling government money intrusted to him as assayer, and appeals. Affirmed.

Silas W. Moody and *George Ainslee*, for appellant.

The burden of proof rested upon plaintiff to show every single circumstance essential to the conclusion that defendant was guilty. *Sumner v. State*, 36 Amer. Dec. 561; *Com. v. Webster*, 52 Amer. Dec. 711; 1 Starkie, Ev. 571.

And the burden of proof never shifts. *Com. v. McKie*, 1 Gray, 61; *Com. v. Eddy*, 7 Gray, 583; *State v. Jones*, 50 N. H. 370; *People v. Garbutt*, 17 Mich. 9; *State v. Crawford*, 11 Kan. 32; *Fife v. Com.*, 29 Pa. St. 429, 439; 1 Greenl. Ev. §§ 34, 35, 78.

Where a legal presumption does not exist, it is error to instruct the jury that one fact should be inferred from another; so held as to an instruction that one's failure to pay over public money, if excusable, raised no presumption of felonious appropriation, which would authorize a verdict of guilty. *People v. Carrillo*, 54 Cal. 63; *People v. Walden*, 51 Cal. 588; *Stone v. Mining Co.*, 52 Cal. 315; 1 Greenl. Ev. § 48.

Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given. *People v. Taylor*, 36 Cal. 255, 267; *People v. Williams*, 17 Cal. 142 et seq.; *Foster v. People*, 50 N. Y. 598.

The presumption of the innocence of a third person is not alone sufficient to convict a defendant, for presumption balances presumption, and nothing is thus affirmatively approved. 1 Bish. Crim. Proc. §§ 1105, 1106; *Campbell v. People*, 16 Ill. 17; *Rex v. Richardson*, 1 Leach, (4th Ed.) 387; *Harris v. State*, 53 Ga. 640.

If there is any evidence from which the jury may infer a fact to be true, or that the fact may exist, it is the duty of the court to declare the law thereon, no matter how slight the evidence may be. *Thomp. Char. Jur.* pp. 87, 88; *Id.* §§ 62, 65; *Flournoy v. Andrews*, 5 Mo. 513; *Bradford v. Pearson*, 12 Mo. 71; *Camp v. Phillips*, 42 Ga. 289.

A defendant indicted for a crime is entitled to have the law applied to every conclusion deducible from the evidence, although the court may think lightly of the weight and value of the testimony, and a charge composed of statutory definitions of the crime, generally applied, will not suffice. *Scott v. State*, 10 Tex. App. 112; *Lawrence v. State*, *Id.* 495; *Davis v. State*, *Id.* 31; *People v. Doggett*, 62 Cal. 27; *State v. Dunlop*, 65 N. C. 288; *Schools v. Risley*, 10 Wall. 91.

It matters not how clearly the circumstances point to guilt, still if they are reasonably explainable, on a theory which excludes guilt, they cannot satisfy the jury beyond a reasonable doubt that the defendant is guilty; hence they will be insufficient. 1 Bish. Crim. Proc. (3d Ed.) foot page 657, § 1077; *Schusler v. State*, 29 Ind. 394; *James v. State*, 45 Miss. 572; *Com. v. Dana*, 2 Metc. (Mass.) 329, 340; *People v. Dick*, 32 Cal. 213; *State v. Orr*, 64 Mo. 339; *State v. Maxwell*, 42 Iowa, 203; *Black v. State*, 1 Tex. App. 368; *State v. Johnson*, 19 Iowa, 230; *State v. Collins*, 20 Iowa, 85.

Freemont Wood, Asst. U. S. Atty., (*Edgar A. Wilson*, of counsel,) for the United States.

BUCK, J. The defendant was indicted, tried, and convicted at the December term, 1885, of the district court in and for Ada county, Second judicial district, for the crime of embezzlement of \$12,306.36 government money, intrusted to him as assayer at the Boise City assay office, Idaho territory. The evidence establishes the following facts, which are admitted: That defendant took charge of said office on or about June 1, 1883, and was last in charge of the same April 14, 1885. On April 14, 1885, there should have been a balance of

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\$24,119.78 in his possession of government money received by him during said time. On the last-named date defendant went east, and remained absent until about May, 1885. That during his absence the office and funds thereof were in charge of R. Heurschkel, assistant assayer under the defendant. When the defendant left for the east, and turned the funds over to said Heurschkel, neither counted the money in the presence of the other. Defendant testifies that he counted it himself, and there was in the neighborhood of \$24,000. Heurschkel testifies that he did not count it; supposed it was all right, and reported the full amount on hand for 16 days thereafter, and until he received orders from Washington to count the same; that upon the receipt of said order he counted the money with witnesses, and found the funds short in the amount charged in the indictment. It was the theory of the defense that Mr. Heurschkel having equal opportunity to embezzle the funds with the defendant, it was impossible to say that defendant took it, and he should have been acquitted.

Upon this point the defendant asked the court to charge as follows: "The jury are instructed that if they believe from the evidence that the circumstances and testimony point as strongly to some other person or persons as being guilty of taking the funds charged as being embezzled in the indictment number one as they do to the defendant, then the jury are instructed that they must find the defendant not guilty." The law relied on as the foundation for this charge is quoted from 1 Bish. Crim. Proc. § 1105, to-wit: "If one of two persons is shown to be guilty, but it cannot be distinctly ascertained which one, none can be convicted." It is clear that if it cannot be distinctly ascertained who committed a crime, no one should be convicted. The effect, however, of the charge requested would be to acquit, if the evidence showed two or more were equally guilty. Two might commit a murder, and the evidence show the guilt of both, and yet, because it pointed as strongly to one as to the other, neither could be separately convicted under the charge as requested. To support this charge appellant refers to *Campbell v. People*, 16 Ill. 17. The charge there asked for was: "If it is uncertain from the evidence which one out of two or more persons inflicted a stab, the prisoner must be acquitted, unless there is proof that the prisoner aided or

abetted the person ascertained to have killed him." The two charges are quite different. Had the charge requested stated that when the evidence pointed as strongly to one as to the other, and it was uncertain which of the two was guilty, the element of uncertainty would have made it impossible to say that either was guilty, there could be no moral certainty by the jury. We think the charge was properly refused. In appellant's brief many principles of law are enunciated which seem sound, and supported by the authorities cited, but we are unable to see that any error therein was committed by the court.

It is insisted that the court should never refuse an instruction asked by defendant in a criminal case to which there is no valid objection. This proposition involves the question as to the character of a charge to a jury. We apprehend that it should be brief, explicit, and comprehensive; full enough to protect the rights of the parties, and not so prolix as to confuse the jury. A few plain propositions embracing the law as applicable to the facts are all that are required or should be given. *Kelley*, Crim. Law, § 367; *State v. Mix*, 15 Mo. 153; *State v. Floyd*, Id. 349; *People v. Varum*, 53 Cal. 630; *People v. King*, 27 Cal. 507; *People v. Davis*, 47 Cal. 93; *People v. Dodge*, 30 Cal. 448; *Railroad Co. v. Horst*, 93 U. S. 295. We think the charge fairly states the law of the case, and that no essential feature of the defense was omitted. The appellant assigns as error the admission of certain papers, receipts, and documents of defendant, showing his financial circumstances, and his expenditures at the time he assumed such position as assayer, and immediately prior to and during the time of his holding said position. We think such evidence competent and relevant in a charge on embezzlement. 2 Bish. Crim. Proc. § 327; *Railroad Corp. v. Dana*, 1 Gray, 83.

In the printed brief the appellant states that said papers were offered and received in bulk, and alleges the same as error. An inspection of the record shows that the objection to their admission was upon the ground of incompetency, and not to the manner of placing them in evidence. We think this objection should have been made at the trial, and cannot be considered for the first time on appeal.

It is urged that the verdict is contrary to evidence. Under our criminal practice act this court cannot consider the weight of conflicting evidence. We may review

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errors of law in admitting evidence, and, in case of error, grant a new trial, but the question of fact, where there is any legal evidence, is for the jury. *People v. Ah Hop*, 1 Idaho, 698.

We find no error, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

WYATT v. WYATT.

(March 5, 1886.)

APPEALABLE ORDERS—ALIMONY PENDENTE LITE.

An order in an action for divorce, awarding counsel fees and alimony *pendente lite*, is not appealable.

Appeal from district court, Ada county.

Action for divorce by Wyatt against Wyatt. From an order awarding plaintiff counsel fees and alimony *pendente lite*, and restraining defendant from disposing of his property, he appeals. Appeal dismissed as to alimony, and affirmed as to restraining order.

Brumback & Lamb, for appellant. *Huston & Gray*, for respondent.

BRODERICK, J. This is an appeal from an order of the district judge, at chambers, awarding to the plaintiff alimony for support pending her divorce suit, and for counsel fees. The first question presented is whether this court has jurisdiction in this class of cases. It is conceded that the court here possesses no power in divorce suits except such as is conferred by statute. Congress has provided that writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court of the territory, under such regulations as may be prescribed by law. The legislature has provided, by section 642 of the Code, that an appeal may be taken from the district courts to the supreme court from a final judgment, and then the mode of appeal is prescribed. Can it be said that an order for alimony *pendente lite* is a final judgment within the meaning of the statute?

It is contended by counsel for the appellant that the order is in the nature of a final judgment, and appealable as such, and, in support of this argument, cite *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. Rep. 456, 635, and 8 Pac. Rep. 709. From a careful examination of the Sharon Case, it ap-

pears that the decision was placed upon the following grounds: (1) That an action of divorce is in the nature of a case in equity; (2) that by the constitution of California the supreme court had appellate jurisdiction "in all cases in equity." The court say: "Appellate jurisdiction in other enumerated cases was and is conferred, but the jurisdiction of this court in an action of divorce, in our opinion, depends on its being, in this state at least, a case in equity." The decision in this case being based on the terms of the constitution conferring upon the supreme court appellate jurisdiction in all cases in equity, it was further held that "wherever and whenever a superior court has jurisdiction to take any step or proceeding, or make any order in any case in equity, of that step, proceeding, or order the supreme court has appellate jurisdiction."

There is no provision, either in the organic act or statute of this territory, that corresponds to the constitutional provision of California; hence it does not seem to us that the Sharon Case is applicable to the case at bar. Our statute defining the appellate jurisdiction of this court (section 21, Code) reads: "Its appellate jurisdiction extends to a review of all cases removed to it, under such regulations as are or may be prescribed by law, from the final decisions of the district courts." It is said by Judge BOVIER that a "final judgment is one which puts an end to a suit." Certain it is that the order appealed from does not come within this definition. It is an incident to the suit. But it is said in some of the cases that such an order is in the nature of a final judgment. This is the most that has or can be said. That such an order may be said to be in the nature of a final judgment does not convince us that the legislature intended to make it appealable. And as this class of orders is not enumerated among the interlocutory judgments and orders made appealable by other provisions of the statute, it cannot be claimed that an appeal will lie in this case unless the order is appealable as a final judgment. Whether there should be an appeal in such cases is not for us to determine; but it seems to us that an appeal would, in many instances, defeat the object and purpose of the statute allowing temporary alimony.

Where a wife has good ground for divorce, but has no property in her own right, it is doubtful if she can bind herself

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personally to pay her counsel. Certainly she cannot bind her husband nor the community property. Since she can neither bind her husband nor the community property, unless she had means of her own, she would be powerless to assert and maintain her right to a divorce if the court could not interfere. From the very necessity of the case, therefore, the court should, on application, award her a reasonable allowance for her support, and a sufficient sum with which to employ counsel. The amount awarded should only go to the necessities of the case, considering all the circumstances and the ability of the husband to pay. In view of the necessity which so often arises, and the obligation of the husband to support the wife, the legislature has, in our judgment, seen proper to leave the matter of temporary alimony to the sound discretion of the trial courts, and by that discretion the parties must abide, in such cases, until a final judgment is rendered. If this has not been wisely done, the law-making power must supply the defect or omission. 1 Bish. Mar. & Div. § 71; Sparhawk v. Sparhawk, 120 Mass. 390; Chase v. Ingalls, 97 Mass. 524; Ex parte Perkins, 18 Cal. 60; 2 Bish. Mar. & Div. § 352; Cook v. Cook, 56 Wis. 203, 14 N. W. Rep. 33, 443; Bacon v. Bacon, 43 Wis. 197.

Our conclusions are that the supreme court has no jurisdiction in this case, except in so far as the order restrained the defendant from disposing of his property. From the restraining order an appeal is allowed. After an examination of the complaint, and the affidavits of the plaintiff and defendant used on the hearing when the order appealed from was made, we are satisfied that there was sufficient ground for granting the restraining order to preserve the property until the rights of the parties could be settled and determined by a decree.

Appeal dismissed, except as to the restraining order, and therein affirmed.

HAYS, C. J., and BUCK, J., concurring.

BRADBURY *et al.* v. IDAHO & O. LAND IMP. Co.

(March 8, 1886.)

TRIAL—VERDICT—SPECIAL FINDINGS.

1. Under Code, § 385, providing that, where special findings of fact are inconsistent with the general verdict, the former control the latter, error cannot be predicated on the action of the court in rendering judgment in accordance

with a special finding, it appearing that such finding was inconsistent with the general verdict.

MECHANICS' LIEN—FORECLOSURE—DECREE.

2. Under Code, §§ 815, 827, providing that a mechanic's lien shall only extend to work, labor, materials, and moneys paid for recording and filing the lien, a decree for the foreclosure of a lien on an irrigating ditch cannot include as damages the cost of protesting an acceptance for the construction of the ditch.

RECORD ON APPEAL—STATEMENT—RULINGS ON EVIDENCE.

3. Under Code, § 653, providing that a statement once made may be used on appeal from the judgment, exceptions to rulings on evidence embodied in a statement of the case may be considered on appeal from the judgment, where it appears that such statement had been used at the hearing on the motion for a new trial.

ACTION ON ACCEPTANCE—EVIDENCE.

4. In an action on an acceptance for the construction under a written contract of an irrigating ditch, evidence of a conversation between the parties at the time of making the contract was properly excluded.

Appeal from district court, Alturas county.

Action by W. C. Bradbury and another against the Idaho & Oregon Land Improvement Company on an acceptance for the construction of an irrigating ditch, and to foreclose a mechanic's lien on said ditch. From a judgment for plaintiffs, and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

F. E. Ensign, for appellant. *Huston & Gray*, for respondents.

Buck, J. This action was brought to collect an acceptance for \$6,774.49, payable in 15 days from date, which had been protested, and was unpaid. The plaintiffs claim that said acceptance was given for a balance found due on settlement from defendant to plaintiffs for digging an irrigating ditch in Alturas county, Idaho territory; and pray the foreclosure of a mechanic's lien upon said ditch. The complaint also alleges that said ditch was dug upon contract, and sets out the contract therein. The answer admits the contract and the settlement, but alleges that, without defendant's knowledge or authority, the plaintiffs dug said ditch larger than the contract specified, and that the alleged settlement was made by them without knowing of said enlargement, and was procured by plaintiffs by fraud, and deny that a larger sum than \$500 was due thereon.

The case was tried by a jury, and the following special questions were submit-

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ted to the jury, and answered, to wit: "(1) Was the ditch constructed upon the survey made by the engineer in charge employed by the defendant corporation? Answer. Yes. (2) Did the dimensions of the ditch as laid out by the engineer in charge vary from the dimensions as stated in the written contract? A. Yes. (3) Were the changes and variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction? A. Yes. (4) Was there a settlement between the plaintiffs and defendant on the ninth day of June, 1883? A. Yes. (5) What amount was found to be due to plaintiffs from defendant upon such settlement? A. \$16,774.49. (6) Did the defendant, by its general manager, R. E. Strahorn, give its acceptance to plaintiffs for the sum of \$6,774.49 upon such settlement? A. Yes." The jury found a general verdict that there was due plaintiffs \$4,274.49, and 20 per cent. interest from date of acceptance.

The court found several findings of fact, and the following conclusions of law: "Conclusions of Law: (1) That the plaintiffs are entitled to a judgment for \$10,107.52; (2) that plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint; and it is so ordered."

The appeal is taken from the order overruling a motion for a new trial, and from the judgment, and is brought upon a statement of the case.

The record assigns as error "(1) that the first four findings of fact by the court are not sustained by any findings or special verdict of the jury; (2) that the court erred in making any finding of facts after the cause had been once submitted to a jury; (3) that the court erred in its first conclusion of law, in that it is in conflict with the general verdict of the jury, and because there is no finding of fact by the jury authorizing it; (4) that the conclusion of law that the plaintiffs were entitled to a foreclosure of the mechanic's lien is not supported by the evidence, in that the evidence does not show that it was filed of record within 30 days after the work was done, and that the notice itself shows that it was only intended as a lien upon a ditch as originally contracted for; (5) that the court erred in decreeing a foreclosure of the lien for the full amount, because the damages allowed for protest are not secured by the lien."

There are also other alleged errors which will be considered hereafter. The alleged

error of rendering judgment for a different amount than specified in the general verdict seems not well taken. Section 385 of our Code provides that where special findings of fact are inconsistent with the general verdict, the former control the latter, and the court must give verdict accordingly. There is an inconsistency between the special findings of fact and the general verdict, but the judgment is in accordance with the special findings, and is valid under said section of the Code.

The alleged error that the conclusion by the court that the plaintiff was entitled to the foreclosure of his mechanic's lien was error seems not well taken, as the evidence shows the plaintiffs to have been original contractors, and entitled to 60 days in which to file their lien.

The objection to the decree of foreclosure on the ground that the lien, if allowed, could not cover damages for protesting the acceptance, seems well taken. The lien exists only by force of the statute, and cannot exceed the express provisions thereof. Section 815 of our Code provides that the lien is for work, labor, or material done and furnished, and section 827 allows the lien to extend to moneys paid for filing and recording the same. It cannot be extended beyond these items. 1 Jones, Mortg. § 360; Phil. Mech. Liens, § 204.

In the statement of the case are several exceptions to the ruling of the court in the admission or rejection of evidence. It is maintained by respondents that such exceptions can only be brought up on a bill of exceptions. Section 413, subd. 3, of the Code, provides that if a motion for a new trial is to be made upon a statement of the case, the moving party must prepare the statement. When the notice of motion designates errors in law occurring at the trial as the ground relied on in the motion, the particular errors relied on shall be specified therein. The Code seems to make no distinction between the errors to be brought up in a bill of exceptions and on a statement. It seems to leave it optional with the aggrieved party as to which method he will adopt. A statement of the case can only be made upon a motion for a new trial. Upon a simple appeal from the judgment no statement is authorized. A statement once made may be used on appeal from a judgment, under section 653 of the Code, and, under the authorities, it seems that a statement can be so used on an appeal from a judgment only when first used on a motion for a new trial. Haynes, New Trials & App. § 254.

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In other respects a statement and bill of exceptions are similar. *People v. Crane*, 60 Cal. 279; *People v. Lee*, 14 Cal. 510; *Purdy v. Steel*, 1 Idaho, 216; *People v. Hunt*, Id. 436. We are of the opinion that exceptions to the ruling of the court in admitting or rejecting evidence may be considered on a statement, where a statement is authorized, the same as in a bill of exceptions.

Examining these alleged errors, we find that the rulings of the court sustaining objections to certain questions specified in the fifth assignment of error are in harmony with established rules of evidence. The first question is, "What conversation, if any, was had at the time of making the contract?" The written instrument itself contains the final result of their conversation, and what they said outside of it was immaterial. "(2) Did you inform plaintiff Bradbury that you had no authority to contract for a larger ditch than that specified, and that a different contract would not be ratified?" The issues made by the pleadings were, was the ditch dug and accepted? The preliminary conversations of parties would be irrelevant to these issues, and were properly rejected. The evidence admitted under objections in assignments of error Nos. 1, 2, 3, and 4 went, generally, to the progress of the enterprise, and, while apparently not relevant to the chief issue of the acceptance of the ditch as completed by the defendant, we cannot see that it in any way prejudiced defendant's case.

We think the instructions present the issues in the case fairly to the jury, and that no matter material to the appellant's cause was omitted.

Judgment affirmed as to judgment, and decree for foreclosure of lien modified by striking from the amount the penalty for protest.

HAYS, C. J., and BRODERICK, J., concurring.

McCARTY v. BOISE CITY CANAL CO.

(March 8, 1886.)

IRRIGATING DITCH — OVERFLOWING LAND — CONTRIBUTORY NEGLIGENCE.

1. Where, in an action to recover damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, it appeared that defendant knew of the defect in its ditch, and permitted the leakage to continue for over a year, error cannot be predicated on the court's

refusal to permit defendant to show that, at small expense, plaintiff might have prevented the injury to her land.

REVIEW ON APPEAL — SUFFICIENCY OF EVIDENCE.

2. Where, in an action to recover damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, evidence was submitted tending to show leakage and damage from such leakage, defendant's contention on appeal that a verdict for plaintiff was unsupported by the evidence will not be sustained.

IRRIGATING DITCH — OVERFLOWING LAND — INSTRUCTIONS.

3. Where, in an action for damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, the evidence shows the leakage and damage as alleged, error cannot be predicated on the refusal of defendant's requested instruction that it was not liable for damages resulting from rains, floods, or acts of other parties in irrigating higher grounds, or from water standing above the ditch, and percolating through the soil, as the fact that others were liable does not excuse defendant's negligence.

Appeal from district court, Ada county.

Action by Martha McCarty against the Boise City Canal Company for damages to plaintiff's land, caused by leakage from defendant's irrigating ditch. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Brumback & Lamb, for appellant.
Huston & Gray, for respondent.

BUCK, J. The defendant is a corporation existing under the laws of Idaho territory, organized for the purpose of digging and operating a ditch for irrigation. The ditch is constructed across the farm of plaintiff. The complaint filed June 17, 1884, alleges, in substance, that during the years 1883 and 1884 the plaintiff's land had been damaged by water escaping from the ditch and running upon it during said years, and prior thereto, through defects in the same, and by carelessness and mismanagement in operating the same, in the sum of \$400. The defendant, answering, alleges, among other things, that said damage, if any, was the result of the carelessly and negligently flowing water thereon by plaintiff, and from rains and floods, and denies all the allegations of the complaint. The cause was tried by a jury, who found a verdict for plaintiff, and assessed her damages in the sum of \$150. The appeal is taken from the judgment, and from the order overruling a motion for a new trial. A bill of exceptions is incorporated in the record.

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The first assignment of error is that the verdict is unsupported by the evidence in that the evidence is not sufficient to prove that water in sufficient quantity to injure the land of plaintiff ever escaped through or over defendant's ditch upon the same. The second error assigned is that the evidence shows that whatever damage was done to plaintiff's land was done by irrigating land above plaintiff's land, by others than defendant, and by the plaintiff's careless irrigating of her own land surrounding the portion alleged to have been injured. Evidence upon both of these propositions was submitted to the jury, and it was their especial province to determine its weight and credibility. Except in the absence of all evidence, we cannot disturb their findings thereon.

The third alleged error is the refusal of the court to allow the defendant to show that, at a small expense on the part of plaintiff, any surplus water that may have come from defendant's ditch could have been conducted off of the land of plaintiff, so that the same would do her no harm. This proposition involves the main issue of the appeal. The important question is, what are the relative duties and obligations of the ditch-owners and the owners of the land through which the ditch runs?

It is admitted that the alleged overflow and seepage had continued with the knowledge of defendant for at least a year; that the plaintiff had notified the defendant of the alleged defects in its ditch, and offered to repair the same so that no water should escape therefrom upon her premises for \$25, and that the defendant had declined said proposition. The theory and claim of defendant is that the plaintiff was under a legal obligation to dig a ditch upon her own premises, if it could be done at a small expense, and thus conduct the said seepage from defendant's ditch off from her land. If this be true, then it results that ditch-owners have such a dominion over the lands through which their ditch is located as gives them not only a right of way for lateral ditches to conduct off water escaping from their main ditch through the adjoining land, but also that such escape ditches shall be maintained by such adjoining owners, providing that it can be done at a small expense. We do not understand that the doctrine relied on can be extended so far. The plaintiff is entitled to control her own premises.

Flynn v. Railroad Co., 6 Amer. Rep. 595; *Yik Hon v. Water Works*, 65 Cal. 619, 4 Pac. Rep. 666; *Burroughs v. Railroad Co.*, 38 Amer. Dec. 75; *Railroad Co. v. Hendrickson*, 21 Amer. Rep. 97; *Fero v. Railroad Co.*, 22 N. Y. 209; *Cook v. Transportation Co.*, 1 Denio, 91; *Kellogg v. Railway Co.*, 7 Amer. Rep. 69.

We understand the rule to be that where one person suffers injury by the carelessness of another, occurring unexpectedly, and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage, if a temporary expedient or slight expense will do so; but if the one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense. *Shear. & R. Neg.* §§ 25, 28, 31, 36; *Kerwhack v. Railroad Co.*, 62 Amer. Dec. 246; *Beach, Contrib. Neg.* §§ 13, 18, 64; *Railroad Co. v. Anderson*, 31 Amer. Rep. 750; *Railroad Co. v. Jones*, 95 U. S. 439; *Gould v. McKenna*, 27 Amer. Rep. 705; *Whart. Neg.* 74-78; *Fraser v. Water Co.*, 12 Cal. 556; *Cooley, Torts*, 679; 4 *Wait, Act. & Def.* 718; *Snyder v. Railway Co.*, 11 W. Va. 37; *Railroad Co. v. Medley*, 40 Amer. Rep. 734.

The appellant assigns the giving of the first six instructions on behalf of plaintiff, and the refusal to give the first, second, and third instructions asked for by defendant, as error. The objection to these instructions given, and to the refusal to give the first and second asked by defendant, are based upon the theory that the plaintiff was guilty of negligence. We think that the evidence offered by defendant itself, and the admissions of defendant, show that plaintiff did all that could legally be required of her, and there was no evidence of negligence to justify the instructions refused, or the rejection of those given. Had plaintiff failed to notify defendant of the defects in its ditch, and thus allowed the damage to continue and increase to her knowledge, when the defendant was ignorant of its cause, or had there been a sudden break in the ditch, which, by a temporary expedient, at a slight expense, the plaintiff might have repaired, and

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thus have prevented the damage, the doctrine of negligence would apply. But in this case we think there was no error in giving or refusing said instructions.

The third instruction asked for by defendant, and refused, is as follows: "The defendant is not liable for damages that may have resulted from rains or floods, or from damages that may have resulted from the acts of other parties in irrigating higher grounds, or from water standing above the ditch of defendant, and percolating through the soil, and accumulating on land of plaintiff; nor from breaks in the banks of the ditch of defendant, if defendant used such care in constructing, operating, and repairing its ditch as a prudent man would use if his own property were exposed to damage." The first proposition in this instruction, though good in a case where there was no question as to water from defendant's ditch contributing towards the damage, is hardly applicable to this case. There seems to be no question that water escaped from the defendant's ditch, and, at best, mingled with the waters from other sources, if such there were. But the fact that others were also liable would not excuse the wrongful negligence of defendant. Cooley, Torts, 684; 4 Wait, Act. & Def. 719. We think the second part of the instruction not applicable, for the reason that defendant's own testimony shows that it allowed the water to run without using adequate means to stop it, upon the theory that the plaintiff might avert the damage at a slight expense, and that it was her duty to do so.

The appellants allege as error the refusal of the court to strike out certain findings of fact and conclusions of law. The first finding objected to seems to be necessarily included in the general verdict of the jury, and can result in no harm to defendant, and the others were within the province of the trial judge, and bear upon the matter of the injunction. As to the remaining alleged error, to wit, the granting of the injunction, we are of the opinion that this remedy is not necessary to protect the rights of the plaintiff, and is of doubtful utility.

The judgment is affirmed as to damages, and reversed as to granting the injunction.

HAYS, C. J., and BRODERICK, J., concurring.

PECOTTE v. OLIVER.

(March 8, 1886.)

EXECUTION — ISSUANCE TO OFFICER LEVYING ATTACHMENT—VALIDITY.

1. The officer who has seized goods under a writ of attachment is the officer to whom the execution on the judgment should issue.

SAME—IMPROPER DIRECTION.

2. The fact that an execution on a judgment in attachment, delivered to the constable, who held the property by virtue of the levy made by him, was directed "to the sheriff of the county," does not render the execution void, as such direction was an improper one, and amendable.

CONSTABLES — ACTION FOR UNLAWFUL SEIZURE—EXECUTION AS EVIDENCE.

3. In an action against such constable for the value of the goods sold by him under such execution, the exclusion of the execution from evidence was reversible error.

Appeal from district court, Alturas county.

Action by Theophile E. Pecotte, assignee of Charles E. Bolton, against B. F. Oliver, to recover the value of certain goods sold by defendant, as constable, by virtue of an execution recovered against plaintiff's assignor in an action of attachment. From a judgment for plaintiff, defendant appeals. Reversed.

F. E. Ensign, for appellant.

When a writ is directed to an improper officer, but executed by a proper officer, the error in the direction does not vitiate the writ, and may be cured by amendment. *Walden v. Davison*, 15 Wend. 578; *Hearsey v. Bradbury*, 9 Mass. 95; *Rollins v. Rich*, 27 Me. 557; *Campbell v. Stiles*, 9 Mass. 217; *Bronson v. Earl*, 17 Johns. 63.

A writ of execution directed to the sheriff, but handed to a constable, and executed by him, is valid. *Blanchard v. Waters*, 10 Metc. (Mass.) 185; *Lyon v. Fish*, 20 Ohio, 104.

Kingsbury & McGowan, for respondent.

HAYS, C. J. The appellant was an acting constable of Hailey precinct, Alturas county, and on the twentieth day of June, 1883, a warrant of attachment was duly placed in his hands for service in an action against one Charles E. Bolton. It was duly served by him seizing and holding certain property of Bolton's. Afterwards judgment was duly entered against said Bolton and an execution issued thereon, and directed "to the sheriff of Alturas county." The execution was delivered to

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defendant, in virtue of which he sold the attached property. Soon after the attachment Bolton assigned his estate to this plaintiff, who brought his suit against this defendant for the value of the goods theretofore seized. Defendant sought to justify by showing the goods were seized by him as constable under attachment proceedings against Bolton, and afterwards sold upon the execution issued upon the judgment obtained in the attachment suit. When the defendant offered the execution in evidence plaintiff objected because it was not directed to B. F. Oliver, or to any constable, but was directed to "the sheriff of Alturas county." The court sustained the objection, and defendant duly excepted. The court also refused to permit defendant to show anything done by him as constable under the writ; all of which was duly excepted to.

It is conceded that the defendant was the officer who had served the attachment process, and that he held the property by virtue of that writ. It therefore follows, as a matter of law, that he was the proper officer to whom the execution which sought to reach said attached property should issue, as he was the proper officer to make the sale. *Freem. Ex'ns*, 62; *Clark v. Sawyer*, 48 Cal. 133. Since all the property in dispute was that held under the attachment, the direction of the execution must therefore be treated as a direction to an improper officer, as it clearly was, so far as the subject-matter of this action is concerned. The rule is laid down by *Freeman on Executions*, § 65: "Where a writ is directed to an improper officer, but executed by the proper officer, the error in the direction does not vitiate the writ, and may be cured by amendment." This position is abundantly sustained by the authorities. *Wap. Attachm.* 141; *Hearsey v. Bradbury*, 9 Mass. 95; *Campbell v. Stiles*, Id. 217; *Lyon v. Fish*, 20 Ohio, 105; *Bank v. Franklin*, 20 Kan. 264; *Walden v. Davison*, 15 Wend. 575; *Hibberd v. Smith*, 50 Cal. 519. It follows that the execution was not void, and the irregularity might have been cured.

Doubtless the better practice in such cases is to apply to the court from which the writ issues to amend the same. Such court would have the right, and it would be its duty, to correct the same; in this case by directing it to the officer to whom it was doubtless intended to be given for service. But as this execution was amenda-

ble, and not void, we think the court erred in sustaining the plaintiff's objection. For the same reason we think the court erred in refusing to permit defendant to show delivery of execution to him. For these reasons we think the judgment should be reversed, and a new trial ordered.

Judgment reversed and cause remanded for further proceeding in accordance with this opinion.

BUCK, J., concurring; BRODERICK, J., expresses no opinion.

MOTHERWELL *et al.* v. TAYLOR.

(March 8, 1886.)

RESULTING TRUST—PURCHASE OF MINE.

Where plaintiffs, half owners of a mine, enter into an agreement with defendant, by which defendant was to negotiate and purchase the remaining half of the mine, and defendant does so purchase, paying the consideration out of his own funds, the fact that at the same time defendant purchases an interest in another mine will not create a resulting trust in favor of plaintiffs in such other mine.

Appeal from district court, Alturas county.

Action by James P. Motherwell and others against Frank Taylor to declare a partnership and a resulting trust in favor of plaintiffs in certain mining property. From a judgment for defendant, and from an order overruling their motion for a new trial, plaintiffs appeal. Affirmed.

L. Vineyard and *J. B. Roseborough*, for appellants. *F. E. Ensign* and *George H. Roberts*, for respondent.

HAYS, C. J. This action was brought to declare a partnership and a resulting trust in favor of the plaintiffs in certain mining property. The theory of the plaintiffs was that a mining partnership was entered into between plaintiffs and defendant, Frank Taylor, about the first day of August, 1882; and it is alleged by plaintiffs that at the same time defendant agreed to negotiate for, and if possible buy in, for the partnership, of one Joseph Taylor, a conflicting claim called the "Far West," in the Davitt mine; that on or about the eighteenth day of August, 1882, the defendant purchased said claim, together with an interest in the "Snow Fly" claim, then a prospect, for \$600; that the said sum of \$600 was by defend-

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ant loaned or advanced to the partnership, and security taken therefor upon the ores upon the dump and in sight in the Davitt mine; that afterwards the \$600 so paid for the interest in the claim was repaid to Frank Taylor from the proceeds of the Davitt mine; that defendant, Frank Taylor, had fraudulently concealed from the plaintiffs the fact that he (defendant) had purchased an interest in the Snow Fly, and that plaintiffs did not ascertain the fact for more than a year after the transaction. The plaintiffs claim that by reason of these facts there was a resulting trust in their favor in and to the Snow Fly mining property.

The case was tried by the court, and the findings were, in substance, that there was no partnership entered into until after the purchase of the claim from Joseph Taylor; that the defendant, Frank Taylor, paid for the entire property purchased of Joseph Taylor from his (defendant's) own funds; that defendant did not take any security from plaintiffs for the money so paid for the claim; that the \$600 was, after the purchase, repaid from the proceeds of the Davitt mine; that there was no fraudulent concealment of facts on the part of the defendant, Frank Taylor; that all the agreement between the plaintiffs and defendant as to the partnership was made contingent upon the purchase of the conflicting claim; and that as it was not partnership funds that purchased the claims, there was no resulting trust in favor of the plaintiffs in the Snow Fly mining property. On the findings and conclusions of law judgment was rendered against the plaintiffs. Motion for new trial was overruled, and from the judgment and order overruling the motion for a new trial the plaintiffs appeal to this court.

The question is, was the money used by the defendant, Taylor, in the purchase of the two claims, partnership funds? If it was not, then there is no resulting trust. As we understand the law applicable to this case, it was the payment of the purchase money at the time the title was obtained that would raise a trust of this kind, and neither a promise to pay nor after payment is sufficient. Here the defendant paid his own money, and we cannot see that he took any security therefor. Certainly there was nothing said or done which would have made the plaintiffs personally liable to the defendant, Taylor, for the money; nor was there

any note or other security in writing taken, nor property pledged and delivered to defendant. We conclude from the record that defendant purchased the claims with the view of getting his money back from the proceeds of the mine, if he could do so, and that there was no partnership at the time of the purchase. *Ryan v. Dunphy*, 4 Mont. 342, 1 Pac. Rep. 711; *Snyder v. Wolford*, 33 Minn. 175, 22 N. W. Rep. 254.

We have examined the record and see no error. Judgment of the court below is therefore affirmed.

BUCK and BRODERICK, JJ., concurring.

LUFKINS *v.* COLLINS *et al.*

(March 8, 1886.)

TRIAL—QUESTION FOR JURY—REPLEVIN.

1. In an action of replevin it appeared that A., in the employ of defendant, and threatened with attachment suits, executed a bill of sale to defendant of certain mules; that on the following day, to effect a delivery, A. and defendant went to where the mules were, in the charge of plaintiff; that A., being indebted to plaintiff, in the presence and with the acquiescence of defendant, sold to plaintiff by bill of sale and actual delivery five of the mules covered by defendant's conveyance; and that A. "then" made a delivery to defendant. *Held*, that the question as to the ownership of the five mules was properly submitted to the jury.

SAME—SPECIAL FINDINGS.

2. Under Code, § 385, making it the province of the court to determine as to what particular facts the jury shall find specially, error cannot be predicated on the action of the court in refusing to direct the jury to find specially on certain issues.

Appeal from district court, Alturas county.

Action of claim and delivery by H. Lufkins against C. H. Collins and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Kimball & Haywood, for appellants. *G. L. Waters, L. Vineyard, J. B. Roseborough*, and *Brumback & Lamb*, for respondent.

BRODERICK, J. This case was here on appeal at the instance of defendants, and was decided at the January term, 1885. Ante, 135, 7 Pac. Rep. 95. The former judgment was there reversed, and the cause remanded to the court below for a new trial. The plaintiff again obtained a

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verdict and judgment, and from this judgment the defendants appeal.

The facts, as disclosed by the record, are substantially as follows: On and prior to the twenty-first day of November, 1882, the firm of Adams & Cunningham were the owners of 71 head of mules and horses used in teaming, and at that time the firm was engaged in teaming for Collins & Co., the defendants herein, with this plaintiff as boss or train-master, in the employ of said Adams & Cunningham, on the Oregon Short Line Railroad. On November 21, 1882, at Pocatello station, on the line of said road, Adams & Cunningham, being threatened with attachment suits, sold their stock and forwarding outfit to Collins & Co., defendants, and delivered to them a bill of sale, but the property was not there, and no part of it was delivered until the next day thereafter. The defendants and Adams then proceeded to the 16-mile station on the road, where they met the plaintiff with some of the property, and informed him of the transaction. On the twenty-second day of November, 1882, at the 43-mile station on the road the firm of Adams & Cunningham, by bill of sale and by actual delivery, sold to the plaintiff the five mules described in the complaint. While the negotiation was going on between plaintiff and Adams for the five mules, the defendant Stevens said to plaintiff that the sale of the property to defendants did not amount to much; that it was done to keep the work going on, and that he (plaintiff) could go ahead and purchase the mules, and thereby make himself secure. Immediately thereafter, and in presence of Stevens, the plaintiff selected the five head of mules, and he and Adams agreed upon the purchase price, and they were then and there delivered by Adams to the plaintiff. The delivery of the property was accomplished by a bill of sale executed by Adams & Cunningham. This occurred before the property had been delivered to the defendants. Adams then delivered to Stevens, for defendants, the other property, consisting of 66 head of stock and the forwarding outfit, and by agreement there made the plaintiff retained the control of the same for defendants, and continued in their employ as train-master. The plaintiff retained possession of the mules so purchased by him, and claimed and used them without objection from defendants until some time in January, 1883. On the nineteenth day of January, 1883, the defendants, while the

plaintiff was absent, and without his consent, and by "force and arms," took and drove away the mules, claiming them under the bill of sale of November 21, 1882.

The action was brought to recover the property, and for damages, and the verdict was in favor of the plaintiff for the return of the property or \$1,000, the value thereof, and \$300 damages for wrongful detention of the same.

On the trial of the case, among others, the following special question was submitted to the jury: "(2) Was there a sale and delivery of the property in question for a valuable consideration by Adams & Cunningham to the plaintiff Lufkins? And if so, did the defendants assent or acquiesce in such sale and delivery?" This question was answered by the jury in the affirmative, and no other special verdict returned is in any manner inconsistent with this one. This special finding of the jury supports the general verdict, and is conclusive upon the question there submitted, if there is any evidence to sustain the finding.

At the trial defendants requested the court to instruct the jury to find specially on certain other questions, a part of which were submitted and others refused, and defendants excepted to the ruling upon the questions refused, and assign the same as error. By our Code, §385, it is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has a right to dictate the terms of such questions, and for refusing to comply with such request no error can properly be assigned.

There are a number of assignments of error in the record as to giving certain instructions to the jury, as well as to the refusal of the court to give others, which assignments need not be noticed in detail.

We are unable to find any error, either in the instructions given or refused.

Counsel for defendants urge that the court erred in refusing to give the last instruction requested, which is as follows: "On the undisputed facts in this case defendants are entitled to a verdict of no cause of action." This request was made on the assumption that there was no evidence in support of the plaintiff's claim. We have carefully examined the record, and are satisfied that this assumption is not well founded. There is some evidence to support the verdict, but we deem it unnecessary to comment thereon at length. The circumstances surrounding the par-

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ties, the apparent motive that governed the parties when the transactions were had, the apparent acquiescence of the defendants in the sale to plaintiff, the manner in which the defendants obtained possession of the property,—in short, the whole case,—is such that we think it was properly submitted on the evidence and instructions to the jury to determine who had the better right and title to the prop-

erty. *Silver Min. Co. v. McLaughlin*, 1 Idaho, 651; *Brown v. Brown*, 41 Cal. 88; *Trenor v. Railroad Co.*, 50 Cal. 222.

We are further satisfied, in view of all the facts and circumstances of this case, that justice has been done, and that the verdict and judgment should not be disturbed. The judgment is therefore affirmed.

HAYS, C. J., and BUCK, J., concurring.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1887.

STEVENSON v. MOODY, Territorial Comptroller.

(January 24, 1887.)

TERRITORIES—POWERS OF LEGISLATURE — SALARY OF ASSISTANT CHIEF CLERK.

Under Rev. St. U. S. § 1855, providing that no law of any territorial legislature shall be made by which the officers of the legislature are paid any compensation other than that provided by the laws of the United States, a territorial legislature has no power to elect an assistant chief clerk, as such office is not created by any United States law, and accordingly a resolution of the legislature authorizing the payment of such officer out of the territorial treasury is void.

Submission on an agreed statement of facts, of a controversy between one Stevenson and one Moody, as territorial comptroller, to determine the right of plaintiff to compensation as assistant chief clerk of the territorial legislature. Controversy dismissed.

BUCK, J. This controversy comes into this tribunal, as a court of original jurisdiction, upon an agreed statement of facts, under sections 20 and 780 of our Code of Civil Procedure. The statement of facts agreed upon by the parties, and submitted to the court, are—*First*. That on the thirteenth day of December, A. D. 1886, the legislative council of Idaho territory proceeded to elect such *attaches* as have formerly been elected; that the plaintiff was elected to a position designated by said council as "assistant chief clerk of the council," and that, as such clerk, he has

rendered services for 39 days. *Second*. That assistant chief clerks of the council, so called, have been elected by former assemblies of this territory. *Third*. That the duties devolving upon the chief clerk of said council are onerous in the extreme, and that public business is expedited by the employment of an assistant, and such assistance is necessary for the proper transacting of the business of the council. *Fourth*. That the plaintiff made the demand of the defendant, as comptroller of Idaho territory, for a warrant upon the general fund of the territory for the sum of \$195, claimed by him to be due him for said services, at the rate of \$5 per day, as said assistant chief clerk, and the defendant refuses to execute or deliver said warrant to plaintiff for the alleged reasons: (1) That there is no law of the United States creating or recognizing such subordinate officer of either branch of the legislative assembly of the territory; (2) that the laws of the United States forbid the payment of moneys belonging to this territory to any subordinate officers of the legislative assembly, for services rendered such assembly; (3) that the laws of the United States forbid the creation of such subordinate office by a legislative assembly; and (4) because there is no law authorizing the comptroller to draw a warrant in payment for services rendered said assembly by persons not officers of said territory.

The following sections of the United States Statutes determine the powers and authority of our territorial assembly.

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"Sec. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. * * * Sec. 1855. No law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory, or the members or officers of any territorial legislature, are paid any compensation other than that provided by the laws of the United States." "Sec. 1888. No legislative assembly of a territory shall, in any instance, or under any pretext, exceed the amount appropriated by congress for its annual expenses."

In the case of *National Bank v. County of Yankton*, 101 U. S. 129, Mr. Chief Justice WAITE, in announcing the decision of the court, says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of congress. * * * The relation of the territories to the general government is much the same as that which counties bear to their respective states, and congress may legislate for them as a state does for its municipal corporation. The organic law of a territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory, and binds the territorial authorities. Congress has full and complete legislative authority over the people of the territories, and all the departments of the territorial government."

It is clear from the inspection of the organic act of the territory, and from the decision of the supreme court of the United States, that the legislative assembly can be composed of such persons only as are provided by congressional enactment, and that the number of its officers and *attaches* is determined by the same power. A legislative assembly of the territory cannot increase the number of its members or officers or *attaches*, or the amount of their compensation, by any enactment of its own. If the length of time allowed for its session, or the number of its officers, is not sufficient, the relief must come from congress. Section 1855 of the United States Revised Statutes limits the compensation of the members of the legislative assembly to a specified amount. Section 1888, in still more explicit terms, provides that the annual expenses of a legislative assembly shall not exceed, in any instance, or under any pretext, the amount appropriated by congress. Section 1855 enacts that

the amount of such compensation for any member or officer of a territorial assembly shall not be increased over the amount provided by congress, and prohibits, in express terms, the making of a law for that purpose by such assembly.

In January, 1873, as appears by section 1861 of the Revised Statutes of the United States, assistant chief clerks of each branch of the legislative assembly of territories were expressly provided for. In 1878, however, by act of congress passed June 19th, (20 St. U. S. 193,) said section was repealed, and it was provided that the subordinate officers of each branch of the territorial legislature shall consist of a chief clerk, enrolling and engrossing clerk, sergeant-at-arms, and door-keeper, messenger, and watchman, and chaplain. The office of assistant chief clerk was not included within this new enumeration of *attaches* to the legislative assembly. We must presume that this omission was intentional.

From an inspection of the several sections of the United States statutes, and the decisions of the supreme court of the United States, it seems clear that the election of an assistant chief clerk of the council was not authorized by law; that the joint resolution of the legislative assembly, providing for the payment of such officer out of the territorial treasury, was contrary to the laws of the United States, and void; and that the territorial comptroller is not authorized by law to draw a warrant upon the territorial treasurer for the payment of plaintiff as said assistant clerk.

Upon the above conclusions of law, and the stipulation of parties herein, this controversy is dismissed.

HAYS, C. J., and BRODERICK, J., concurring.

HEILNER *et al.* v. BROWN.

(February 7, 1887.)

REVIEW ON APPEAL—OBJECTION NOT RAISED BELOW.

An objection that an affidavit on motion for a new trial was void, in that it did not have a proper jurat, cannot be raised on appeal for the first time.

Appeal from district court, Washington county.

Action by Heilner, Ottenheimer & Co. against R. Brown on a promissory note

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and on an account. There was judgment for defendant. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

G. W. Adams and Brumback & Lamb, for appellant.

An affidavit on motion for a new trial that is not sworn to is not sufficient. *McDermaid v. Russell*, 41 Ill. 489; *Ladow v. Groom*, 1 Denio, 431; *People v. Sutherland*, 81 N. Y. 5-8; *Knight v. Elliott*, 22 Minn. 551; *Tunis v. Withrow*, 10 Iowa, 307.

An affidavit on motion for a new trial is not sufficient that alleges "that affiant could not, with reasonable diligence, have discovered and produced said evidence at such former trial." It must set forth the acts constituting the diligence used, or reason for not performing such acts, so the court may judge of the same. *Wilkes v. Wolback*, 30 Kan. 375, 2 Pac. Rep. 508; *People v. Cummings*, 57 Cal. 88; *Stoakes v. Monroe*, 36 Cal. 388; *Fenno v. Chapin*, 27 Minn. 519, 8 N. W. Rep. 762, 763; *Chapman v. Moore*, 107 Ind. 223, 8 N. E. Rep. 80; *Pinschower v. Hanks*, 18 Nev. 99, 1 Pac. Rep. 454; *People v. Jones*, (Cal.) 8 Pac. Rep. 611; *Carson v. Henderson*, 34 Kan. 404, 8 Pac. Rep. 727; *People v. Superior Court*, 5 Wend. 115, 10 Wend. 286; *Hopper v. Moore*, 42 Iowa, 563; *People v. Cummings*, 57 Cal. 88.

Huston & Gray, for respondents.

No appeal lies from an order granting a new trial, as such order is not a "final decision," within the meaning of Rev. St. U. S. § 1869. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. Rep. 15; *Coughlin v. District of Columbia*, 106 U. S. 11, 1 Sup. Ct. Rep. 37; *Baker v. White*, 92 U. S. 176-179; *McComb v. Commissioners*, 91 U. S. 1; *Davis v. Crouch*, 94 U. S. 514.

Confessions and statements of defendant are not cumulative evidence. *Parker v. Hardy*, 24 Pick. 246; *Gardner v. Mitchell*, 6 Pick. 116; *Chatfield v. Lathrop*, Id. 417; *Flannagan v. Newberg*, 1 Idaho, 84; *Gray v. Harrison*, 1 Nev. 509; *Wall v. Trainer*, 16 Nev. 131-135.

HAYS, C. J. This is an appeal from an order granting a new trial. The grounds of the motion for a new trial were irregularity in the proceedings of the court, newly-discovered evidence, insufficiency of the evidence, and errors in law. The appellants contend that the affidavit of J. Durkheimer, produced and read in the court below on the motion for a new trial on the ground of newly-discovered evi-

dence, was insufficient and void on account of not having a proper jurat thereon. It was read and treated as an affidavit in the court below without objection, and counsel cannot be heard to raise such an objection for the first time in this court. If it was defective, they should have objected to it in the court below, and, if overruled, they could have excepted, and been heard here. While courts look with disfavor on motions for new trial, on the ground of newly-discovered evidence, yet the court below must be clothed with large discretionary powers in such cases, and, if there is no abuse of that discretion, the appellate court will not interfere. We find no abuse of that discretion in this case, but think the order a very proper one. This being decisive of the question, other points discussed will not be considered.

The order is affirmed.

BUCK and BRODERICK, JJ., concurring.

ROSENTHAL *et al.* v. IVES *et al.*

LANSDALE *et al.* v. SAME.

(February 7, 1887.)

CONSOLIDATION OF ACTIONS—CONSENT OF PARTIES.

1. Error cannot be predicated on the action of the court below, in consolidating, for the purposes of the trial, two actions, where it appears that both parties consented to the consolidation; that defendants were the same in both actions; and that the same questions were involved.

MINES AND MINING—ADVERSE CLAIMS—FINDINGS—CITIZENSHIP.

2. In an action to determine the right of possession to a mining claim, the failure of the court to find as to the citizenship of the party for whom judgment was rendered is error, even though such party's citizenship is admitted by the pleadings.

MINER'S CUSTOM—LIMITATION OF PLACER CLAIMS—VALIDITY.

3. A miner's custom limiting placer claims to 80 rods in length to each locator is a reasonable one, and binding on all locators in the vicinity where it is in force.

Appeal from district court, Shoshone county.

Two actions, one by Joseph Rosenthal and others against George B. Ives and others, the other by Robert K. Lansdale and others against the same defendants, to determine the right of possession to a certain mining claim. The actions were

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consolidated, by the consent of parties, for the purposes of the trial. From a judgment for plaintiffs in both actions, defendants appeal. Reversed.

Charles W. O'Neill, for appellants.

The consolidation and trial of the two causes as one case was unauthorized by law and improper, even with the consent of parties. Code, § 713; *Wallace v. Eldredge*, 27 Cal. 498.

Actions brought pursuant to section 2326, Rev. St. U. S., are virtually applications for a patent for the ground in controversy; and it is incumbent upon a party to such action to show every fact essential to the initiation and perfection of any right claimed by him under the act of May 10, 1872, and to entitle him to the possession of the ground, not only against the defendant, but against the general government. *Golden Fleece G. & S. M. Co. v. Cable Consol. G. & S. M. Co.*, 12 Nev. 312; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652; *Mining Co. v. Brown*, 10 Sawy. 243, 21 Fed. Rep. 167; *Gelcich v. Moriarty*, 53 Cal. 217; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110; *Steel v. Mining Co.*, 18 Nev. 80, 1 Pac. Rep. 448.

The performance of annual labor is necessary to hold a placer claim. *Carney v. Mining Co.*, 65 Cal. 40, 2 Pac. Rep. 734.

An alien can neither locate, possess, nor acquire title under patent to the mineral land of the United States. *Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. Rep. 759; *Chapman v. Toy Long*, 4 Sawy. 28; *Golden Fleece G. & S. M. Co. v. Cable Consol. G. & S. M. Co.*, 12 Nev. 312.

The possessory right to the mineral lands of the United States may be acquired, in the absence of local rules, by a bare compliance with the act of congress. *Golden Fleece G. & S. M. Co. v. Cable Consol. G. & S. M. Co.*, 12 Nev. 312.

Wm. H. Clagett, for respondents.

The consolidation of the two causes was proper. Code Civil Proc. § 713; *Cariaga v. Dryden*, 29 Cal. 308; Code Civil Proc. § 196.

A finding is not necessary on any fact that is expressly admitted, or not denied in the pleadings. *Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 Cal. 588; *Taylor v. Palmer*, 31 Cal. 256.

The laws of the United States do not require \$100 to be annually expended upon a placer claim. Rev. St. U. S. § 2324.

Forfeiture and a relocation thereunder must be specially pleaded. *Morenhaut v.*

Wilson, 52 Cal. 268; *Water Co. v. Mooney*, 12 Cal. 534; *Richardson v. McNulty*, Blanch. & W. Lead. Cas. 225, notes; *Pralus v. Mining Co.*, 35 Cal. 35.

The law of 1866 was intended to extend to the customary law of the miners the legal protection of the government. *Broder v. Water Co.*, 101 U. S. 276; *Basey v. Gallagher*, 20 Wall. 683; *Jennison v. Kirk*, 98 U. S. 456, 457.

BRODERICK, J. These actions were commenced in support of the adverse claims made by the plaintiffs against the issuance of patents to Ives and Silverthorn to the Idaho Bar claim, in Shoshone county, Idaho. The two cases were, by consent of the parties, consolidated, and tried by the court without a jury. The court found and adjudged that Ives and Silverthorn were, as against the plaintiffs in each of said cases, the owners of, and entitled to the possession of, a certain portion of the claim, which was described in the judgment; that the plaintiffs in the Lansdale Case were the owners of, and entitled to the possession, as against the defendants, of that portion of the Idaho Bar claim more than 80 rods distant from the west line thereof, which conflicted with the lower half of the Murray location; that the plaintiffs in the Rosenthal Case were the owners of, and entitled to the possession, as against the defendants, of all the area in conflict with the upper half of the Murray location; that Ives and Silverthorn be enjoined and restrained from asserting or claiming any right, title, interest, or estate in any of the two parcels herein adjudged to be the property of the plaintiffs in the consolidated cases, respectively, and from prosecuting their application for a United States patent to any portion of said parcels of land.

From this judgment Ives and Silverthorn appeal to this court, and assign as error: *First*. That the consolidation and trial of the two cases as one was unauthorized by law, and improper, even with the consent of the parties. *Second*. That the findings do not show that Murray (one of the original locators) was a citizen of the United States, or had declared his intention to become such, nor that the plaintiffs in either of said cases were citizens of the United States, or had declared their intention to become such. *Third*. That the findings fail to show that the plaintiffs in either of said cases, or their predecessors in interest, ever complied with

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the requirements of section 2324 of the Revised Statutes, and the several acts amendatory thereof, as to performing the annual labor required by those acts, during A. D. 1884. *Fourth.* The finding that there was a mining custom in force, at the date of the Ives location, limiting all placer claims in that locality to 80 rods in length to each locator; that no exceptions to this custom were allowed by the custom itself; that the Ives location was made in violation of this custom, and was void as to the excess in length beyond 80 rods from its beginning point.

We will notice these questions in their order.

The consolidation of the cases below for the purposes of the trial, by the consent of the parties, is certainly no ground for reversal. The defendants were the same in both cases, and the questions involved the same. The consolidation and trial as one case saved costs to all the parties, and, if the order was error, it was without prejudice. At least, there has been no claim here that any prejudice resulted therefrom. In such a case a party should not be heard to complain here of that to which he assented in the court below.

The second question, as to the omission to find that Murray or the plaintiffs in either of the cases were citizens, or had declared their intention to become such, is more difficult. It appears from the record that in the Rosenthal Case the citizenship of Murray and plaintiffs is alleged, and not denied. In the Lansdale Case the citizenship of plaintiffs is alleged, denied by the defendants, and hence put in issue. It further appears that on October 13, 1885, after the rendition of the judgment, appellants stipulated in open court that the Lansdale Case should "abide and be controlled by all orders, decisions, and judgments in the Rosenthal Case."

It is contended, on behalf of the respondents, that the judgment in the Rosenthal Case should be affirmed, (so far as this point is concerned,) because the citizenship of Murray and the plaintiffs is admitted, or not denied; and also that the judgment in the Lansdale Case should be affirmed, because under the stipulation it was to abide and be controlled by the decision and judgment here in the Rosenthal Case. In ordinary cases, this point made by counsel would have to be sustained, as it is a general rule, well recognized, that what is admitted by the pleadings is taken as proven, and that which is alleged in the

complaint, and not denied by the answer, is considered admitted, as between the parties. But these are statutory actions, brought under an act of congress, and must be controlled by its provisions. It is true that it is a contest between parties to settle the right of possession to mining ground, but the act provides that, after a judgment is rendered, the party entitled to the possession of the claim, or any part thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land-office, together with the certificate of the surveyor general, etc., and make the payments required; "whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land-office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess." The amendatory act of 1881 provides that if, upon the trial, neither party appears to be entitled to the claim in dispute, nor any part thereof, this fact must be found, and judgment rendered accordingly.

From a consideration of these provisions, it is clear that the object and purpose of the action is not only to settle the controversy as between the claimants, but for the information of the officers of the land department of the general government. It is not enough that one party should show the better or superior title, as against the other claimant, but one party must show clearly, as against the government, the right to a patent for the disputed ground, or some part thereof, before either claimant can prevail in the action. *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, and 8 Pac. Rep. 625; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 653, 660.

The citizenship of Murray and the plaintiffs was pleaded, and we think there should have been a finding upon this allegation of the complaint, notwithstanding the admissions of the defendants. We must not be understood as deciding that in all actions the trial court must find upon allegations which are admitted by the parties, but we limit our conclusions in this regard to this particular class of cases. *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522.

As to the third assignment of error, we think the findings show a sufficient compliance on the part of the plaintiffs with

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the requirements of law as to performing the necessary labor upon the claim.

This brings us to the fourth and last question to be considered. Was it error to find the existence of a mining custom at the date of the Ives location, limiting all placer claims in that locality to 80 rods in length, and will this finding support the conclusion of law based thereon? Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as a part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question in any way conflicts either with the acts of congress, or the laws of the territory, but, on the contrary, think the custom a reasonable one, and entirely in harmony with the spirit of the laws. Rev. St. U. S. § 2319; Code Civil Proc. Idaho, § 486; *Smelting Co. v. Kemp*, 104 U. S. 652; *Erhardt v. Boaro*, 113 U. S. 535, 5 Sup. Ct. Rep. 560; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522.

We find no error in the record, except the omission to find on the question of citizenship; and, to have this omission supplied, the judgment is reversed, and the causes remanded to the court below, with directions to find upon this question on the evidence taken at the trial, if sufficient, and, if not, upon such evidence as may be adduced, and render judgment accordingly.

HAYS, C. J., and BUCK, J., concurring.

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(February 7, 1887.)

TRIAL BY COURT—FAILURE TO FIND—EFFECT.

1. If, in an action of fraud, the findings of the court are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which, if found true or not true, would not affect the result, is no cause for a new trial.

SAME—FINDINGS—WHEN RESPONSIVE TO ISSUES.

2. In such actions findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof.

(*Syllabus by the Court.*)

Appeal from district court, Ada county.

Action by Nancy Burns against George Alberts to set aside a deed. During the pendency of the action Burns died, whereupon E. B. Tage, administrator of her estate, was substituted as party plaintiff. From a decree for plaintiff, defendant appeals. Affirmed.

Brumback & Lamb, for appellant.

A judgment based upon findings which do not determine all the issues is a decision against law. *Knight v. Roche*, 56 Cal. 17; *Brady v. Bartlett*, Id. 364; *Billings v. Everett*, 52 Cal. 661.

Where specific facts are put in issue, it is the duty of the court to find the facts specifically. *Hihn v. Peck*, 30 Cal. 286; *Pratalongo v. Larco*, 47 Cal. 382; *Breeze v. Doyle*, 19 Cal. 104; *Hidden v. Jordan*, 28 Cal. 301; *Jones v. Block*, 30 Cal. 228; *Polhemus v. Carpenter*, 42 Cal. 386.

The specific facts constituting a fraud must be pleaded. *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. Rep. 132; *Green v. Hayes*, 70 Cal. 276, 11 Pac. Rep. 716; *U. S. v. Atherton*, 102 U. S. 372; *Misner v. Knapp*, 13 Or. 135, 9 Pac. Rep. 65.

The cause of action established by the findings must be the cause of action set out in the complaint; otherwise, judgment will be reversed. *Mondran v. Goux*, 51 Cal. 152; *Green v. Chandler*, 54 Cal. 626.

The findings must cover every material issue raised by the pleadings. *Cummings v. Peters*, 56 Cal. 593; *Everson v. Mayhew*, 57 Cal. 144; *Packard v. Johnson*, Id. 182, 183; *Robinson v. Railroad Co.*, Id. 419.

Huston & Gray, for respondent.

One who deals in property matters with an aged and feeble person is bound to prove the fairness of the transaction. *Bigelow, Frauds*, p. 282; *Wartemberg v. Spiegel*, 31 Mich. 400; *Ellis v. Mathews*, 19 Tex. 390.

Equity will set aside a contract for the sale of real estate and a conveyance thereunder when it appears that the capacity for business on the part of the grantor has been greatly weakened by trouble and distress of mind, and the price was grossly inadequate. *Bigelow, Frauds*, p. 283; *Perkins v. Scott*, 23 Iowa, 237.

Where inadequacy of consideration or undue influence is joined to imbecility or weakness of mind, arising from old age, sickness, intemperance, or other cause, equity will set aside the transaction at the suit of the injured party. *Bigelow, Frauds*, 283 et seq., and notes; *Tracey v. Sacket*, 1 Ohio St. 54; *Crawford v. Hoeft*,

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58 Mich. 1, 23 N. W. Rep. 27, 24 N. W. Rep. 645, 25 N. W. Rep. 567. and 26 N. W. Rep. 870; Cooley, Torts, 515, 516; Oakey v. Ritchie, 69 Iowa, 69, 28 N. W. Rep. 448; In re Disbrow's Estate, 58 Mich. 96, 24 N. W. Rep. 624, and note.

Evidence that parties lived together in adulterous intercourse is pertinent as one of several facts to prove the prevalence of undue influence. Bigelow, Frauds, 500, 501, et seq.; Cooley, Torts, 515.

BUCK, J. This action was brought to set aside a deed from plaintiff to defendant, on the ground that it was procured by fraud. Decree was granted, setting aside the deed, and from the decree and order denying a new trial appeal is taken. The appellant specifies three errors upon which he relies. *First.* That the court erred in excluding evidence offered by the defendant that he had furnished the money that purchased the property conveyed by the deed. The record shows that the offer was to show that defendant had given money to plaintiff, from time to time, which was used by her in the purchase of property. He did not offer to show that he had loaned or furnished her money with the understanding that it was to be used to purchase the property. She had a right to use her own money as she chose, whether she received it from the defendant or others. We think the evidence clearly incompetent. *Second.* Appellant claims that the evidence was insufficient to support the sixth, seventh, ninth, tenth, eleventh, thirteenth, and fourteenth findings of fact. Upon an examination of the testimony we find evidence upon the subject-matter of each of these findings. Some of it is undisputed, and where there is a conflict we think the credibility of the witnesses a matter for the trial judge, and we see no ground for disturbing the decision of the court thereon. *Third.* That some of the findings are outside of the issues, and that those actually found do not cover the issues raised by the pleadings. This objection suggests the question, what are the material issues in the case? The citation from 1 Daniell, Ch. Pr., in appellant's brief, states that, in actions of fraud, "everything intended to be proved should be stated, otherwise evidence cannot be admitted to prove it." 1 Daniell, Ch. Pr. 335. Accepting this as correct, yet it does not follow that everything alleged in a pleading will be proven upon the

trial, or that every allegation must be sustained by evidence before fraud can be established. Bigelow, Frauds, 490, 493. The *gravamen* of plaintiff's alleged cause of action is that "on the twenty-seventh day of May, 1884, defendant, fraudulently taking advantage of plaintiff's incapacity resulting from sickness and disease, caused her to execute a certain deed, whereby she conveyed to him certain real estate." The charging part of the complaint is as follows: "That the plaintiff being then sick, weak, and enfeebled from disease and prolonged sickness and confinement, and believing she had but a short time to live, and plaintiff being an illiterate person, and unable to read or write, the defendant on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured her to sign a certain writing, without paying her any consideration therefor, and which writing he falsely and fraudulently represented to be a will of the plaintiff, and purporting to devise her property as she had theretofore directed." In the decision of the court there is no finding upon the allegation that defendant fraudulently represented to plaintiff that said deed was a will. The failure to find upon this allegation is assigned and insisted upon as error.

In *Schroeder v. Jahns*, 27 Cal. 281, the court says: "While agreeing with counsel that the court must find as to the truth of every issue of fact found in the case, we think the finding need not be directly and pointedly made that each of the several allegations of the complaint or answer is not true. But if the court finds such facts as will be sufficient * * * to necessarily determine every material issue in the cause, the requirement of the law will, in that respect, be satisfied." See, also, to the same effect, Bigelow, Frauds, above cited.

In the case at bar the court finds that on the twenty-seventh day of May, 1884, the plaintiff was the owner of certain real estate of the value of \$1,500; that on said day she made the deed, whereby she conveyed it to the defendant for the consideration of two dollars; that, at the time she made the deed, the plaintiff was so sick, weak, and enfeebled, both mentally and physically, by disease and prolonged sickness, that she did not know or comprehend what kind of an instrument she was signing; that she had been a prostitute for years, and that the only relation existing between her and defendant were those

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resulting from illegal cohabitation; that prior to the making of the deed the defendant had been very assiduous in his attentions to plaintiff, and that after said deed was procured his attentions almost entirely ceased; that the property conveyed by the deed constituted plaintiff's entire estate; that she had eight children; that a short time before the making of said deed she had made a will devising said property to her children, and that a few days before the execution of said deed, with the assistance of defendant, she had destroyed said will; that said deed was executed about midnight, before a notary who had been sent for at the request of the defendant, there appearing no necessity for such unusual proceedings or haste; that plaintiff did not know the character of the instrument that she had signed until about the thirtieth of September, four months after its execution; and that, having ascertained that she had executed a deed to her property, she demanded of defendant that he reconvey the same to her, and upon his refusal so to do, she commenced this action to recover the same; and that said deed was obtained of plaintiff by fraud by defendant. It is maintained by appellant that some of these findings are outside of the issues, and that findings outside the issue will not sustain a judgment. The legal proposition that findings outside the issue will not sustain a judgment is probably correct, and we think it is also correct that findings outside an issue will not impair a judgment entered upon sufficient findings responsive to the issues. In the case at bar we think the findings are all responsive to the issues, although the subject-matter of them may not all have been alleged in the pleadings. It is said in Bigelow on Frauds, 482, that "fraud may be proved either by intrinsic evidence of unfairness in the transaction itself, or by evidence of facts and circumstances attending it." 3 Lawyers' Briefs, p. 583, § 577.

In the citation from Daniell's Chancery heretofore made it is said "that everything intended to be proved must be alleged;" but this would hardly be construed to mean that all the evidence by which it was to be proved must be pleaded. In the case at bar the *gravamen* of the charge is that, the plaintiff being sick and enfeebled, the defendant took advantage of her condition, and procured the deed. The fact that the plaintiff had eight children to whom a few days before she

had willed her property; that the defendant had assisted her to destroy said will; that defendant had sent for a notary at midnight, without any apparent necessity for haste, to have the deed executed,—are circumstances properly admitted in evidence, and, if competent evidence, we think findings upon them would be responsive to the issues. Appellant claims that defendant is entitled to a finding as to the allegation in the complaint that he falsely represented to plaintiff that the deed was a will. While a finding that such allegation was true might serve to make the fraud more apparent, yet the finding that it was not true could hardly relieve the defendant from the effect of the other findings in the case. The complaint does not in terms limit the acts of the defendant to the alleged false representations as to the character of the deed. It alleges that defendant took advantage of the condition of the plaintiff, and induced her to sign the deed without consideration, and falsely represented to her that the deed was a will. Without a finding upon the false representations, we think enough was found to sustain the judgment under the authorities cited. It is also claimed by appellant that, if the direct misrepresentation by defendant as to the will is not found, the remaining facts as alleged and found constitute constructive, rather than actual, fraud as alleged in the complaint. Actual fraud is defined to be the intentional and successful employment of any cunning or artifice used to circumvent another. 3 Lawyers' Briefs, p. 568, § 558. We think the facts found by the court clearly come within this definition.

We find no error, and the judgment below is affirmed.

HAYS, C. J., and BRODERICK, J., concur.

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(February 7, 1887.)

NONSUIT—WHEN GRANTED.

1. Where there is evidence to support the case, a nonsuit will not be granted.

SUNDAY — INJURY FROM DEFECT IN STREET — NECESSITY.

2. Where an injury occurs to the plaintiff on the Sabbath day through the negligence of the defendant in not keeping its streets in proper condition, the plaintiff is not required to show that he was engaged in a work of necessity at the time of the accident in order to en-

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title him to recover; and a motion for nonsuit on that ground is properly overruled.

EXCEPTION—GENERAL EXCEPTION TO INSTRUCTION.

3. Where the court gives a general charge to the jury, and the charge contains various propositions of law, and a general exception only is taken, such exception is not sufficient.

(*Syllabus by the Court.*)

Appeal from district court, Nez Perce county.

Action by William Black against the city of Lewiston to recover damages for personal injuries caused by a defective highway. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Brumback & Lamb, for appellant.

A dedication of a street must be by the owner of the land or of an interest therein. 2 Dill. Mun. Corp. §§ 635-637; *Irwin v. Dixon*, 9 How. 10; *Lee v. Lake*, 14 Mich. 12; *Leland v. Portland*, 2 Or. 46; *Bangan v. Mann*, 59 Ill. 492; *Dovaston v. Payne*, 2 Smith, Lead. Cas. 95; *Detroit v. Railroad Co.*, 23 Mich. 173; *U. S. v. Chicago*, 7 How. 185.

There must be an intent upon the part of the owner to dedicate, and this intent should clearly and satisfactorily appear. *Irwin v. Dixon*, 9 How. 10; *San Francisco v. Canavan*, 42 Cal. 541; *Fisk v. Havana*, 38 Ill. 208; *Grube v. Nichols*, 36 Ill. 92; *Rees v. Chicago*, 38 Ill. 322; 2 Dill. Mun. Corp. 636, note 4, and cases there cited.

To constitute an implied acceptance, repairs must be made and ordered or knowingly paid for by the authority which has legal power to adopt the street. *State v. Bradbury*, 40 Me. 154; *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Bridge Co. v. Bachman*, 66 N. Y. 261; *Town of Dayton v. Town of Rutland*, 25 Amer. Rep. 457; *People v. Jones*, 6 Mich. 176; *Guthrie v. New Haven*, 31 Conn. 308; *Des Moines v. Hall*, 24 Iowa, 234; *Requa v. Rochester*, 45 N. Y. 129; *Wisby v. Bonte*, 19 Ohio St. 238.

The jury are the exclusive judges of the facts, and it is erroneous for the court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist. *Caldwell v. Center*, 30 Cal. 539; *Wood v. Tomlinson*, 53 Cal. 720; *Bradley v. Lee*, 38 Cal. 362; *Crawford v. Roberts*, 50 Cal. 235; *McNeil v. Barney*, 51 Cal. 603; *Stone v. Mining Co.*, 52 Cal. 315.

Silas W. Moody, for respondent.

If the right to injure is claimed as a punishment for traveling on the Sabbath, this right does not belong to the city of

Lewiston. "Vengeance is mine; I will repay, saith the Lord." Bible, tit. "Romans," c. 12.

If the right to punish respondent is claimed by appellant for his earning his subsistence by assisting to harvest a wheat crop on the Sabbath, we cite: "It is lawful to do well on the Sabbath day." Bible, tit. "St. Matthew," c. 12.

Appellant, having excepted to the whole instruction, and having failed to specify what portion thereof it excepted to before the jury retired, is estopped from assigning error here. *Thomp. Char. Jur. pars.* 115, 116; *Haynes, New Trials & App.* § 129; *Code Civil Proc.* § 402; *Brown v. Kentfield*, 50 Cal. 130; *Robinson v. Railroad Co.*, 48 Cal. 425; *Hicks v. Coleman*, 25 Cal. 122.

HAYS, C. J. The charter of the city of Lewiston gives to that corporation, among its powers, the right to control all streets, highways, squares, and other public grounds within its limits; and provides that it shall be liable to any one for any injury to any person growing out of any casualty or accident happening to any such person on account of the condition of any street or public ground therein. The plaintiff claims to have been greatly injured by falling into a hole which the city had negligently suffered to remain in one of its public streets; that it occurred in the night-time, while he was lawfully traveling along the public highway, and he was free from fault or negligence. All of which is denied by the defendant. The case coming on for trial, a jury was duly called; and, when plaintiff rested, the defendant moved for nonsuit on the grounds hereinafter stated, which motion was denied, and the defendant now assigns such ruling as error.

After submission of all the testimony and arguments of counsel, in the court below, the learned judge who there presided charged the jury at considerable length, evidently intending to give them all the law that was necessary for their information in the consideration of the case. To which said instructions, and the whole thereof, counsel for defendant excepted. There was no specific exception to any particular portion of the charge, nor did counsel seek to point out or inform the court wherein he claimed the instructions to be wrong, but contented himself with a general exception to the whole instruction. It is not claimed or contended but that many of the propo-

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sitions of law given by the court were correct. While the instructions, as a whole, very fairly present the law of the case, some specific parts of an instruction perhaps might be open to criticism, and these specific portions appellants here assign as error, and ask a reversal on that ground. We think the exceptions taken entirely too general to be available to the defendant on appeal. The rule seems to be well settled in the federal and most of the state courts, and we now adopt it as the rule of this court, that the supreme court will not review the charge of the district judge unless his attention has been called by exceptions specially to those particular portions complained of. The necessity for such a rule is apparent. In the hurry of jury trials in the district courts, it must often happen that the judge prepares his charge hastily, and without an opportunity for that investigation and deliberation which is desirable; and it would be unjust to him, and a wrong to suitors, if an error inadvertently committed, and which the judge would have perceived and corrected had his attention been called to it, should be allowed to work a reversal of the judgment. If the party thinks the charge wrong in any particular, let him call the judge's attention to it at the time, and give an opportunity for correction; thus saving the necessity for an appeal.

Justice HARLAN, in delivering the opinion of the supreme court of the United States in *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119, said, in speaking on this subject: "The attention of the court should be called to the particular point by something more definite than the general exception taken." Substantially the same was held in *Beckwith v. Bean*, 98 U. S. 284; *Beaver v. Taylor*, 93 U. S. 46; and in many other cases. Again, the same court holds that a general exception to a charge, which did not direct the attention of the court to the particular portion of it to which the objection is made, raises no question for review in the appellate court. *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. Rep. 960.

In Iowa it has been held that an exception to all the instructions in a mass raises no question for the consideration of the supreme court. *Pitman v. Molsberry*, 49 Iowa, 339; *McCaleb v. Smith*, 24 Iowa, 591.

In *Nisbet v. Gill*, 38 Wis. 657, the defend-

ants excepted "to each and every part of the judge's charge to the jury;" and the court said: "Under repeated decisions of this court, if the charge is correct in any material particular, such an exception is entirely insufficient to authorize us on an appeal to review the charge." The same court says: "General and sweeping exceptions to anything resting in detail will be disregarded here, when any single detail is correct." *University v. Shanks*, 40 Wis. 352. Such is the settled rule in that state, and the same has been adopted substantially in California.

In *Hicks v. Coleman*, 25 Cal. 122, that court says: "We take this occasion to remark that exceptions to a charge ought to point out the specific portions excepted to, and to be made at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial." This was approved later. *Robinson v. Railroad Co.*, 48 Cal. 409.

In New York it is held that a general exception to a charge containing distinct propositions is unavailing, unless the party excepting can show that each proposition is erroneous, to his prejudice. *Haggart v. Morgan*, 5 N. Y. 422; *Stone v. Transportation Co.*, 38 N. Y. 240. An exception to the whole, and to each and every part of a charge, is equally unavailing, if any part of the charge is correct. *Jones v. Osgood*, 6 N. Y. 233; *Caldwell v. Murphy*, 11 N. Y. 416.

In Kansas, where the court gave a general charge to the jury, and the charge contained various propositions of law, and a general exception only was taken to the charge, it was held that the exception was not sufficient. *Fullenwider v. Ewing*, 25 Kan. 69, and cases there cited; *Bailey v. Dodge*, 28 Kan. 72.

Many other states have adopted this rule, but we think the wisdom of it so evident that it is unnecessary to cite authorities further in its support.

When the plaintiff rested, a nonsuit was asked by defendant on the following grounds: (1) That the plaintiff has not proved that said road mentioned in the complaint as the "Camas Prairie Road" is within the limits of the city of Lewiston, or that the same had ever been adopted by the common council of said city, by any ordinance thereof, as a public street, highway, or thoroughfare, or

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that the same has been ordered opened up by any ordinance of said council, or that it has ever been dedicated as a public ground; (2) that the proof shows that plaintiff was guilty of contributory negligence sufficient in law to prevent him from recovering; (3) the proof shows that said accident, if any occurred, took place on Sunday, and there is no proof that plaintiff was engaged in a work of necessity.

As to the first ground, there was ample proof to go to the jury on that point.

As to the second ground, if the undisputed facts showed contributory negligence, it would then have been the duty of the court to grant the motion; but, if there was a question of fact in dispute or doubt, it was for the jury to find from the evidence, and the court very properly denied the motion.

The third ground for nonsuit cannot be entertained. The fact that the accident happened to the plaintiff on the Sabbath day will not prevent him from recovering, since that was not contributory negligence.

And the plaintiff should not be nonsuited unless it appears that the evidence in his behalf, upon the most favorable construction that the jury would be at liberty to give it, would not warrant a verdict for him. It has become the settled law of this court that it will not disturb a judgment, or order denying a new trial, as being against the evidence, where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. *Mootry v. Hawley*, 1 Idaho, 543; *Ainslie v. Printing Co.*, Id. 641.

While the application for a new trial on the ground of newly-discovered evidence is addressed to the sound discretion of the court, the authorities seem to agree that such application should be looked upon with suspicion and disfavor because of the temptation to make a favorable showing after having sustained defeat, and certainly we find nothing in this application to have warranted the granting of a new trial.

The evidence seems to have fully warranted the verdict, and the amount seems reasonable, in view of the dreadful accident to the plaintiff occurring through the defendant's fault.

Finding no error, the judgment is affirmed.

BUCK and BRODERICK, JJ., concurring.

DARBY *v.* HEAGERTY *et al.*

(February 14, 1887.)

STATUTES IN DEROGATION OF COMMON LAW—CONSTRUCTION.

1. Section 3, Code Civil Proc. Idaho, reverses the rule of the common law that statutes in derogation of the common law must be strictly construed. Under our Code such statutes are to be liberally construed, with a view to promote justice.

DEPOSITION—ADMISSIBILITY—CODE CIVIL PROC. IDAHO.

2. In determining the admissibility of a deposition taken under the provisions of Code Civil Proc. Idaho, the presumption is that the commissioner discharged his duty by doing all that the statute requires, except as to matters which he must return specifically as done.

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

3. Objection to the admissibility of evidence cannot be made for the first time in the appellate court.

(*Syllabus by the Court.*)

Appeal from district court, Washington county.

Action by Edward Darby against D. Heagerty and others to set aside a deed from plaintiff's grantor to defendants, for alleged forgery. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Huston & Gray, for appellant.

Depositions should be taken at the place named in the commission, and, this not appearing by the certificate of the commissioner or otherwise, they cannot be read. *Weeks*, Dep. § 192; *Rhoades' Lessee v. Selin*, 4 Wash. C. C. 723.

Evidence by depositions is in derogation of the common law, and, to entitle them to be received, the statutory provisions in relation to taking depositions must be strictly complied with. *Weeks*, Dep. § 328; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. Rep. 183; *Dye v. Bailey*, 2 Cal. 383; *Williams v. Chadbourne*, 6 Cal. 559; *McCann v. Beach*, 2 Cal. 25.

L. Vineyard and *Brumback & Lamb*, for respondents.

The court will not presume error; it must be made to affirmatively appear. *People v. Best*, 39 Cal. 690; *Moore v. Masini*, 43 Cal. 389; *Clark v. Sawyer*, 48 Cal. 133.

It is unnecessary to find upon an immaterial issue. *Fontaine v. Railroad Co.*, 54 Cal. 654; *McCourtney v. Fortune*, 57 Cal. 619; *Lovell v. Frost*, 44 Cal. 474.

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BUCK, J. This action was brought to set aside a certain pretended deed from James Landy to D. Heagerty, and to declare the same void, on the ground that it is a forged instrument, and for other relief. The complaint was filed on the twenty-third day of July, 1885, and the action tried by the court at the July term of said court, 1886. Decision was rendered in favor of the defendants, and decree entered accordingly. Motion for a new trial was made and denied, and the plaintiff appeals from the judgment and decree of the court, and from the order denying a new trial, and brings the same into this court on a statement of the case.

The specification of errors assigns the following errors of law: *First*, in admitting in evidence the deposition of one Robert C. Burton; *second*, in admitting the minutes of the evidence of D. Heagerty, (one of the defendants,) taken before a committing magistrate on a charge of larceny against said Heagerty, to be read in evidence; *third*, that there is no finding of the court as to whether the deed from Landy to Heagerty alleged to have been forged was or was not made in La Grande, Oregon, on the night of January 8, 1884; *fourth*, in finding that said deed was valid, said finding being contrary to the evidence; and, *fifth*, that the decision and judgment are not supported by the evidence.

The appellant argues that the said deposition of Robert C. Burton was inadmissible in evidence for the reasons—*First*. That the deposition was not taken at the place designated in the commission. An inspection of the commission shows that it designates the residence of the commissioner at Butte, Montana, but does not direct that the deposition be taken at that place, or any particular place. *Second*. That it does not appear that the deposition of the witness was read to the witness, and corrected by him, as is provided by section 969 of our Code. The appellant places this objection to the deposition upon the principle that evidence by depositions is in derogation of the common law, and the statutory provisions providing therefor must be strictly construed. In support of this principle he cites *Dye v. Bailey*, 2 Cal. 383; *McCann v. Beach*, 1d. 25; *Williams v. Chadbourne*, 6 Cal. 559; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. Rep. 183. These cases, except that in 10 Pac. Rep., were authorities under the early practice act of that state.

The fourth section of the Civil Code of California, adopted in 1885, provides that "the rule of the common law that statutes in derogation of the common law are to be strictly construed, has no application to this Code. The Code establishes the law respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects, and promote justice." This is also section 3 of the Code of Civil Procedure of Idaho territory. This provision of the Code changes the rule in this as well as other questions of practice in our territory.

In *Williams v. Eldridge*, 1 Hill, 249, COWEN, J., says that "they will presume the commissioner discharged his duty by doing all those things, in the execution of the commission, which he is not bound to return specifically as done."

Section 965 of our Code provides that the commissioner shall "certify the deposition to the court." It does not specify the contents of the certificate, and under the rule above cited in *Williams v. Eldridge*, and section 3 of our Code, it will be presumed that the commissioner did all that he was required to do.

It is also objected that there is no certificate. There seems to have been a return by the commissioner, which was not objected to on the trial, and we think any objection thereto is waived, and that the deposition was properly admitted in evidence.

The second specification of error is that the court erred in admitting the minutes of the evidence of Mr. Heagerty at a preliminary examination on a charge of larceny. We find no objection to this evidence in the statement, and it is claimed none was made on the trial. It is too late to make the objection for the first time on appeal.

The third specification of error is that there is no finding as to whether the deed alleged to have been forged from Landy to Heagerty was executed and delivered on the eighth day of January, 1884, at La Grande, Oregon. The second finding of fact is that said Landy's signature to said deed is genuine. That seems to have been the real issue in the case, and we think the *locus in quo* immaterial, and a finding not required thereon.

The fourth and fifth alleged errors are that the finding that the said deed was valid is contrary to the evidence, and that the judgment and decision are not support-

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ed by the evidence. The evidence shows that Mr. Landy was the owner of one-half of the Black Maria mine, and had been for several years before the transactions set out in the complaint; that he was unable to develop the same, or to demonstrate its value, because of a lack of machinery; that Mr. Heagerty had the means to procure machinery; and that, under an indefinite arrangement with Mr. Landy, he shipped a quartz-mill into the country, and met Mr. Landy at La Grande, Oregon, where the deed in dispute is alleged to have been executed. These circumstances are such as might lead to some similar transaction to the arrangements set up in the answer. Mr. Burton directly states that Mr. Landy executed the deed, and Mr. Landy directly denies it. The deed, however, is produced, and several witnesses acquainted with Mr. Landy's signature declare it to be genuine. None are produced who deny its genuineness, and a comparison of handwriting indicates that the signature is genuine. In the trial court the witnesses were examined in person, and the court had an opportunity to judge of their credibility from their manner of testifying and appearance on the stand, which this court has not. We are unable to see that the findings of fact are not sustained by the evidence, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concur.

PARKE *et al.* v. WARDNER *et al.*

(February 14, 1887.)

WRIT AND PROCESS—DEFECTIVE SUMMONS.

1. Where a summons is irregular or defective, the remedy, if any, is by application to the trial court to quash or set it aside.

TROVER AND CONVERSION—DAMAGES—DEFAULT.

2. In an action for the wrongful sale of personal property, and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment as upon default, but the plaintiff in such case should go into court, and prove his damages.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Trover by Lyman C. Parke and others against James F. Wardner and others. From a judgment for plaintiffs, entered by default, defendants appeal. Reversed.

Charles W. O'Neil, for respondents.

Though the statement of the cause of

action in the summons is defective, yet a copy of the complaint was served upon one of the defendants, both residing in the same county, and the court did not fail to acquire jurisdiction. *Calderwood v. Brooks*, 28 Cal. 151; *King v. Blood*, 41 Cal. 314.

Objection to a summons cannot be raised for the first time in this court. *Gordon v. Clark*, 22 Cal. 533.

Nor would the court below have set aside the default without imposing such terms as forbid that any advantage be taken of technical errors. *People v. Rains*, 23 Cal. 127.

When the facts set forth in the complaint make a good cause of action on contract, the action is to be regarded as one *ex contractu*, notwithstanding allegations of false representations which are insufficient to sustain an action *ex delicto*. *Sparman v. Keim*, 83 N. Y. 245.

BRODERICK, J. This is an action for the recovery of the value of certain goods and chattels which are alleged to have been wrongfully converted and sold. The plaintiffs demanded judgment for \$900 and costs. Summons was issued and served on the defendants, but there was no appearance or answer. Default and final judgment was entered by the clerk, and from this judgment the defendants appeal, and assign as error—*First*, the summons does not set forth the cause of action stated in the complaint in any manner, and the clerk had no jurisdiction to enter default; *second*, the judgment entered by the clerk herein was entered without statutory authority, and is void; *third*, the court never had or acquired jurisdiction.

The first point is not well taken. The summons is irregular, but not void, and for irregularity the remedy, if any, was by application in due time to the court below for an order to quash or set it aside.

The second alleged error is that the judgment entered by the clerk was without statutory authority, and is void. The authority, if any exists, by which the clerk of the district court may, without an order of the court, enter judgment, is found in section 356 of the Code of Civil Procedure, which reads: "Judgment may be had if the defendant fail to answer the complaint, as follows: In an action arising upon contract for the recovery of money or damages only, if no answer has been filed by the clerk of the court within

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the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs against the defendant," etc.

The complaint alleges, in the first and second counts, that defendants were the agents of the plaintiffs to sell or dispose of certain machinery, and when disposed of defendants were to account to plaintiffs therefor; that defendants wrongfully converted said property to their own use, and disposed of the same as their property, and wrongfully converted the proceeds, and failed and refused to account to plaintiffs. In the third count the complaint avers that the plaintiffs left with the defendants certain machinery to dispose of as agents for plaintiffs; that defendants wrongfully converted this property to their own use, broke and injured same; and that, by reason of such wrongful conversion and use, plaintiffs were damaged in the sum of \$200. We are of opinion that neither of these causes of action, as set forth in the complaint, falls within the statute which provides that, "in an action arising upon contract, for the recovery of money or damages only," a default and final judgment may be entered by the clerk. The plaintiffs in this case should not have applied to the clerk to enter judgment, but should have gone into court, and submitted their proofs upon the questions presented by the complaint.

The default is opened, judgment vacated and set aside, and the cause remanded to the court below for further proceedings.

HAYS, C. J., and BUCK, J., concurring.

TOULOUSE *et al.* v. BURKETT.

(February 14, 1887.)

APPEAL—OBJECTIONS TO PLEADINGS.

1. If an action is tried upon the theory that the answer denies the allegations of the complaint, the objection that certain allegations in the complaint are admitted through defective denials cannot be raised for the first time in the appellate court.

SAME—RECORD—ERROR NOT SHOWN.

2. If the record on appeal does not affirmatively show error in the court below, the judg-

ment will be affirmed, as every intendment is in favor of the regularity of the trial court.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county.

Action by Andrew Toulouse and another against J. M. Burkett, administrator of the estate of Nicolas Boucher, deceased, to set aside an alleged contract between plaintiffs and defendant's intestate, and to reform a deed of a mining claim. From a judgment, declaring a vendor's lien on the mining claim in favor of plaintiffs, but refusing other relief, they appeal. Affirmed.

For former report, see ante, 170, 10 Pac. Rep. 26.

A. F. Montandon, for appellants.

Findings contrary to admissions in the pleadings must be disregarded, nor can a defendant controvert a fact admitted by the pleadings. *Burnett v. Stearns*, 33 Cal. 468; *Bradbury v. Cronise*, 46 Cal. 287; *Hill v. Den*, 54 Cal. 20; *Tracy v. Craig*, 55 Cal. 93; *Silvey v. Neary*, 59 Cal. 97, 98; *White v. Douglass*, 71 Cal. 115, 11 Pac. Rep. 860.

A refusal of a party to perform amounts to abandonment. *Hicks v. Lovell*, 64 Cal. 14-21, 27 Pac. Rep. 942.

Where parties, wishing to apply one law, but mistakenly apply another, relief will be afforded, and the same rule will prevail as if it was a mistake of fact. *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, Id. 408.

A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453-473.

An allegation not denied is admitted, though the allegation is in the charging part. *Thomas v. Austin*, 4 Barb. 265.

Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. *Racouillat v. Rene*, 32 Cal. 450, 454; *Gay v. Winter*, 34 Cal. 153.

Kingsbury & McGowan, for respondent.

BUCK, J. This action is brought to set aside an alleged contract, and to reform a deed, upon the ground that it was executed by mutual mistake. The plaintiff appeals from the judgment, and brings the cause into this court on a bill of exceptions.

Coughanour v. Hoffman's Estate.

The errors assigned and insisted upon are that certain findings of fact by the trial court are contrary to the evidence, in that they are contrary to the admissions in defendant's answer. There is no evidence in the transcript, and appellant rests the merits of his appeal entirely upon admissions by defendant in failing to deny certain allegations of the complaint. In each instance in which objection is made to the denials in the answer, there is, at least, an attempted denial. Had the objection been made in the trial court by motion or other appropriate remedy, or had objection to the introduction of evidence been made upon the ground that the allegations in the complaint were admitted by defective denials, the ruling of the court thereon might have been brought to the consideration of this court. There is, however, nothing in the record to indicate that these denials were not regarded sufficient to raise an issue upon the trial of the case. It is a rule of practice that, "if a cause is tried upon the theory that the answer denies the allegations of the complaint, the plaintiff will not be permitted to object to the sufficiency of the denials for the first time in the appellate court." 2 Estee, Pl. & Pr. (3d Ed.) 467; *White v. Railroad Co.*, 50 Cal. 417.

It is the duty of the court to find the facts, upon the issues made, according to the evidence given at the trial, and the presumption of law is in favor of the regularity of the proceedings of the court trying the cause. *Lowe v. Turner*, 1 Idaho, 107; *Goodman v. Milling Co.*, Id. 131; *Hazard v. Cole*, Id. 276.

In the absence of anything in the record indicating that these denials were not accepted as sufficient when the cause was tried, we find no error, and the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

COUGHANOUR v. HOFFMAN'S ESTATE *et al.*

(February 17, 1887.)

HOMESTEAD—RIGHTS OF WIDOW

Under the homestead laws of Idaho, (page 627, Rev. Laws, Ed. 1874-75,) the widow may select a homestead after the death of her husband, under section 1 of said act, and have the same set apart by the probate court for the benefit of herself and children, under section

4 of said act. The widow is the head of a family, in contemplation of the first section of said act, and the benefits of the act are secured to her, as a wife surviving her husband, by section 4 of said act.

(Syllabus by the Court.)

Appeal from district court, Boise county.

Petition by Ella M. Hoffman, widow of Fred Hoffman, deceased, to have set aside from the estate of said deceased a homestead. From a decree of the district court confirming an order of the probate court granting the petition, W. A. Coughanour appeals. Affirmed.

George Ainslie, for appellant.

The widow could acquire no homestead interest in the property until an order of the probate court or judge was made setting it apart to her. It differs from the case of a homestead created during the existence of the community by a compliance with the provisions of the homestead act. *Estate of Boland*, 43 Cal. 640-642 *et seq.*

The probate court does not acquire jurisdiction to set apart a homestead for the surviving wife, where no homestead had been selected before the death of the husband, unless a petition therefor is filed. *Cameto v. Dupuy*, 47 Cal. 79.

The declaration of homestead must be filed during lifetime, and not by the survivor. *Estate of James*, 23 Cal. 416 *et seq.*

The probate court, in setting apart, for the use of the family of the deceased husband or wife, property which had been dedicated as a homestead under the homestead act, does not change or transfer the title, nor does it adjudicate the question of title. *Rich v. Tubbs*, 41 Cal. 34-36.

One claiming the benefit of the homestead law must establish a clear case within its provisions. *Tilton v. Vignes*, 33 La. Ann. 240; *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. Rep. 92; *Lord v. Lord*, 65 Cal. p. 84, 3 Pac. Rep. 96.

The exemption of property from sale on execution is a personal right, which the debtor may waive or claim at his election. *Borland v. O'Neal*, 22 Cal. 507.

The homestead rights of a widow and children are determined by the conditions existing at the time of the death of the husband and father, not by the conditions existing at the time of the settlement of the succession. *Lessasuer's Succession*, 34 La. Ann. 1066.

The widow's homestead right must be determined by the law in force when the debts were contracted against which it is asserted. *Bolling v. Jones*, 67 Ala. 508.

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The fact that the probate court, after the death of the wife, set the property apart as a homestead for the benefit of the surviving husband and children, does not affect the question. *Watson v. Creditors*, 58 Cal. 556-558.

C. S. Kingsley, for respondents.

Section 123 of the "Probate Practice Act" provides for the setting aside of a homestead, either under the general homestead law or under the fifth subdivision of section 126. It is obligatory on the probate court. *Estate of Orr*, 29 Cal. 101; *Estate of Walley*, 11 Nev. 260; *Estate of Wixon*, 35 Cal. 320; *Estate of Ballentine*, 45 Cal. 696; *Sulzberger v. Sulzberger*, 50 Cal. 385; *Mawson v. Mawson*, Id. 539; *Estate of McCauley*, Id. 544; *Eproson v. Wheat*, 53 Cal. 715.

If the widow is not, strictly speaking, "wife," she is at least the "head of a family." *Ellis v. White*, 47 Cal. 73; *Estate of Walley*, 11 Nev. 260; *Estate of Busse*, 35 Cal. 310.

That the tract included in the homestead was originally two farms or tracts, divided by imaginary lines, does not affect the question, so long as they are contiguous, and so connected as to constitute one body. *McDonald v. Badger*, 23 Cal. 393; *Clark v. Shannon*, 1 Nev. 568.

It need not have been taken or selected before the death of the husband. *Estate of Busse*, 35 Cal. 310.

But may be made at any time before sale on execution. *Hawthorne v. Smith*, 3 Nev. 182; *Estate of Walley*, 11 Nev. 260; *Estate of Boland*, 43 Cal. 640.

It may be taken for property which the husband acquired before marriage. *Revalk v. Kraemer*, 8 Cal. 66; *Gee v. Moore*, 14 Cal. 472.

BUCK, J. Appeal from a decree of the district court, confirming an order of the probate court of Boise county, setting aside 317 acres of land as a homestead, upon petition of Ella M. Hoffman, widow of Fred Hoffman, deceased, under section 4, p. 629, of the Revised Laws of Idaho. The section reads as follows: "The homestead, and other property exempt from forced sale, of either husband or wife, may be set apart by the probate court for the benefit of the surviving husband or wife, and his or her legitimate children." Section 1 of the same act (Rev. Laws, 627) provides that "the homestead, consisting of a quantity of land, together with the dwelling thereon, and its appur-

tenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or the head of a family, shall not be subject to forced sale on execution," etc. The section further provides that said homestead shall be selected by a written declaration, and recorded as a conveyance affecting real estate, and after said recording the husband and wife shall be deemed to hold said premises as joint tenants.

It is argued by appellant that a homestead, set aside to the widow, must be limited to 20 acres, under section 126, c. 5, of the probate act, (page 262 of our Revised Laws.) That section provides that, "if there is no law in force exempting property from execution, a homestead, consisting of a quantity not exceeding 20 acres," etc., "shall be set apart for the use of the widow and children, and shall not be subject to administration." In our territory there is an exemption law, and therefore said section 126 of chapter 5 is not applicable to the case at bar.

It is claimed by appellant that deceased, Hoffman, having neglected to claim his homestead while living, he had no real estate exempt from execution at the time of his death, and therefore there was no homestead exempt from forced sale at the time of his death which could be set apart to his widow and children. This construction seems too literal to be in harmony with the spirit of our homestead laws. Homestead and exemption laws are construed liberally, as a protection of the unfortunate. *Ror. Jud. Sales*, §§ 1354, 1355; *Woodward v. Murray*, 18 Johns. 400; *Conklin v. Foster*, 57 Ill. 104; *Kneettle v. Newcomb*, 22 N. Y. 249. It is admitted in this case that neither the deceased, Hoffman, nor his wife had made a selection of a homestead under the statute prior to his death; but that, after his death, and prior to the order of the probate court appealed from, the widow, Ella M. Hoffman, made the declaration, and had the same recorded as provided by law. It is claimed, however, by appellant that the widow is not a wife in contemplation of statute, nor is she the head of a family under the contemplation of the homestead law. It is admitted that the widow is the mother of three children, all of whom are living with her, and dependent upon her for support. We think that she is clearly the head of the family, and entitled to exercise her right to select a homestead at any time before the prop-

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erty is disposed of by forced sale or otherwise. *Hawthorne v. Smith*, 3 Nev. 182; *Estate of Walley*, 11 Nev. 260; *Ror. Jud. Sales*, §§ 1358, 1359. In the case at bar she did so after the death of her husband, and during the course of administration of his estate. We think she was entitled so to do.

It is contended, however, by appellant, that, admitting that the selection of a homestead was valid, under the first section of the homestead act, yet, being a widow, she is not a wife, and section 4 does not authorize the homestead to be set off to her as the head of the family by the probate court. We think this construction inconsistent with the spirit of homestead or exemption laws. The statute reads in terms that the homestead, etc., may be set apart for the benefit of the surviving husband or wife. Perhaps the meaning would have been better expressed by transposing the words so that it would read "for the benefit of the husband or wife surviving." But it cannot be presumed that the legislators intended to limit the benefits of this section to the husband, and deprive the widow of it, when she needed it most. Indeed, the construction contended for would deprive the husband surviving the wife of the homestead, as well as the wife surviving the husband, and the section would be without force or meaning. We deem it unnecessary to discuss the principles involved in this case at length, as we are informed that in the revision of our laws which will take effect on the first of June, 1887, important changes have been made in the sections considered in this case.

Judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concur.

GOLDSTEIN *v.* KRAUSE *et al.*

(February 21, 1887.)

PLEADING—FRIVOLOUS ANSWER—STRIKING OUT.

1. An answer taking issue only on an immaterial issue of the complaint is frivolous, and may be stricken out on that ground.

SAME—SHAM ANSWER.

2. Falsity is the test of a sham answer, and an answer shown to be sham by this test may be stricken out.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Action by A. B. Goldstein against Camill Krause and another on a promissory note. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles W. O'Neil, for appellants.

A sham answer is one which is good in form, but false in fact; such falsity being proven by the failure of the defendant to deny the truth of the matters set up in the affidavits in support of the motion to strike. *Gostoris v. Taafe*, 18 Cal. 385; *Fay v. Cobb*, 51 Cal. 313; *Arata v. Mining Co.*, 65 Cal. 340, 4 Pac. Rep. 195.

The answer was pleaded in good faith, and, if insufficient in law, it should have been demurred to. If true, it was a good defense. *Wap. Attachm.* p. 208, note 2; *Citing Burton v. Wynne*, 55 Ga. 615; *Clough v. Buck*, 6 Neb. 343; 2 *Wade, Attachm.* §§ 460, 462; *Bills v. Bank*, 89 N. Y. 349.

W. W. Woods, for respondent.

If the plea is false, the striking out is not an invasion of the trial by jury. *Coykendall v. Robinson*, 39 N. J. Law, 98.

Fraud, as a defense, must be specially pleaded. *Churchill v. Anderson*, 56 Cal. 55; *McKiernan v. Lenzen*, *Id.* 61; *McCreary v. Marston*, *Id.* 403; *Brodrib v. Brodrib*, *Id.* 566; *Hayward v. Rogers*, 62 Cal. 349.

HAYS, C. J. This action was brought upon a promissory note. The complaint alleges the making and delivering of the note to one Henry Bernstine, by the defendants, who were copartners, under the firm name of Krause & Boehm, and that the same became due on the twenty-third day of August, 1884, and had not been paid; that prior to the maturity of the note, Henry Bernstine duly indorsed and delivered the note to this plaintiff, who has ever since been the owner and holder of the note. Defendants, Krause & Boehm, answering, admit the partnership; the making and delivering of the note; that the same became due and owing August 23, 1884, and that the same is not paid; but deny that, prior to August 20, 1884, Henry Bernstine indorsed and delivered the note to this plaintiff, and that the plaintiff is the owner and holder of the same. And for further answer allege that on the thirteenth day of August, 1885, Corbit and Mackay sued Henry Bernstine, and garnished these defendants, and thereby attached the money due upon said note. Corbit and Mackay inter-

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vened, and set out, in their complaint, as intervenors, in substance, what had been alleged in the answer. Plaintiff demurred to this complaint, and the demurrer was sustained. Upon motion of plaintiff, the answer was stricken out as sham and irrelevant, and judgment was entered in favor of plaintiff, from which an appeal is brought.

Section 250 of our Code of Civil Procedure provides: "Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out upon such terms as the court may in its discretion impose." Under this section, a court may strike out a whole answer as irrelevant or as sham. By reference to the pleadings, it will be observed that the defendants admit that the note became due August 23d; but they deny that it was indorsed and delivered to plaintiff prior to August 20th. This is equivalent to an admission that it was indorsed and delivered prior to its maturity. But defendants deny that plaintiff is the owner and holder of the note. This is the only question raised by the answer.

A frivolous answer is one which denies no material averment in the complaint, and which, if admitted to be true, does not constitute any defense to the plaintiff's cause of action. 2 Wait, Pr. 492, and cases there cited. An answer taking issue only on an immaterial averment in the complaint is frivolous. *Fairchild v. Railroad Co.* 15 N. Y. 337. In *Wedderspoon v. Rogers*, 32 Cal. 569, the court says: "The averment that the plaintiff was the owner of the note is not an averment of an issuable fact. It is but the averment of a conclusion of law, which follows from the other facts averred. It was immaterial, and might have been omitted. The conclusion of law necessarily followed from the other facts stated." Tested by these rules, this answer was frivolous. Falsity is the principal element of a sham answer. 2 Wait, Pr. 488, and cases cited.

The plaintiff properly proceeded upon proof furnished the court below, in accordance with the practice, to thus test the answer. The court there found the answer to be sham,—we think rightfully, unless it may be said it was so irrelevant that it could not be sham. But it was properly stricken out.

It is unnecessary to go into a discussion of the propriety of sustaining the demurrer. The intervening complaint was in-

sufficient, and the demurrer was properly sustained.

Judgment affirmed.

BUCK and BRODERICK, J.J., concurring.

BERRY v. ALTURAS COUNTY.

(February 21, 1887.)

EXCEPTIONS—ORDER SUSTAINING DEMURRER.

An exception, deemed to have been taken to the order sustaining a demurrer, should have been settled in a bill of exceptions, and brought to the supreme court. When it is not done, this court will not consider it.

(Syllabus by the Court.)

Appeal from district court, Alturas county.

Action by Windsor Berry against the county of Alturas. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. H. Harris, for appellant. *R. Z. Johnson*, Atty. Gen., and *Alanson Smith*, for respondent.

HAYS, C. J. The plaintiff commenced his action in the district court. Defendant demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. Plaintiff not amending, a judgment was entered in favor of defendant, from which judgment plaintiff appealed. No bill of exceptions was settled, and none is brought to this court. We had supposed the practice to be settled in this territory that the exceptions which, by section 403 of the Code of Civil Procedure, the adverse party is deemed to have taken, cannot be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the judgment roll. *Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, ante, 89, 6 Pac. Rep. 107; *Guthrie v. Fisher*, ante, 101, 6 Pac. Rep. 111; *Purdum v. Taylor*, ante, 153, 9 Pac. Rep. 607.

Many questions of practice have been settled here. They should be observed by the profession, and adhered to by the courts, unless changed by legislative enactment. Prudence would seem to dictate the necessity of a careful observance of them, as the danger of looking too far from home for rules of practice must be apparent to the thoughtful practitioner.

The record failing to bring before us the

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points discussed, and no error being apparent, the judgment must be affirmed.

BUCK and BRODERICK, JJ., concurring.

PEOPLE v. ARMSTRONG.

(February 21, 1887.)

JURY—FAILURE TO SUMMON JUROR—EFFECT.

1. The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury. Section 322, Criminal Practice Act Idaho.

SAME—EXCEPTION TO CHALLENGE.

2. An exception to the challenge to the panel admits the facts stated therein. Such exception, in our criminal practice, has the same relation to the denial of the challenge as a demurrer to a complaint has to the denials in the answer in our civil practice.

(Syllabus by the Court.)

One Armstrong was convicted of murder, and appeals. Reversed.

Kingsbury & McGowan, for appellant.
Richard Z. Johnson, Atty. Gen., for the People.

BUCK, J. The defendant was indicted at the October term, 1886, for the crime of murder in the first degree, and charged therein with the killing of one Paul Klubert on the twenty-second day of August, 1886. When the cause was called for trial, the defendant, by his attorneys, *Kingsbury & McGowan*, interposed a challenge to the panel of the trial jury, and specified, as the facts constituting the grounds of said challenge, "that the sheriff had purposely omitted to summon one L. H. McIrving, a trial juror drawn to serve at said term of court, and whose name was on the list of jurors given to the sheriff to be summoned as said juror." To such challenge, N. M. Ruick, the district attorney for Alturas county, excepted, and the same having been submitted to the court was overruled, to which ruling the attorneys for the defendant excepted, and the cause is brought into this court on a bill of exceptions. The record contains much other matter; but, as the conclusion of the court upon said assignment of error is decisive of the case, it will not be necessary to consider the other specifications of error.

The appeal having come into this court,

the attorney general stated that, upon examination of the record, he was of the opinion that the said assignment of error was well taken, and moved that the cause be placed upon the calendar, the judgment be reversed, and the case remanded for a new trial. By consent of the attorneys for the defendant the said motion was submitted without argument.

Our criminal practice act (page 409, Rev. Laws 1874-75) provides as follows: "Sec. 324. If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. Sec. 325. Upon the exception, the court shall proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true. Sec. 326. If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may in like manner permit the amendment of the challenge. Sec. 327. If the challenge be denied, the * * * court shall proceed to try the question of fact." Section 322 specifies the intentional omission of the sheriff to summon one or more jurors drawn as a good cause of challenge to the panel.

An exception to a challenge in our criminal practice is practically a demurrer thereto, and admits the facts stated therein. An exception to a challenge and a denial of it has sometimes inadvertently been confounded as meaning the same thing. This seems to have been so regarded by the district attorney in the case at bar. An inspection of the statute, however, indicates that they bear the same relation to each other in our criminal practice as the demurrer to the complaint and denials in the answer do in our civil practice. The district attorney having failed to deny the challenge, the facts stated therein were admitted. The intentional omission of the sheriff to summon the juror McIrving was thereby admitted; and, such omission being designated as a ground of challenge by section 322 of our criminal practice act, it was a good cause of challenge to the panel, and the challenge should have been sustained. The motion is granted, judgment reversed, and the cause remanded for a new trial.

HAYS, C. J., and BRODERICK, J., concur.

Hopkins v. Utah Northern Ry. Co.

HOPKINS v. UTAH NORTHERN RY. CO.

(February 21, 1887.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

1. Where a suit is brought against a railway company to recover damages for injury to property by reason of the negligence of the agents or servants of the company, and defendant relies on such contributory negligence of the plaintiff or his servant so as to prevent a recovery, this is a defense to be established by the defendant.

TRIAL—ORDER OF PROOF—DISCRETION OF COURT.

2. It is a general rule that a defendant should not open the defense by a cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.

APPEAL—DEFECTIVE RECORD—PRESUMPTIONS.

3. Where a refusal to give instructions requested by a party is assigned as error, the supreme court will look into the entire charge to determine whether such refusal was prejudicial; and, where the record shows that a charge was given which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.

(Syllabus by the Court.)

Appeal from district court, Bingham county.

Action by R. H. Hopkins against the Utah Northern Railway Company to recover damages for the killing of plaintiff's horses by one of defendant's engines. From a judgment for plaintiff, defendant appeals. Affirmed.

P. L. Williams and Homer Stull, for appellant.

It is not necessary to plead contributory negligence in order to prove it, and especially is this true where the plaintiff has alleged that he is without fault, and this is denied by the answer. *Pom. Rem.* §§ 642, 607-675, inclusive; *Railway Co. v. Shacklet*, 12 *Amer. & Eng. R. Cas.* 166; *Hawes v. Railway Co.*, 64 *Iowa*, 315, 20 *N. W. Rep.* 717.

Smith & Wright, for respondent.

New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter. All new matter of defense must be stated in the answer. *Railway Co. v. Crawford*, 1 *Idaho*, 770; *Piercy v. Sabin*, 10 *Cal.* 22; *Glazer v. Clift*, *Id.* 304; *Coles v. Soulsby*, 21 *Cal.* 50.

In actions for personal injuries, contributory negligence of plaintiff is a matter of defense that must be established by the defendant, and is therefore "new matter," within the meaning of the statute, and must be pleaded. *Robinson v. Railroad Co.*, 48 *Cal.* 426; *McQuilken v. Railroad Co.*, 50 *Cal.* 7; *Hoyt v. Hudson*, 22 *Amer. Rep.* 714; *Buesching v. Gas-Light*, 39 *Amer. Rep.* 503; *Thompson v. Railroad Co.*, 51 *Mo.* 190; *Canal Co. v. Bentley*, 66 *Pa. St.* 30; *Smoot v. Mayor, etc.*, 24 *Ala.* 112; *Johnson v. Railroad Co.*, 5 *Duer.* 21; *Railroad Co. v. Horst*, 93 *U. S.* 298; *Railroad Co. v. Gladmon*, 15 *Wall.* 406.

BRODERICK, J. This action is to recover damages for killing a team of horses, and the destruction of a wagon and harness of the plaintiff, which is alleged to have been caused by the negligence of the defendant company, about the first day of November, 1885, near Blackfoot, in this territory. The complaint alleges, in substance, that defendant was a corporation duly incorporated, etc.; that plaintiff was the owner of a team and wagon worth \$450; that, at a time and place named, the team and wagon were negligently run against and over by defendant's locomotive, the team killed, and wagon and harness damaged; that the accident happened through no fault of plaintiff, but resulted from the carelessness and negligence of the agents and servants of the defendant; and that by reason of such negligence the plaintiff was damaged in the sum of \$350. The defendant answered, denying specifically each allegation of the complaint except that defendant was a corporation. In May, 1886, the case was tried before the court with a jury, which resulted in a verdict and judgment in favor of the plaintiff for \$225 and costs. The defendant moved for a new trial. Motion overruled by the court, and from this order and the judgment the defendant appeals, and assigns as error—*First*, that the evidence is insufficient to justify the verdict of the jury, in this: that it does not show that the defendant was negligent in the premises, or that any negligence on its part caused the injury complained of, and constituting the cause of action herein; and in that it does show that the plaintiff's servant, Charles Chestine, who was driving the team, was negligent in not looking along the track to discover the

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approach of an engine as he neared the crossing, and that his negligence in that connection caused, or contributed to cause, the injury complained of; *second*, errors in law occurring at the trial, and excepted to by defendant, in excluding certain evidence sought to be introduced by cross-examination of plaintiff's witnesses; *third*, that the court erred in refusing to give certain instructions to the jury requested by defendant's counsel.

The evidence is undisputed that the team and the train were coming from the north; that the train was running at rapid speed; that the highway upon which the team was moving, for some distance above the crossing, runs nearly parallel with defendant's road; that about 80 rods above the crossing was a whistling post; that the accident happened at the crossing, and at the time stated in the complaint. The rules of defendant in force at the time of the alleged accident were identified and received in evidence at the trial, but do not appear in the record. The case seems to have been tried, however, on the theory that the rules required the whistle sounded when a train was nearing a crossing, and we think there is sufficient proof in the record from which we may infer, for the purposes of this appeal, that this was the requirement of the rule. Each party introduced evidence before the court and jury, as to whether or not the whistle was sounded, or other signal given, before the engine reached the crossing, and on this question there seems to have been a substantial conflict in the testimony, all of which was submitted to the jury, and the question is settled by the verdict.

But it is contended that even though the defendant was negligent, that the plaintiff, by the carelessness of his servant who was at the time in charge of the team, contributed to the result and injury, and that, therefore, the defendant is not liable. In this case the burden was on the plaintiff to prove, in the first instance, that his property was injured and destroyed, for which he seeks redress, and that such injury was done by the locomotive of the defendant at or about the time and place charged in the complaint, and that such injury was the result of negligence of the agents and servants of the defendant. These facts proven, with the amount of damages sustained, made a *prima facie* case for the plaintiff. Then the burden shifted to, and was cast on, the defendant

to overcome the case made by the plaintiff, by showing that the agents and servants of defendant were on this occasion exercising due care and caution; or, if it relied on such contributory negligence of the plaintiff or his agent as to prevent a recovery of judgment by plaintiff, that was a defense to be proven and established by defendant. *Railway Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291. We are aware that there has been a contrariety of opinion on this question, but we are entirely satisfied with the rule as settled by the above-cited authorities.

We see no error in the ruling of the trial court in excluding the evidence sought to be adduced by the defendant by cross-examination of plaintiff's witnesses as tending to show contributory negligence on the part of plaintiff's servant. It is a general rule that the defendant should not open his case by a cross-examination of plaintiff's witnesses; but the application of this rule must necessarily rest largely in the sound discretion of the trial court. The record shows, however, that the defendant, to make out its defense, was permitted to introduce all evidence offered as to the negligence of plaintiff's servant, and this question was also submitted to the jury. In this state of the case it is unnecessary to determine here whether, under our practice, the defendant should have pleaded contributory negligence as a predicate for the proof on this point or not.

The remaining question is as to the instructions requested by defendant's counsel, and refused by the court. Counsel contend that the evidence shows that the accident happened in a level, open country, where there was no obstruction to prevent the driver from seeing the approaching engine in time to have stopped or turned aside, and thus have avoided the collision; and that the instructions refused were proper, and should have been given to direct the attention of the jury to these facts. It is doubtless the duty of a person approaching a railroad crossing to listen and look if he is in a position where looking will avail him; and if, under all the circumstances, he has reason to suspect or apprehend danger, and does not use his senses, but heedlessly goes on, and is injured in person or property, he alone is responsible for the consequences of such negligence. But in this case the teamster was driving in advance of the approaching train, with his back towards it, and he testifies, in substance, that he heard no signal of any kind, and saw nothing to in-

dicade danger, until within a short distance of the crossing, and where the highway gradually turned towards the crossing, and that then and there the horses became affrighted, and commenced jumping and plunging towards the crossing; that he was wholly unable to stop or manage them; that he finally sprang out of the wagon in time to save himself harmless; that the collision took place; that the horses were killed, and the wagon and harness destroyed. There is other evidence which corroborates this testimony.

The trial court is required to give such instructions as are applicable to the issues and facts of each case, but is not required to state propositions of law, however sound they may be, which are not applicable, and will not aid the jury in reaching a correct conclusion. *Railroad Co. v. Horst*, supra; *U. S. v. Camp*, ante, 215, 10 Pac. Rep. 226.

The record shows that an instruction defining negligence, etc., was given, which nowhere appears in the transcript. It has been held by this court that, in determining whether an instruction given was prejudicial, the entire charge should be looked into; and if the charge, as a whole, fairly presented the case to the jury, that the verdict would not be disturbed. *People v. Bernard*, ante, 178, 10 Pac. Rep. 30. The same rule will apply where instructions are refused. The reason for the rule is apparent.

We are here asked to reverse a judgment because certain instructions calling the attention of the jury to the alleged negligence of the plaintiff were refused, and it appears from the record that an instruction was given by the court, of its own motion, on this question; but the instruction, as given, is not brought here for our examination. Every intendment is in favor of the judgment, and the regularity of the proceedings; and the presumption is, until the contrary appears, that the court gave the instructions necessary and proper, under the facts of the case, to assist the jury in arriving at a just verdict. This presumption cannot be overthrown by a partial view of the instructions given. Those not given may have been refused for the reason that they had been substantially given. If so, the court was not bound to repeat them.

No error appearing, the judgment is affirmed.

HAYS, C. J., and BUCK, J., concurring.

BOWMAN *et al.* v. AYERS.

(February 21, 1887.)

APPEAL—REVERSAL—UNCERTAINTY OF FINDINGS.

Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed.

(*Syllabus by the Court.*)

Appeal from district court, Ada county.

Action by one Bowman and others to restrain one Ayers from interfering with plaintiffs' water-ditch. From an order granting the injunction, defendant appeals. Reversed.

Brumback & Lamb, for appellant. *Huston & Gray*, for respondents.

HAYS, C. J. This case, tried before the court without a jury, was brought to restrain the defendant from interfering with plaintiffs' water-ditch, and for damages for injury to the same. The defendant claims an interest in said ditch. The title to, capacity of, and cost of constructing the ditch were all in issue. There was also an issue as to the allegation that the defendant had obstructed the ditch, cut down its banks and flumes, and caused the waters thereof to run to waste. It was also alleged that defendant was committing waste of the waters of said ditch; that he threatened to continue the same, and would, unless restrained by injunction, damage and injure the ditch, which was plaintiffs' property. All of which defendant denied.

The court found that plaintiffs and defendant had each an interest in the ditch, but failed to find the capacity of the ditch, or its cost, or the interest specifically that each party had therein. This became necessary in order to determine whether or not the defendant had taken more water from the ditch than he was entitled to. If the ditch is as large as alleged in the complaint, it must have a carrying capacity of about 2,000 inches of water. It is only claimed that defendant drew therefrom 75 inches; yet from anything appearing in the findings the defendant's interest may have been much greater than the plaintiffs'. How, then, are we to draw our conclusions of law? How can we determine the rights of the parties without these findings? Although there is an allegation of waste, and that defendant threatens to continue the same, and an issue upon this allegation, the court fails

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to find upon this issue, yet grants an injunction.

It is found in the sixth finding of fact that "in 1883 defendant constructed a ditch of his own, bringing water upon his land, and using a portion of plaintiffs' ditch upon or through defendant's land. The portion of the plaintiffs' ditch thus used was the part constructed in 1874, and adopted by the new ditch;" yet the court had before found that this ditch, which was constructed in 1874, was partly owned by the defendant. If the defendant was a joint owner in the old ditch, and the new ditch adopted this old ditch, and enlarged the same, the defendant would still have his interest in the ditch. It might be said, in a sense, that the ditches became commingled by the act of the plaintiffs; but this, certainly, would not divest defendant of his property therein. The conclusions of law and judgment were not warranted by the findings. If the court is correct, in finding 6, we are unable to see why the water which defendant by his industry and enterprise has brought upon his own land may not be used by him for any useful purpose, as he pleases.

The granting of an injunction restraining the defendant from using this water except upon his own land we think was error; the findings also being insufficient.

The judgment is reversed. Case remanded for a new trial.

BUCK, J., concurring. BRODERICK, J., expressing no opinion.

LALANDE et al. v. McDONALD et al.

(February 23, 1887.)

APPEAL—JUDGMENT OF NONSUIT.

1. A judgment of nonsuit is a final judgment within the meaning of Idaho Code, from which an appeal will lie.

NONSUIT—EJECTMENT.

2. Where an action to recover specific real property is brought pursuant to section 2326 of the Revised Statutes of the United States, and there is no evidence for the consideration of the jury, a nonsuit may be granted.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county.

Action by Vincent Lalande and others against Scott McDonald and others to recover the possession of certain mining property. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

W. B. Heyburn, A. E. Mayhew, and W. W. Woods, for appellants.

When a party enters upon land with no higher evidence of title than that which the law presumes from his possession, and distinctly marks out the extent and boundaries of his claim, his actual possession of a part within these boundaries gives him constructive possession of the whole. 2 Estee, Pl. & Pr. § 2172; Plume v. Seward, 4 Cal. 94.

Mining ground acquired by entry, under a claim for mining purposes, the bounds being distinctly defined, accompanied by actual occupancy of a part of the tract, is sufficient possession to maintain ejectment for the entire claim, although the acts of appropriation were not according to any mining rule. 2 Estee, Pl. & Pr. § 2257; Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198.

Work done outside, in immediate proximity to, the claim, is a sufficient possession. 2 Estee, Pl. & Pr. § 2257; McGarrity v. Byington, 12 Cal. 426; English v. Johnson, 17 Cal. 107.

If the possession is constructive, the extent of the claim or boundaries should be in some manner indicated or defined. Plume v. Seward, 4 Cal. 94; Garrison v. Sampson, 15 Cal. 93; Borel v. Rollins, 30 Cal. 408; Huey v. Smith, 3 Pa. St. 353; Ellicott v. Pearl, 10 Pet. 412.

Plaintiff in ejectment need not, in his complaint or in the proofs in support thereof, negative the allegations of defendant's answer, or disprove his title. The defendant must show his right affirmatively on his defense. Mining Co. v. Marsano, 10 Nev. 379; Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & S. M. Co., 12 Nev. 320.

The entries of the defendants for the purpose of making survey for a patent, or for planting the post, were in themselves sufficient acts of ouster to maintain ejectment. Sears v. Taylor, 5 Morr. Min. R. 318.

When neither party establishes title to the ground in controversy, judgment cannot be for either party, and suit must be dismissed. Mining Co. v. Brown, 21 Fed. Rep. 167; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. Rep. 301.

F. Ganahl, G. W. Stapleton, and Albert Allen, for respondents.

No appeal lies from a judgment of nonsuit. Civil Code, §§ 354, 355; Kimple v. Conway, 69 Cal. 71, 10 Pac. Rep. 189.

Such judgment is not on merits, and is not final. Gates v. McLean, (Cal.) 9 Pac.

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Rep. 938; Clapp v. Thomas, 5 Allen, 158; Merritt v. Campbell, 47 Cal. 545.

The answer of defendants denies the ouster of plaintiff, and therefore, if plaintiff failed to prove such ouster, a nonsuit was proper. Association v. Willard, 48 Cal. 614; Miller v. Chandler, 59 Cal. 540; Shaeffer v. Matzen. Id. 652; Pope v. Dalton, 31 Cal. 218; Brown v. Brackett, 45 Cal. 167.

Possession of a mining claim depends upon location thereof, and not location from possession. Belk v. Meagher, 104 U. S. 287, 288; Hauswirth v. Butcher, 4 Mont. 307, 1 Pac. Rep. 714; McKinstry v. Clark, 4 Mont. 370, 1 Pac. Rep. 759.

A defendant in ejectment who claims title to a large tract of land, including a smaller tract, for which plaintiff sues, and to which he shows title, cannot establish an adverse possession of the land of plaintiff by proving actual possession of a portion of a larger tract not extending to any of the land claimed by the plaintiff. Kimball v. Stormer, 65 Cal. 116, 3 Pac. Rep. 408.

One in actual possession of real estate cannot maintain ejectment against a person not in possession. Carmichael v. Argard, 52 Wis. 508, 9 N. W. Rep. 470.

HAYS, C. J. This action was commenced pursuant to the provisions of section 2326 of the Revised Statutes of the United States and the act of March 3, 1881, amendatory thereof, to recover the possession of specific real property. The plaintiffs allege in the complaint, among other things: "(1) That they were citizens of the United States," which was admitted by the defendants. "(2) That the plaintiffs now are, and ever since the sixteenth day of August, 1884, have been through their grantors and predecessors in interest, the owners and entitled to the possession of that certain tract or parcel of mining ground known and called the 'Lalande Claim,' and [describing the same] containing an area of thirteen and 18-100 acres." This the defendants deny. "(3) That on the sixth day of November, 1875, the said Scott McDonald and George P. Cater have made an application in the United States land-office at Lewiston, Idaho, for a United States patent for a certain mining claim called the 'Poorman Lode and Mining Claim,' and have caused a survey of the same to be made, upon which said application for a patent is based, and which said survey overlaps a portion of the land above described as belonging to the plain-

tiffs herein, and which portion, so covered by said survey and application for patent, is described by metes and bounds as follows, to-wit, [the premises are here described, containing an area of six 40-100 acres of land.]" The defendants admit the making of the application for patent for the mining claim called the "Poorman Lode and Mining Claim," and the survey thereof, and that it includes the aforesaid land described in subdivision 3 of the complaint, but deny that the same, or any part thereof, belongs to the plaintiffs, or either of them. "(4) That on the sixth day of November, 1885, the said Scott McDonald and George P. Cater, by the order of the register of the land-office, caused notice of their said application to be published, notifying all persons claiming adversely any portion of the mining ground covered by the Poorman Lode mining claim, as surveyed, to file their adverse claim," etc.; that the plaintiffs filed their adverse claim to the tract of mining ground hereinbefore described; that said claim was duly allowed; and this action is brought in support of this claim. This, not being denied by the answer, stands admitted. "(5) That, while the plaintiffs were such owners of the aforesaid demanded premises, seized, possessed, and entitled to the possession of the same, the said defendants afterwards, to-wit, on or about the sixth day of November, 1885, and before the commencement of this suit, and without right or title, entered into possession of the said hereinbefore described tract of mineral land, mining claim, and location, the demanded premises, and ousted and ejected the plaintiffs therefrom, and ever since said day, and now, unlawfully withhold possession thereof from the plaintiffs, to their damage," etc. This the defendants deny.

The case being brought to hearing, a jury was called to try the issue. Various questions propounded by plaintiffs were excluded by the court, which ruling is now assigned as error. When the plaintiffs rested, upon motion of defendants the court ordered a nonsuit, and judgment of nonsuit and for costs was duly entered against the appellants; from which an appeal is brought to this court. The respondents ask to have the appeal dismissed, on the ground that no appeal lies from a judgment of nonsuit.

Section 1869 of the Revised Statutes of the United States provides for the appellate jurisdiction of this court pursuant to

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such statute. Section 642 of our Code of Civil Procedure was enacted, which provides that "an appeal may be taken to the supreme court from a district court (1) from a final judgment in any action or special proceeding." The term "final judgment" has been variously defined. One definition is: "A judgment which puts an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." 3 Bl. Comm. 398. Again, it has been defined to be "a judgment which determines a particular cause, and terminates all litigation on the same right." 1 Kent, Comm. 316. A third definition is given to be "a judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon." Snell v. Manufacturing Co., 24 Pick. 300; Foster v. Neilson, 2 Pet. 294; Forgay v. Conrad, 6 How. 201.

In what sense, then, did the legislature use this term? By the common law in England a writ of error would lie from a judgment of nonsuit in the *nisi prius* courts to the king's bench, where costs were taxed in favor of defendant, and judgment entered thereon against the plaintiff. 3 Bac. Abr. 325. In this country the general rule seems to be that, in determining the question whether or not a judgment is final, within the meaning of the various statutes in relation to appeals, matters of form are to be disregarded, and matters of substance alone considered, and that the judgment is "final" if it disposes of the action or proceeding in which it was made, so far as the court which made it is concerned, without reference to the question whether the claims of the parties may not be litigated in some other action or proceeding. *Weston v. City of Charleston*, 2 Pet. 449; *Yates v. People*, 6 Johns. 339; *Clason v. Shotwell*, 12 Johns. 31; *Belt v. Davis*, 1 Cal. 135. With this rule before them, our Code was adopted. True, under a statute similar to our own the supreme court of Montana seems to hold that an appeal would not lie from a judgment of nonsuit. *Kleinschmidt v. McAndrews*, 4 Mont. 8, 5 Pac. Rep. 281. But the case, being appealed, was considered by the supreme court of the United States, and the decision of the lower courts was reversed, thus disposing of that case and this question. 117 U. S. 282, 6 Sup. Ct. Rep. 761. We must therefore conclude that the legislature intended by this enactment to allow appeals from all judgments which

finally determine the particular suit without reference to the question whether or not it determines the final rights of the parties to the subject-matter of litigation. A judgment of nonsuit being a final judgment within the meaning of our Code, the motion to dismiss the appeal must be denied.

It will be observed by the pleadings heretofore referred to that the claims of appellants and respondents overlap each other to the extent of 6.40 acres; that each party has grounds outside of the area in dispute. Upon the trial of the cause various questions were propounded by the plaintiffs tending to show work done upon the Poorman grounds by defendants, but outside of the area in dispute, for the alleged purpose of establishing possession in the defendants, and thus tending to prove ouster of plaintiffs. The court, under objection, excluded such testimony unless the plaintiffs first showed that the defendants have made or attempted to make a legal location of the entire claim. As a general rule, evidence should be competent in the order in which it is offered; yet from necessity it must be left to the discretion of the court which tries the case whether evidence will be admitted out of its proper order or not, and, except in cases of manifest abuse of discretion, the supreme court will not interfere with the ruling of the court below in that respect. A party claiming mining lands through possession alone only holds so much as he is in actual possession of, while, if he seeks to hold through location, he must show more than mere possession; he must show a valid location upon which such possession is based. A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the act of congress and the local laws and regulations. *Belk v. Meagher*, 104 U. S. 279. If a proper location had been shown, and possession under it to a part of the claim, this might have been proper evidence to go to the jury, as tending to prove the issue. True, the plaintiffs might perhaps have been able to bring evidence later, tending to show that the defendants held the Poorman claim through location, but the court below gave them notice that they must introduce such testimony in advance of that which it rejected, and intimated if they did so it would then be competent. This the plaintiffs refused to do, and we think the testimony

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was rightly rejected; for, standing alone, it did not tend to prove the issue, and it was not competent in the order offered.

The judgment shows the motion for nonsuit to have been based upon the following grounds: "(1) Upon the ground that the plaintiffs have failed to prove that the defendants, or either of them, at the time of the commencement of this action, or at any time since, have been or now are in the possession of the premises in controversy herein, or any part thereof; (2) that the plaintiffs have failed to prove that defendants, or either of them, at the time of the commencement of this action, or at any other time, or at all, have withheld the possession of the ground in controversy, or any part thereof, from the plaintiffs; (3) that the plaintiffs have shown by their evidence that the plaintiffs were at the time of the commencement of this action, and ever since have been and now are, in possession of the premises in controversy herein; (4) that the plaintiffs have failed to show that the location of the Lalande claim was made upon vacant and unoccupied public land." The record fail to show upon which ground the nonsuit was granted. Applying the rules, then, that the party alleging error must make it affirmatively appear, and that the presumptions are in favor of the correctness of the rulings and judgment, we are unable to see how the judgment of nonsuit can be reversed; for, if granted upon the fourth ground, that the plaintiffs had failed to show that the location of the Lalande claim was made upon vacant and unoccupied public land, we find no evidence in the transcript upon this point. If such testimony was given in the court below, it has not been brought here for our examination. We must therefore presume that none was given, and, such being the case, the court below properly granted the nonsuit. In *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301, it was held in substance that, where neither party showed a compliance with the requirements of law in regard to work done upon a claim like the one at bar, the findings should be against both.

The right of possession is the question to be determined in this suit; and in full accord with the principles enunciated above is *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, wherein the court says: "A valid and subsisting location of mineral lands, made and kept in accordance with the provisions of the statute of

the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters upon lands to make a location there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second. * * * To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute superior in right to that of the defendants. His location must be one that entitles him to possession as against the United States, as well as against another claimant. If it is not valid against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated."

Applying this principle to the case at bar, if the plaintiffs have failed to show a valid location, they cannot recover, and they have no longer any standing in court, unless, perhaps to try and defeat the defendants' claim so as to prevent the defendants from recovering costs against them as provided in the act of March 3, 1881, which provides that where the title to the ground in controversy shall not be established by either party, no costs shall be allowed.

It follows, we think, that the nonsuit was properly granted, but it should have been without costs. The judgment of the court below is therefore modified so as to read that it is ordered and adjudged that the plaintiffs take nothing by this action, and this action be, and the same is hereby, dismissed, without costs to either party. This judgment of nonsuit, as modified, is affirmed.

BUCK and BRODERICK, JJ., concurring.

PALMER *et al.* v. UTAH & N. RY. CO.

(February 23, 1887.)

PLEADING—GENERAL DEMURRER.

1. Defects in pleadings which make them uncertain are special grounds of demurrer under our Code, which cannot be taken advantage of on general demurrer.

NEW TRIAL—MISCONDUCT OF SUITOR.

2. A judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in their favor in rendering the verdict, should be reversed, and a new trial granted, on the ground of public policy.

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MASTER AND SERVANT—FELLOW-SERVANTS—RAILROAD EMPLOYEES.

3. A railroad corporation is liable for damages to employes injured through the negligence of their agents or servants who are invested with a controlling and superior duty in the management of the business of the corporation.

(Syllabus by the Court.)

Appeal from district court, Bingham county.

Action by Linnie M. Palmer and another against the Utah & Northern Railway Company to recover damages for the death of plaintiffs' intestate, an employe of defendant. From a judgment for plaintiffs, defendant appeals. Reversed.

P. L. Williams and Homer Stull, for appellant.

To determine who is the proper party plaintiff, the complaint must show, by averment, whether the deceased was a minor or major, and the plaintiff must then be the person indicated by the statute. The essential facts in every case must be averred directly, and cannot be left to inference. *Harris v. Hillegass*, 54 Cal. 463; *Stringer v. Davis*, 30 Cal. 318.

An employe in the bridge department of a railroad and a telegraphic operator are fellow-servants. *Russell v. Railroad Co.*, 17 N. Y. 134; *Laning v. Railroad Co.*, 49 N. Y. 521; *Wonder v. Railroad Co.*, 32 Md. 411; *Lawler v. Railroad Co.*, 62 Me. 463; *Seaver v. Railroad Co.*, 14 Gray, 466; *Gilman v. Railroad Corp.*, 10 Allen, 233.

Misconduct of a suitor is sufficient to reverse a judgment. *Rose v. Smith*, 4 Cow. 17; *People v. Douglass*, Id. 26, 33; *Hilton v. Southwick*, 17 Me. 303; *Brant v. Fowler*, 7 Cow. 562; *Wilson v. Abrahams*, 1 Hill, 207; *Jackson v. Smith*, 21 Wis. 26; *State v. Hartmann*, 46 Wis. 248, 50 N. W. Rep. 193; *McIntire v. Hussey*, 57 Me. 493; *Bank v. Fulmer*, 31 N. J. Law, 52.

The proof should have been confined to the defect alleged. *Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. Rep. 508; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358.

H. M. Bennett and Smith & Wright, for respondents.

Where a defect of parties exists, the objection must be taken by demurrer, or it will be waived. *Dunn v. Tozer*, 10 Cal. 167; *Mott v. Smith*, 16 Cal. 557; *Sampson v. Schaeffer*, 3 Cal. 202; *Burroughs v. Lott*, 19 Cal. 125; *Barber v. Reynolds*, 33 Cal. 497.

The fact that deceased was riding on a pass in no wise affects the question of defendant's liability. *Railroad Co. v. Derby*,

14 How. 483; *Railway Co. v. Selby*, 47 Ind. 492; *Railroad Co. v. Muhling*, 30 Ill. 23; *The New World v. King*, 16 How. 472; *Railroad Co. v. Horst*, 93 U. S. 296; *Railroad Co. v. Lockwood*, 17 Wall. 374, 10 Amer. Rep. 366, note.

The deceased was killed by the negligence of either telegraph operator or train dispatcher; both of them were agents of defendant, and were not "fellow-servants" of deceased, within the meaning of that term as used in law. *Gillenwater v. Railroad Co.*, 61 Amer. Dec. 101; *Bowers v. Railroad Co.*, 4 Utah, 215, 7 Pac. Rep. 251; *Cunningham v. Railway Co.*, 4 Utah, 206, 7 Pac. Rep. 799; *Kielley v. Mining Co.*, 3 Sawy. 437; *Railroad Co. v. Moranda*, 34 Amer. Rep. 168; *Darrigan v. Railroad Co.*, 23 Amer. & Eng. R. Cas. 438; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co. v. Crockett*, 19 Neb. 139, 26 N. W. Rep. 921; *Railway Co. v. Lundstrom*, 16 Neb. 256, 20 N. W. Rep. 198; *Railway Co. v. Condon*, 17 Amer. & Eng. R. Cas. 583; *Railroad Co. v. Collins*, 5 Amer. Law Reg. (N. S.) 266.

Buck, J. On the eleventh day of December, 1885, the defendant, a corporation, was running a passenger train on its road, which was derailed, and thrown from the track, and one William O. Palmer, an employe of defendant, riding thereon at the time of the accident, was killed by a car falling upon him. It is claimed by plaintiffs that the accident was caused by a broken rail which defendant carelessly and negligently allowed to be and remain on the track. The action was brought by Linnie M. Palmer, widow of deceased, and Alfred Perle Palmer, minor son of deceased, by W. F. Fisher, guardian of said minor. The defendant interposed a general demurrer to the complaint, on the usual ground, "that it does not state facts sufficient to constitute a cause of action."

That part of the complaint relied upon by attorneys for defendant in the argument of the demurrer is in the following words: "That the plaintiff Linnie M. Palmer is the widow of William O. Palmer, deceased, and that the plaintiff Alfred Perle Palmer is the son of Linnie M. Palmer and William O. Palmer, deceased; that Alfred Perle Palmer, one of the plaintiffs herein, is an infant under the age of ten years, and that W. F. Fisher was duly appointed such guardian *ad litem* by the Hon. J. B. Hays, judge of this court, on

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the twenty-eighth day of April, 1886; and that said deceased died intestate."

It is agreed by both parties that the sufficiency of the complaint is to be determined by sections 191 and 192 of our Code, which are as follows: "Sec. 192. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Section 191 provides that, if the deceased is a minor, the father and mother may bring the action.

The appellant argues that the complaint is bad in that it does not allege whether the deceased was a minor or major. He claims, in terms, that the question is not whether there is a cause of action in the abstract, but whether the facts stated constitute a cause of action in favor of plaintiffs. We are not prepared to concede the correctness of appellant's position. We think the question is—*First*, whether there is a cause of action; and, *second*, whether the plaintiffs are the proper parties. There can be no doubt that they are the parties directly interested in the action. The appellant claims that whether they are the proper parties to bring the action under the Code depends upon whether the deceased was a minor or major, and that that is not shown by the complaint. It seems that such omission, if such exists, would cause only an uncertainty, which under our Code is a distinct cause of demurrer. Such an objection does not go to the substantive cause of action, and we think cannot be taken advantage of under a general demurrer. *Blanc v. Klumpke*, 29 Cal. 156; *Slattery v. Hall*, 43 Cal. 191.

In *Jamison v. King*, 50 Cal. 136, the defendant demurred to the complaint on the ground that it was ambiguous, unintelligible, and uncertain, in that certain facts did not appear therein. The court says: "The defendant had the right to be informed whether the plaintiff claimed that the instrument was of no effect because not delivered, or, having been delivered, that it operated only as *donatio causa mortis*. Defendants are entitled to a distinct statement of the facts by plaintiff claimed to exist. The complaint is ambiguous and uncertain, and the demurrer ought to have been sustained." So, in the case at bar, perhaps the defendant had a right to be informed as to whether the deceased was a minor or a

major, in order to enable it to know whether the plaintiffs were proper parties, and, if this did not appear by the complaint, it was ambiguous and uncertain; but this defect must be specially set out in the demurrer, and cannot be taken advantage of upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The second assignment of error is that the court erred in refusing a continuance on the ground of the absence of one Braddock, a witness for defendant. An inspection of the affidavit upon which the motion for a continuance was made shows that said witness would testify that he was on the scene of the accident soon after it occurred; that said Braddock possessed special knowledge of the condition of the defendant's roadway and track at and about the point of the accident; that said witness supervised the removal of said broken rail, and personally inspected the same; that the broken end or surface showed a complete and entirely new fracture, and that the external appearance thereof gave no indication of any defect therein; and that, by reason of the special knowledge of said witness as an expert in the structure and maintenance of roadway and track of a railway, and the particular characteristics and distinguishing features of the fractures of iron and iron rail, the defendant will not be able to supply the proof, etc. The peculiarity of this affidavit, as considered in connection with appellant's argument, is that it does not allege that said witness is an expert in any sense, or that he has any special knowledge as an expert. It does not set out that witness has any special knowledge of the condition of defendant's roadway and track at and about the point of the accident, and it nowhere alleges that he has any other special knowledge. The substantive fact desired to be proven by said witness was that the appearance of the broken rail indicated a complete and entirely new fracture, and the external appearance thereof gave no indication of any defect therein. Although for some reason the record does not show it, yet it is admitted by the attorneys in this court that the motion was overruled upon the admission by attorneys for plaintiffs that the witness would testify, if present, as is set out in the affidavit of continuance, and it was so considered at the trial. Section 364 of our Code provides that

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upon such admission the trial must not be postponed.

The third error assigned is that the evidence does not justify the verdict, in that it does not show that the accident was the result of a broken rail, which defendant carelessly and negligently permitted to remain on the track. An inspection shows that the evidence upon this point was submitted to the jury by both plaintiffs and defendant. Its consideration was within the special province of the jury, and we see no reason to disturb their verdict.

The fourth error assigned is that the court erred in refusing to give instructions 3, 4, and 5, requested by the defendant. The foundation for these instructions is in the fact claimed by defendant that the deceased received the injury of which he died in consequence of the carelessness and negligence of a fellow-servant, both being in the employment of the defendant. There was evidence tending to show that one Sherman, station agent at Camas, a station about five miles from the scene of the accident, had received notice several hours before the accident that there was a bad place in the road five miles from said station; that his duty was to notify the proper officers of the company, that the same might be repaired, and also the conductors of passing trains, that they might guard against it; that he neglected to do so, and, in consequence of said neglect, the broken rail was not removed until after the train upon which deceased was riding was thrown from the track. It is claimed by appellant that, admitting all this, yet the agent, Sherman, was a fellow-servant of the deceased, Palmer, and that the company is not liable for the accident to Palmer resulting from the carelessness or negligence of his fellow-servant, Sherman. Palmer was a carpenter, and had no relations or connection with the station agent, Sherman. It is admitted by appellant that Sherman's duties were the same as a train dispatcher, as far as they relate to the case at bar. The importance and applicability of said instructions depend upon the legal proposition that Palmer and Sherman were fellow-servants, in the sense that the one cannot recover for injuries resulting from the carelessness of the other.

The general proposition that an employer is exempt from responsibility, where injury results to one servant from

carelessness or negligence of another, is now said to be well settled. Cooley, Torts, 642. "There seems, however, to be a strong disposition to hold that the rule does not apply where, at the time of the injury, the servant injured was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted." Cooley, Torts, 543. We think such was the relation of the deceased, Palmer, to the station agent, Sherman, and the question for us to determine is whether said rule of law should apply to such a case.

The authorities cited by the respective attorneys in their arguments constitute an able collation of adjudicated cases bearing upon this question. The weight of such authorities, considered by their number, seems to be in favor of the doctrine that the employer is exempt from liability where the injury results to one servant through the carelessness of another, without regard to the connection which the servants have with each other. Opposed to this view, however, is a smaller number of cases from high authorities, which hold that the employer is not exempt from such liability where employees are injured through the negligence of officers and agents who are invested with a controlling or superior duty in the care of the business in which the servant is engaged. *Hough v. Railway Co.*, 100 U. S. 213.

In the case at bar the agent, Sherman, represented the defendant at the station where he was located. It was his duty to prevent accident by warning the conductor of the passing train of the bad place in the track, and to cause the broken rail to have been removed, and a sound one put in its place, before a train should pass over it. The deceased was employed as a carpenter on the road, in a department wholly disconnected with that in which the agent, Sherman, was employed.

After a careful examination of the authorities, we feel bound to adopt the doctrine enunciated by the supreme court of the United States, whose decisions are controlling upon all territorial courts. In the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, the principle is established that, where an agent is clothed with the control and management of a distinct department, the company is liable to an employee injured by

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the carelessness of such agent. Under this authority we think that the deceased, Palmer, was not a fellow-servant of the agent, Sherman. Both were employes of defendant, but in entirely distinct departments of labor. In this view the said instructions were irrelevant and misleading, and properly refused.

The sixth instruction asked by defendant, and refused, is to the effect that the deceased is bound by the conditions of a certain pass, designated in appellant's brief as a "gang pass," upon which he and other workmen were riding when the accident occurred. The pass was between different parties than those interested in this action. The deceased had never signed it, nor assented to its conditions, and we think the defendant not in a condition to avoid liability upon the conditions of a pass issued by the Union Pacific Railway to one Barraclaugh. We think the pass no defense to the action, and that this instruction was properly refused.

The only remaining assignment of error which we deem it necessary to consider is that of irregularity in the proceedings of the jury and adverse party. The affidavit of P. L. Williams in support of this assignment, among other things, says "that William Mester was a juror in the trial of the cause; that during said trial he was engaged in the business of saloon keeping at Blackfoot, where the court was sitting; that, as affiant is informed and verily believes, W. F. Fisher, father of one of the plaintiffs in the action, and grandfather to the other plaintiff, Alfred Perle Palmer, for several days before the said trial begun, and during all the time it was in progress, was a frequent and liberal patron of said saloon, and that during the progress of said trial, and especially during the evenings and nights of the said twenty-seventh and twenty-eighth days of May aforesaid, treated and entertained in said saloon large numbers of his friends and acquaintances; and, as affiant is informed and believes, that during said evenings different members of the jury impaneled to try said cause drank liquor in said saloon with the said Fisher, at his expense; and that during a portion of the time that said Fisher was so in said saloon on the evening last aforesaid, and treating and entertaining the said persons, the said Mester was present, and waited upon and assisted in waiting upon the said Fisher and his guests and friends; that during one of the said nights, near

the hour of 2 o'clock A. M., as he is informed and believes, he was awakened from sleep in the hotel by the approach of a noisy, tumultuous, and boisterous crowd of men, coming from the direction of said saloon, some of whom were talking loudly, some singing, some one playing a banjo, and distinctly, above the din and uproar, affiant could distinguish the voice of said Fisher." To this affidavit the said Fisher replies in a counter-affidavit, and alleges that for six years prior thereto he had frequently patronized said saloon; that his reason for so doing was that said Mester kept the best liquor in town, and that on one or two occasions during said trial he drank at the bar of said Mester, and treated some of his friends; but denies that during said trial he treated any member of said jury, or drank with any of them, or that said Mester waited on him at said bar during said trial. Mr. Fisher does not deny that he patronized said saloon, or that said Mester and other members of the jury were present on such occasions, as alleged in the affidavit of said Williams.

We are unable to say what effect this liberal and conspicuous patronage during the trial may have had upon the mind of the juror whose bar he was patronizing. It is not necessary for us to find that it had effect upon the verdict in order to sustain this assignment of error as to irregularities of an adverse party. It is enough to find that it was calculated so to do. It is perhaps impossible for the juror himself to appreciate what influence this patronage may have had upon his mind.

In *McDaniels v. McDaniels*, 40 Vt. 374, the court says: "There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law, and upon the evidence in court. The court set aside the verdict in justice to themselves as well as the defendants: that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties, and the confidence of the court."

In *Cottle v. Cottle*, 6 Greenl. 140, quoted in *Haynes on New Trials & Appeals*, § 48, the court says: "In case of an alleged attempt to influence a jury, it may be useful for a party to learn that a good cause

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may be injured, but cannot be promoted, by conduct of this sort, and to the public generally to know that it will be tolerated in no case whatever."

In *Cilley v. Bartlett*, 19 N. H. 324, where statements were made within hearing of one of the jurors, by a party without knowing that the juror was present, the court says: "There will be no security for the proper administration of justice if a party, while his case is on trial, can be permitted to make statements denouncing witnesses, during adjournment, and after the jury have separated, whether he is aware of the presence of the juror or not. If he will conduct in this manner, he must take the risk of the consequences on himself. The presumption is, where jurors hear such statements, they are more or less affected by them. It is necessary that such conduct should be discountenanced, and the demandant is entitled to a new trial."

In the case at bar it is not alleged that the plaintiff Fisher made any direct attempt to influence the verdict by denouncing the opposite parties, or their witnesses, but that his generous patronage at the bar of one of the jurors was intended and calculated to influence a verdict in his favor.

In *Knight v. Inhabitants of Freeport*, 13 Mass. 217, the court says: "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least, intermeddling with jurors a verdict will always be set aside."

In *Thompson & Merriam on Juries*, 406, the practice is stated as follows: "Where the successful party to a suit is shown to have attempted by improper means to influence the verdict in his favor by corrupting or intimidating particular jurors, or arousing prejudice in their minds by undue hospitalities or civilities, the verdict will be set aside on the grounds of public policy, without reference, and without considering whether the attempt was successful or not."

These authorities establish the practice that, whenever the adverse party is guilty of conduct calculated to influence a verdict afterwards rendered in his favor, a new trial will be granted as a matter of public policy, and to secure a pure administration of justice. What effect the conduct of the party in the case at bar may

have had upon the juror it may be impossible to determine. He was pursuing an occupation authorized by law, and if Mr. Fisher frequented his place of business, and expended liberal sums of money in the entertainment of his friends, with his partner in business, and in his presence, or to the knowledge of the juror and other jurymen, as is alleged, and not denied by Mr. Fisher, the court will not attempt to calculate its influence upon the verdict. Such conduct is entirely reprehensible, as an attempt to corrupt the administration of justice. The party thus attempting to interfere with the trial of causes is not only guilty of contempt of court, and liable to punishment therefor, but he cannot be allowed to profit by a verdict in his favor procured under such corrupting influences.

We find no error in the law occurring at the trial, but, on the ground of irregularity by and in behalf of the party in whose favor the verdict was rendered, the judgment is reversed, and the cause remanded for a new trial.

BRODERICK, J., concurring. HAYS, C. J., expressing no opinion.

BROADBENT *et al.* v. JOHNSON.

(February 24, 1887.)

SUBSCRIPTION — ONE SIGNER — ACCEPTANCE — OFFER.

A gratuitous subscription with only one signer is but an offer, which, until accepted by the promisee in express terms, or by a performance of the conditions stipulated therein, is but a *nudum pactum*, and cannot be enforced, against the will of the subscriber, by suit at law.

Appeal from district court, Ada county.

Action by John B. Broadbent and others against O. P. Johnson to recover a subscription in aid of the building of a railroad. From a judgment for plaintiffs, defendant appeals. Reversed.

D. P. B. Pride, for appellant. *Brumback & Lamb* and *Huston & Gray*, for respondents.

BUCK, J. This action was brought to recover the sum of \$500 subscribed by the defendants towards the building of a branch railroad from the Oregon Short-Line Railroad to Boise City. The subscription is in the following words, to-wit:

*Broadbent v. Johnson.***"SUBSCRIPTION FOR A RAILROAD TO BOISE CITY.**

"We, the undersigned, citizens and property holders of Boise City and vicinity, Ada county, Idaho territory, hereby, each for himself, agrees to pay the amount set opposite his respective name, to the Union Pacific Railroad Company, upon consideration that the said Union Pacific Railroad Company shall build a branch railroad from some point on the Oregon Short-Line Railroad, hereafter to be determined upon by S. H. H. Clark, general manager of said Union Pacific R. R. Co., to Boise City, Idaho; the construction of such branch road to be commenced and completed within a reasonable time; said amounts to be due and payable to Jeremiah Brumback, John Lamb, and John Broadbent when required; said Brumback, Lamb, and Broadbent being duly authorized to collect and pay over said money subscribed by us.

"Boise City, December 7, 1883. Dollars.

[Signed] "O. P. JOHNSON, - - \$500."

The complaint states that the said Clark located the road to Boise City, and that the said Union Pacific road, through the Oregon Short-Line Railroad, surveyed and located said branch road from the town of Caldwell to Boise City, and did procure the right of way and depot grounds, and did promise and agree to and with defendant, among others, to build and construct said branch road, and have commenced the construction thereof; that the said promise and agreement of said Union Pacific Railroad was upon the condition that the said Oregon Short-Line road should receive good and sufficient deeds of said branch line, road-bed, depot grounds, and 20 acres of ground for shops; that the said Oregon Short Line did locate said branch line to Boise City, and two miles above said city, and that the defendant and other subscribers did assent, after said subscription, that the amount subscribed by him and them should be used to procure and purchase said right of way, shop, and depot grounds; that J. Brumback and J. H. Bush were appointed by defendant and other subscribers to procure said right of way; that they procured the same, and delivered to said Oregon Short-Line road good and sufficient deeds therefor, and did pay out and expend about \$40,000 for the same; that the defendant has paid no part of said \$500; and that the same is now due and owing.

To this complaint the defendant interposed a demurrer, upon the grounds, among others, of non-joinder of parties, and that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, to which ruling the defendant excepted. The defendant thereupon filed his answer denying the allegations of the complaint, and alleging that the same was procured by fraud. The action was tried at the April term of court, 1886, and the jury returned a verdict for plaintiff for the amount claimed, \$500. From the judgment entered upon the verdict the defendant appeals, and brings the cause into this court on a bill of exceptions. Among the errors specified in the bill of exceptions is:

1. That the court erred in overruling plaintiff's demurrer to the complaint. In considering the merits of the demurrer, we notice that the subscription set out in the complaint is not a mutual one, to which there are several signers. The defendant, O. P. Johnson, is the only signer thereto. If there were others, it is not so alleged in the complaint, and it does not so appear in the record. It is unilateral. For this reason much of the argument, and many of the authorities cited, on appeal, do not seem applicable to the facts of the case as they appear in the record. The obligation set out in the complaint is a written offer by defendant to the Union Pacific Railroad Company to pay the company \$500 if they will build a branch road connecting Boise City with the Oregon Short-Line Railroad, and specifying that the plaintiffs in this action are authorized to collect the same, and to pay the same to said company. The document contains no acceptance on the part of the company. In and of itself it is a naked offer,—a promise without a consideration,—and not binding on the subscriber. *Railroad v. Brinkehorff*, 21 Wend. 139; *Cottage-Street M. E. Church v. Kendall*, 121 Mass. 529; *Livingston v. Rogers*, 1 Caines, 585; *Trustees, etc., v. Stewart*, 1 N. Y. 581. It has none of the elements of a mutual promise between different signers of a subscription, which the courts have held to be a sufficient consideration between the several subscribers.

The complaint, however, alleges that, after the subscription was made, the said Union Pacific Railroad promised and agreed to and with defendant and others to build said branch road upon the consideration that the Oregon Short-Line Rail-

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road should receive good and sufficient deeds to their road-bed, depot grounds, and ground for shops, and that defendant assented thereto; that thereupon, upon such assent, one J. Brumback and J. H. Bush were appointed by the defendant and other parties subscribing to procure said right of way in January, 1884, to secure the same, which they did, relying upon said subscription, at an expense of about \$40,000.

Accepting this statement to be true, as admitted by the demurrer, it seems that the proposition of defendant to the Union Pacific Railroad, made by the terms of said subscription dated December 7, 1883, was met by a counter-proposition from said company to defendant and others to build the road if they could be given the right of way, and that defendant, with others, assented to the counter-proposition in January, 1884; that, pursuant thereto, defendant and others appointed J. Brumback and J. H. Bush to procure said right of way; and that said Brumback and Bush accepted such employment, and procured said right of way at an expense of about \$40,000. The agreement under which said right of way was secured, as is set out in the complaint, was subsequent to and entirely distinct from the subscription upon which this action is founded. The subscription was dated December 7, 1883. The arrangement for right of way was made in January, 1884. If the defendant was a party to the agreement as proposed by the railroad company in January, 1884, the subscription of December 7, 1883, was only referred to as fixing the amount of his liability. Whatever obligations defendant may have assumed under the arrangement to secure the road-bed must have been under the subsequent agreement, and not on the subscription set out in the complaint. Said subscription being void for want of mutuality,—a mere *nudum pactum*,—the plaintiffs could acquire no authority from it to bring this action, or to collect the amount subscribed; nor can the defendant be forced to pay upon a void obligation. If defendant is liable at all, it must be to parties other than the plaintiffs, and upon some other obligation than that set out in the complaint.

We are of the opinion that the demurrer should have been sustained, and the judgment is reversed.

HAYS, C. J., and BRODERICK, J., concur.

COOPER et al. v. KELLOGG et al.

(February 28, 1887.)

APPEAL—AFFIRMANCE.

Where the findings are responsive to all the material issues raised by the pleadings, and are warranted by the testimony, and they support the judgment, and no error of law appearing, the judgment will be affirmed.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county.

Action by one Cooper and others against one Kellogg and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Richard Z. Johnson, William H. Clagett, and Albert Allen, for appellants. *W. W. Woods and W. R. Heyburn*, for respondents.

HAYS, C. J. This case is founded upon a contract which was entered into between the plaintiffs and defendant Kellogg, wherein plaintiffs were to furnish said defendant with a prospector's outfit known in miner's parlance as a "grub-stake," in consideration of which Kellogg was to do certain prospecting, and to give to plaintiffs a one-half interest in all mining claims discovered by him. Kellogg received the outfit, and did the prospecting. It is claimed by the plaintiffs that Kellogg discovered all of the mining claims for which this suit is brought while working under said contract as a prospector, and that he made location of some of them; but that he afterwards, for the purpose of defrauding plaintiffs, procured defendant O'Rourke, without plaintiffs' knowledge or consent, to accompany him, and to take down the location notice put up by Kellogg, and to relocate the premises in the name of O'Rourke. All of which defendants deny, and claim the Bunker Hill, the only claim now in controversy here, was discovered by O'Rourke alone. Upon the trial a jury was called, and special questions submitted to them, upon which they found the facts. The court adopted a portion of their findings of fact, and further found that "on September 10, 1885, Kellogg became the owner, by location, of an undivided one-half interest in the Bunker Hill lode; that at the time he acquired this interest by location, he was under a contract with plaintiffs, by which they were to have a half interest in all mining property located or acquired by him; that plaintiffs were the owners of

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one-half of Kellogg's interest in the Bunker Hill acquired by him by location on September 10, 1885; that prior to September 10th, while said contract existed between plaintiffs and Kellogg, Kellogg knew of the existence of mineral-bearing rock on the Bunker Hill mine, and indications of mineral there, as caused him and O'Rourke to locate the same for their joint benefit." And, as a conclusion of law, the court found "plaintiffs entitled to a decree against Kellogg and O'Rourke for an undivided one-fourth interest of the Bunker Hill mine, as they held the same September 10, 1885, and in all interests acquired by them since that date." Judgment was entered in accordance with the findings of fact and conclusions of law.

The findings, we think, cover all the material issues raised by the pleadings, and are sufficient to support the judgment. After a careful examination of the whole case, which is very voluminous, we find it more a question of fact than of law, and upon the question of fact we have no hesitancy in saying we think the findings fully sustained by the evidence. If the defendants, Kellogg and O'Rourke, have acted in good faith, and did not intend to defraud these plaintiffs out of their legitimate interest in the Bunker Hill claim, they are certainly unfortunate in having their transactions, as detailed by themselves, laden with many badges of fraud. We are unable to see how any impartial mind can arrive at a different conclusion. Their conduct relative to this mine is consistent with this theory, and inconsistent with any other.

We have examined all the assignments of error, and deem it unnecessary to discuss them in detail, inasmuch as we find no error that would warrant a reversal of the judgment. Judgment affirmed.

BRODERICK and BUCK, JJ., concurring.

SCHULTZ et al. v. KEELER et al.

(February 28, 1887.)

BILL OF EXCEPTIONS—WHAT CONSTITUTES.

1. A bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a "statement."

APPEALABLE ORDERS — OVERRULING MOTION FOR NEW TRIAL.

2. The organic act of the territory does not prohibit the legislative assembly from authorizing an appeal from an order of the district court overruling a motion for a new trial.

MINING CLAIM — LOCATION BY AGENT—VALIDITY.

3. The instructions given to the jury, to the effect that one cannot initiate the location of a mining claim through an agent, etc., examined and held erroneous. BUCK, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Action by one Schultz and others against one Keeler and others to recover the possession of certain mining ground. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiffs appeal. Reversed.

W. B. Heyburn, for appellants. Wm. H. Clagett and Albert Allen, for respondents.

BRODERICK, J. This action is in the nature of ejectment, brought to recover the possession of certain placer mining ground situated in Shoshone county. The case was tried before the court with a jury. Verdict and judgment in favor of defendants. The plaintiffs moved for a new trial, which motion was overruled, and from this order and decision the plaintiffs appealed. The motion was made upon a bill of exceptions which contains the substance of a portion of the evidence, and also certain instructions given to the jury, and an exception taken by the plaintiffs to the giving of these instructions. The error assigned is the giving of the instructions set out in the bill of exceptions, and the refusal to grant to plaintiffs a new trial.

At the hearing in this court a preliminary motion to dismiss the appeal was argued, on the ground, among others, that there was no sufficient statement or bill of exceptions in the transcript. The bill of exceptions is somewhat informal, but it contains the charge excepted to, and shows that the objection was made before the jury retired for deliberation, and indicates with sufficient certainty upon what the appellants rely for a reversal of the judgment. It is authenticated by the trial judge, and it makes no difference, under our practice, whether it is called a statement or bill of exceptions. It brings the exceptions here, and we must take this portion of the transcript for what it is, and not for what it may have been called. *People v. Crane*, 60 Cal. 279; *Bradbury v. Improvement Co.*, ante, 221, 10 Pac. Rep. 620. The motion to dismiss is therefore overruled.

Counsel for respondents interpose an-

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other preliminary objection to passing upon the merits of this appeal; and it is insisted that this court has no jurisdiction of the case, because section 1869, Rev. St. U. S., allows appeals from the final decisions of the district courts to the supreme court of all the territories respectively, under such regulations as may be prescribed by law. It is therefore contended that an order denying a motion for a new trial is not a final decision, and not appealable. In support of this contention against jurisdiction counsel refers to *McCormick v. Walla Walla Co.*, 1 Wash. T. 512. An examination of that case will show that it is not directly in point in the case at bar. In that case a new trial had been granted in the trial court, and on appeal from the order the supreme court said, in substance, that there was no final decision to appeal from. But, if that decision does go to the extent that counsel here claim for it, we would still be unwilling to follow it.

Ever since the organization of this territory, litigants have been appealing from orders denying motions for new trials. Our reports show a great number of these cases to have been heard and determined in this court, and now for the first time the right of appeal is questioned. It will be observed that the organic act allows appeals from final decisions. Now, if an application for a new trial is overruled, is not the order a final decision? Certainly, so far as the trial court is concerned, it puts an end to the suit. In our opinion it is final, within the meaning of the law, and from such an order or decision an appeal will lie. *Wyatt v. Wyatt*, ante, 219, 10 Pac. Rep. 228.

This brings us to the consideration of the instructions given to the jury, and objected to by the plaintiffs at the time. They are as follows: "The jury are instructed that if they find from the evidence that the alleged location of the plaintiffs of June 11, 1883, was made in one body, including 80 acres of land, and that said location was made in the joint names of Jesse A. Prichard, C. A. Schultz, M. H. Lane, and W. O. Endicott, in the absence of said Schultz and Lane, by A. J. Prichard as their agent, and that before C. A. Schultz and M. H. Lane personally entered the premises, defendants in person made location thereon as required by law, you will find for defendants." "There is evidence tending to show that three of the locators, under the alleged location of June 11, 1883, were absent at the time of

the alleged location by plaintiffs, and remained absent until after the location by the several defendants of the mining ground claimed by them respectively, and that the locations in the names of J. A. Prichard, C. A. Schultz, and Mary H. Lane were made by A. J. Prichard, as their agent, in their absence. I instruct you as a matter of law that if the defendants were personally present on the disputed premises, with the purpose of locating the same, and that the plaintiffs Schultz and Lane had never been personally upon the claim, but had duly been represented in making their location by A. J. Prichard, their agent, that the defendants had the better right, and the absent plaintiffs acquired no rights through their agent, as against defendants in possession." "The laws of the United States provide that all valuable mineral deposits in lands belonging to the United States are open and free to exploration and purchase, and the lands on which they are found to occupation and purchase, under regulations prescribed by law. The entry upon mineral lands for such purpose, and complying with the laws in reference thereto, is a location. A valid location of a mining claim practically severs the land described therein from the public lands, and withdraws it from the public domain. It is important, therefore, that a person who claims for himself the privilege of holding public land, and appropriating it to his own use at the expense of the public domain, should do so under some specified provision of law. I instruct you that there is no provision of law which authorizes a person to take the necessary steps to initiate the location of a mining claim by an agent in the absence of the principal, and that any such location, or attempted location, made under power of attorney from one who is absent, is unauthorized by law, and void, as against one who personally takes possession of the premises prior to the personal presence of the principal upon the claim."

We think the propositions of law announced in these instructions to the jury too broadly stated. We find nothing in the statutes of the United States that prohibits one from initiating a location of a mining claim by an agent. Counsel for respondents contend that as the acts of congress do not specifically authorize the location by an agent that they must be construed as forbidding it. We might accept this view, if congress had legislated

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upon the entire subject, and had abrogated all other laws and regulations with reference thereto. This has never been done with regard to the public mineral lands, but, on the contrary, congress, by express enactment, has sanctioned and continued in force all local laws and customs not inconsistent with the laws of the United States. Section 2319, Rev. St. U. S. Long prior to the mineral land act of 1872 it had been held by the courts of California that a valid location of a mining claim could be initiated through an agent. *Gore v. McBrayer*, 18 Cal. 582; *Morton v. Mining Co.*, 26 Cal. 527. So at that time it was well understood on this coast that the law authorized a location by an agent; or, in other words, that a valid location could be made without the locator participating in person. 2 *Estee*, Pl. & Pr. 2252.

The law as interpreted by the courts had been acted upon in all this mining region until it had, in a certain sense, become a rule of property. Congress had full knowledge of the local laws, and, had they intended to change or disaffirm this rule, it certainly would have been done by express provision. As there is no such provision, it is a fair presumption arising from section 2319, *supra*, that it was the intention to affirm and continue in force this as well as all local laws and customs, as construed by the courts, not in conflict with the laws of the United States. As bearing upon the question, see *Rush v. French*, 1 *Ariz.* 99, 116, 25 *Pac. Rep.* 816; *Boucher v. Mulverhill*, 1 *Mont.* 310; *Murley v. Ennis*, 2 *Colo.* 300.

To sustain these instructions and this judgment would be holding, in substance, that no one can initiate a location to a mining claim, under any circumstances, unless he be personally present, and participate therein. We do not think the law should be so construed and administered, and, out of the numerous mining cases decided in this country, not one has been cited that so holds. If the parties herein attempted to locate through an agent, and the laws were not complied with as to the manner of locating, or as to performing labor, making improvements, etc., that would be another and different question.

In the first paragraph of the instructions is an intimation that there was evidence tending to show that the plaintiffs and their predecessors in interest located jointly, in one body, 80 acres of ground; that there was but one location, and that

it was a part of this joint location in dispute. The evidence not being here, we cannot know the facts, and the record is so imperfect that we would not be warranted in expressing any opinion on the merits, or as to this joint location of the claim; but think, on the whole case, that a new trial should be awarded.

The instructions that a location could not be initiated through an agent, etc., are so clearly erroneous that the error could not have been cured by any others that may have been given. *Lufkins v. Collins*, ante, 135, 7 *Pac. Rep.* 96.

The judgment is reversed, and cause remanded to the court below for a new trial in conformity with this opinion.

HAYS, C. J., concurring. BUCK, J., dissents from the third and last point in the syllabus.

BURKE *et al.* v. McDONALD *et al.*

(February 28, 1887.)

MINES AND MINING—ACTION TO SETTLE ADVERSE CLAIMS—PRACTICE.

1. In proceedings under Rev. St. U. S. §§ 2325, 2326, to determine the right of adverse claimants to mineral locations, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but assents to calling a jury, and proceeds to trial as in an action at law, and both parties adduce their evidence on the questions of fact involved, it is then too late for the defendants to move to have the case declared a proceeding in equity, and to have it decided as such without the intervention of a jury. BUCK, J., dissenting.

SAME—RIGHT TO JURY TRIAL.

2. In proceedings under this act of congress, the right of possession of the ground in dispute is the gist of the action,—the thing to be tried and settled by the controversy,—and such proceeding is, in Idaho, an action at law, in which a jury may be demanded as a matter of right to try such controversy, and render a general verdict therein. BUCK, J., dissenting.

SAME—POSSESSION.

3. So far as the form of the action is concerned, it makes no difference who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent; and in such a case, where the claim is asserted under a location, actual possession is not a material question. BUCK, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Action by J. M. Burke and others against Scott McDonald and others to de-

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termine the right of plaintiffs as adverse claimants to certain mineral locations. From a judgment of nonsuit, plaintiffs appeal. Reversed.

A. E. Mahew, W. B. Hayburn, and W. W. Woods, for appellants. F. Ganahl, G. W. Stapleton, and Albert Allen, for respondents.

BRODERICK, J. This action was commenced under Rev. St. §§ 2325, 2326, to determine the rights of adverse claimants to certain mining ground situated in Shoshone county, Idaho. The complaint sets out the location by plaintiffs of the Tiger Lode mining claim, and that the defendants claimed an adjacent mine called the "Poorman Lode Mining Claim," and that they (defendants) wrongfully caused a survey of said Poorman claim to be made so as to cross upon and overlap the said Tiger claim; that defendants made application for a patent to said Poorman claim; that plaintiffs filed in the land-office their adverse claim to that portion of the Poorman which overlapped the Tiger claim, and in due time thereafter commenced this action to sustain their adverse claim. The defendants answered the complaint, denying some of its allegations, and admitting others, and then set up claim to and right of possession in themselves to the area in conflict. At the April term, 1886, of the district court, the cause came on for trial. A jury was impaneled, without objection, and the cause tried, as appears from the record, as an action at law before the court and jury. The jury, being unable to agree upon a verdict, were discharged by the court. The defendants then moved for a change of venue, but no order was entered upon the motion.

The defendants next moved the court, "upon the pleadings and all the evidence in the cause, that the court find the facts involved, and render judgment accordingly, upon the ground that it appears from all the evidence that the plaintiffs were, at the time of the commencement of this action, in the possession of, and at all times since have been and now are in the possession of, the ground and premises in controversy, and on the further ground that the evidence and pleadings show that the action is a proceeding in equity, and not at law, and is one peculiarly cognizable by the court, and should be tried by the court." The court sustained the motion, and rendered its decision upon the ev-

idence and arguments adduced upon the trial. To these rulings and decisions the plaintiffs excepted, and assign the same as error. The appeal is from the judgment, and the questions involved must be determined from the judgment roll.

The first question is as to the change of venue. The trial court intimated its intention to change the venue to Kootenai county, unless counsel agreed upon some other; but no order was made or entered, and hence there was no change, and the court did not lose jurisdiction.

The second and more important question for consideration is whether the court erred in holding that this was a case in equity, and rendering judgment accordingly. Ordinarily this question would not be difficult of solution. It could be readily settled from an examination of the pleadings; but in this case there are able counsel on either side, with years of experience in this class of cases, and it was not until after the preparation of the case, and a trial before the court and jury covering a period of several days, and an application by respondents for a change of venue, that this question of equity jurisdiction was first suggested. The complaint alleges that on the first day of November, 1885, and prior thereto, the plaintiffs were, and ever since have been and now are, the owners and in possession of the ground in controversy. In another portion of the complaint it is alleged that on the sixth day of November, 1885, the defendants wrongfully entered upon the disputed ground, ousted and ejected the plaintiffs therefrom, and ever since have withheld and still withhold the possession thereof from the plaintiffs, to their damage in the sum of \$5,000. After some other averments as to an application for patent, etc., the complaint closes with a prayer for judgment that plaintiffs are the owners and entitled to the possession of the premises, the area in conflict, and for restitution thereof. While the one allegation in the complaint, of possession by plaintiffs when the action was commenced, and the other of ouster by defendants prior thereto, and continued possession by them, are inconsistent averments, yet, as the complaint states a cause of action, and was not questioned by motion or demurrer before trial, we think it too late, after the trial was commenced, to do so. *Brown v. Martin*, 25 Cal. 88; *Kerr v. Hays*, 35 N. Y. 331.

But counsel for respondents contend

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that the answer admits the possession of the premises to be in the plaintiffs, and that there was no issue as to possession to try. The portion of the answer referred to reads as follows: "*Second.* Deny that on the sixth day of November, 1885, or at any other time, the defendants ousted or ejected the plaintiffs from the ground and premises described in the second subdivision of the complaint, and deny that defendants withhold the possession thereof from the plaintiffs; but, on the contrary, defendants allege that the plaintiffs wrongfully withhold the possession thereof from defendants. *Third.* Admit that on or about the sixth day of November, 1885, the defendants filed field-notes, a diagram, and application for patent for the Poorman lode and mining claim in the United States land-office at Lewiston, Idaho, and that such field-notes, diagram, and application included the land and premises described in the second subdivision of plaintiffs' complaint, and allege that the same were lawfully so included. Admit that they caused the register of said land-office to give notice by publication of defendants' application for patent for said Poorman lode." The answer also denies "that the location of the said Tiger lode mining claim was ever marked upon the ground and premises described in the complaint as overlapped by the Poorman lode mining claim, or any part thereof."

While these pleadings are somewhat indefinite and uncertain, yet it is clear that the question whether the boundaries of the claims were so established as to conflict with each other was in issue, and also the right to the possession of the disputed ground. As we understand the answer, it admits that defendants were in possession of the Poorman, when the action was commenced, but denies that it overlaps the Tiger, and claims rather that the Tiger overlaps the Poorman. If this construction of the pleadings be correct, it follows that the right to the possession of the disputed ground was in issue, and this right of possession is the gist of the action,—the only thing to be litigated between the parties. *Gwillim v. Donnellan*, 115 U. S. 49, 5 Sup. Ct. Rep. 1110; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232; *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289. The right by which a mining claim is held before patent is a possessory right, which is acquired by discovery, location, and compli-

ance with the laws of congress, and local laws or customs not in conflict with the laws of congress.

In *Belk v. Meagher*, 104 U. S. 283, Mr. Chief Justice WAITE, in speaking for the court, says: "Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title remains in the United States. In furtherance of this policy it was enacted by section 9 of the act of February 27, 1865, c. 64, (13 St. 441; Rev. St. § 910,) that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession."

Section 2326, (Act Cong. May 10, 1872,) Rev. St. 427, among other provisions, says: "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim." We understand that an action to determine the right of possession as authorized by this act is in this territory an action at law. If so, the appellants were entitled to a jury, and the court erred in holding the cause was a suit in equity, and in denying the right to a jury trial. *Killian v. Ebbinghaus*, 110 U. S. 573, 4 Sup. Ct. Rep. 235. This view seems to have support in a subsequent statute upon this subject. The effect of the act of congress of March 3, 1881, amendatory of original section 2326, was that the right of each party to the possession of the property should be tried and determined; and, if neither party established a right to the same, the jury should so find, and judgment should be rendered accordingly.

But it is contended that the form of action must be controlled by our territorial practice act. Section 476 of our Code of Civil Procedure reads: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." We see nothing in this statute which attempts

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to prescribe any particular form of action in the class of cases we have been considering, or that can be construed against the views herein expressed. We do not decide what would be the effect of this local statute in ordinary actions concerning real property, but only that it does not affect this cause. This is a special action, brought under a statute of the United States, and must be controlled by its provisions. *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, and 8 Pac. Rep. 622.

We are of opinion that the trial court erred in holding that this was a cause in equity, and in denying to the plaintiffs a trial by jury. For this reason the judgment is reversed, and cause remanded to the court below for a new trial in conformity with this opinion. So ordered.

HAYS, C. J., (*concurring*.) I think the rights of the parties to this proceeding purely legal, dependent upon their legal *status*, such as citizenship, and their having complied with the requirements of the mining laws and regulations. When this has been shown, they have a legal right to demand a judgment of the court that they are entitled to the "right of possession" of the premises in controversy, or so much thereof as the facts warrant, and upon the proof of this judgment they will be entitled to their patent, upon compliance with the other requirements of section 2326, Rev. St. U. S. All that was necessary to allege in the pleadings herein were the ultimate facts that would have authorized the respective parties to have made the required proof, showing such citizenship, and compliance with the requirements of law. It is immaterial whether they are in or out of possession of the premises at the time of the bringing of the action, as it is not an equitable proceeding to remove a cloud from or to quiet the title to realty; nor is it an action at law simply to recover possession thereof. It is to determine the right of possession alone; for upon that the patent issues, when the requisite proof and payment are made. The pleadings in this case, I fear, were so redundant as to have confused the parties, and misled the court. The purpose of our Code is to secure clearness, conciseness, and truthfulness in pleadings, and thereby accuracy in the issue. I commend its spirit to the consideration of counsel.

I concur in the opinion that the judgment of the court below should be re-

versed, and that a new trial should be granted.

BUCK, J., (*dissenting*.) This case comes up on an appeal from the judgment, and the record properly before the court consists, under section 653, Code Civil Proc., of a copy of the notice of appeal, of the judgment roll, and bill of exceptions. There are in the transcript papers and documents not properly a part of the record, and, under the decision in *Graham v. Linehan*, 1 Idaho, 780, such documents, improperly inserted in the transcript, cannot be considered. Looking into the record, it appears that this case came on regularly for trial upon the issues therein on the seventeenth day of May, 1886, at the April term of the district court, in Shoshone county, First judicial district; that a jury was impaneled to try the issues of fact therein, and, having failed to agree, were discharged; that, after the discharge of the jury, the defendant moved the court to find the facts, and render a decree thereon, on the ground that it was a proceeding in equity; that the plaintiffs objected to the decision thereof, claiming that it was a cause for a jury; that, after hearing arguments thereon, the court filed its findings of fact, and rendered decree therein, against the objection of plaintiffs, who duly excepted thereto.

The real question upon the appeal is whether the court had the jurisdiction to decide the case. The jurisdiction of the court is determined by the character of the issues in the case.

In *Basey v. Gallagher*, 20 Wall. 680, FIELD, J., says: "But the consideration which the court will give to the questions raised by the pleadings when the case is called for hearing, whether it will submit them to a jury, or pass upon them without such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived; if equitable, the court is not bound to call a jury; and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The relief which equity affords must still be applied by the court itself."

This authority, coming from the supreme court of the United States, determines the law of the case upon this question. The jurisdiction, then, of the court

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to decide the case at bar depends upon the issues to be tried. These are determined by the pleadings,—both complaint and the answer. Section 357 of our Code defines an issue to be a fact arising on the pleadings, maintained by one party, and controverted by the other. Section 359 defines an issue of fact to be a material allegation in the complaint controverted by the answer. An allegation not controverted is not an issue in the case. It is an admitted fact, to be considered as proven.

Looking, then, to the pleadings, we find the first allegation of the complaint to be as follows: "The plaintiffs complain, and for cause of action allege—*First*, that on the seventh day of November, A. D. 1885, and long prior thereto, the plaintiffs were, and ever since have been, and now are, the owners, and in the possession, and entitled to the possession, of that certain quartz mine," etc., "called the 'Tiger Lode,'" etc., describing the same by metes and bounds. The complaint is verified; and, under section 237 of our Code, "if the complaint is verified, the denial of each allegation controverted must be specific." Section 259 provides that every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true. Referring to the answer, the defendant denies as follows: "Deny that the plaintiffs now are, or ever have been, the owners of or entitled to the possession of the ground and premises described in the complaint." The allegation of plaintiffs, that plaintiffs are now in possession of said premises, is not controverted by defendants; and, by virtue of said section 259, for the purposes of this action, "must be taken as true."

The defendant has a right, in the conduct of his case, to rely upon its being taken as true, and I know of no power in the court to disregard this provision of the statute. In *Gay v. Winter*, 34 Cal. 160, SANDERSON, J., in announcing the decision of the court, says: "Before entering upon the trial of an action it is of the utmost importance that all doubt, if such there be, as to the issues, should be removed. This is alike important to both parties and to the court. The plaintiff is entitled to an explicit denial of the material allegations of the complaint, or an admission of their truth, either by direct statement or by silence." In the case at bar the defendant remained silent as to

plaintiffs' possession, and under the Code said allegation is to be taken as true for the purposes of the action. SANDERSON, J., says: "It is quite as important for the defendant and the court as to the plaintiff that the issues should be settled in advance." I am unable to see how the court could disregard the rule of the Code that plaintiffs' allegation was admitted and must be taken as true. See *Lillienthal v. Anderson*, 1 Idaho, 678, which is conclusive as to the admission.

The appellants claim that the pleadings set out an action in ejectment. I denominate the action to recover real property under the Code ejectment, and the issue was out of law. But their allegation of possession of the premises described in the complaint, which under the Code must be taken as true, precludes it from being ejectment. In *Kribbs v. Downing*, 25 Pa. St. 404, BLACK, J., says: "It is not without surprise that we find parties going back to the remote transactions of a former generation, and fishing up a lawsuit from an oblivion of fifty years. It is still stranger to see this done in the form of an ejectment for the whole of the original tract of land, when the plaintiffs are themselves in the actual possession of a part of it." Ejectment is a possessory action, and it cannot be maintained for land of which the plaintiff is himself in possession. If, then, the allegation of plaintiffs is taken as true, this cannot be ejectment.

It is claimed, however, that from a subsequent allegation in the complaint it appears that the plaintiffs are not in possession. 3 Wait, Act. & Def. 78. The third allegation of complaint is as follows: "Plaintiffs allege that while the said plaintiffs were such owners, and so seized and possessed, and entitled to the possession, of said Tiger lode mining claim and premises, the said defendants did on the sixth day of November, 1885, without right or title, enter into and upon that said portion and part of the said Tiger lode mining claim last above mentioned and described, and oust and eject the plaintiffs therefrom; and ever since the said sixth day of November, 1885, have withheld, and still withhold, the possession thereof from the plaintiffs, to their damage in the sum of five thousand dollars."

This allegation is evidently intended to set up ouster by defendants. It is in the form prescribed for that purpose. It alleges that defendants ousted plaintiffs,

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and still withhold possession thereof from plaintiffs. It does not allege that defendants are in possession, but that they withhold the possession from the plaintiffs. What constitutes the withholding of possession in the mind of the pleader does not appear. Possibly the filing a claim for patent is in his estimation the withholding of possession. It is such an allegation as allows the pleader to evade the requirements of the statute. It is not direct and positive, as is the allegation of possession in plaintiffs. If intended to be so, it is contradictory. At best, it makes the complaint ambiguous and unintelligible. In such pleading the adversary may demur, on the ground that the same is ambiguous, unintelligible, and uncertain; or, if he thinks he can answer it intelligently, he may do so, and, in the event of a conflict between his construction of it and the pleader's, the pleading will be construed against the pleader. 2 Wait, Pr. 334; *Landers v. Bolton*, 26 Cal. 418.

In *Clark v. Dillon*, 97 N. Y. 373, the court says: "A construction [drawing] of doubtful or uncertain allegations in a pleading which enables a party, by thus pleading, to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly; and, when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader." *Clark v. Jones*, 49 Cal. 618.

In *Landers v. Bolton*, above cited, SAWYER, J., says: "The allegations of a pleading are to be taken most strongly against the pleader. The presumption is that he will state his case as strongly in his own favor as the facts will justify." 2 Wait, Pr. p. 334, § 1; *Bates v. Rosekrans*, 23 How. Pr. 102.

In *Nation v. Cameron*, 2 Dak. 362, 11 N. W. Rep. 525, the court says that "ambiguities arising on the face of the pleadings are to be construed against the pleader."

In *Burke v. Water Co.*, 5 Morr. Min. R. 211, an action in ejectment, the court says: "The complaint charges that the defendant, the Table Mountain Water Company, was in possession. The answer of the company does not deny this averment. This admission is conclusive evidence of the fact admitted." In the case at bar the plaintiff alleges possession in himself, and the defendant does not deny it. Is not the admission equally conclusive? Can he deny possession, upon the trial, against his own allegation in the complaint?

In *Butler v. Kaulback*, 8 Kan. 672, the court says: "Facts admitted by the pleadings cannot be disputed by the evidence, but must be taken as true for the purposes of the action. It is impossible that a thing be true and untrue at the same time."

In *Board v. Shaw*, 15 Kan. 34, the court says: "On the trial of a cause the whole pleadings are considered together; and, where two allegations of the same party are inconsistent with each other, the allegation most unfavorable to such party will be deemed to override the other allegation." To the same effect, *Natchez v. Minor*, 48 Amer. Dec. 731, and *Burrows v. Yount*, 39 Amer. Dec. 439.

The pleadings are not merely construed most strongly against the pleader by the courts, but it was the province of, and, indeed, it is necessary for, the defendant to construe the allegations of the complaint in making his answer. In *Clark v. Dillon*, above cited, the court says: "It is in the nature of things that a party who is required to frame his issues for the information of his adversary and the court must be responsible for any failure to express his meaning clearly and unmistakably. While it is competent for a party to move to make the pleadings of his adversary more definite and certain, yet, inasmuch as it is the primary duty of the party pleading to present a clear and unequivocal statement of his allegations, the onus of having them made so cannot be cast upon his adversary by his own fault in failing to perform his duty."

In the complaint in the action at bar there is a positive allegation of possession in the plaintiff of the premises in dispute, and an equivocal allegation of possession in defendant, and ouster by defendant. The defendant, in answering, exercised his prerogative in the interpretation of the allegations in the complaint, admitted possession in plaintiffs, and denied ouster and possession in himself; and, under our Code, possession in plaintiffs must be taken as true for the purposes of this action. The court, in determining the character of the action to be tried, must do so upon an inspection of the issues made by the pleadings. If it be true that an action of ejectment cannot be maintained by one in possession of the premises in controversy, it follows that the case at bar is not in the nature of an action in ejectment, and that the title to the disputed premises cannot be determined by this action under the issues made in the pleadings, except it be

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considered an action to determine the adverse claim of defendants to the premises in dispute under section 476 of our Code. "This action is brought under section 2326 of the United States Statutes, to determine the adverse claim of parties to the mining claim in dispute." Section 476 of our Code provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Under such provision of the Code, action may be brought by one in possession. This action is denominated an action to quiet title, and "is the converse of the legal action of ejectment." Pom. Rem. 415. In many states this action is confined to parties plaintiff in possession. Under our Code the plaintiff may be either in or out of possession, and the adverse party must claim an interest adverse to the plaintiff. In *Curtis v. Sutter*, 15 Cal. 262, FIELD, J., says: "It enlarges the class of cases in which equitable relief could formerly be sought in quieting title." In Pomeroy's *Equity Jurisprudence* (volume 3, p. 435, § 1399) the principle is stated that equity will exercise this jurisdiction where the estate or interest is legal, when the remedies at law are inadequate. In the case at bar, the plaintiff being in possession, the legal action of ejectment cannot be maintained, and the remedy at law is inadequate, unless all the rules of practice are to be subverted.

It is intimated that in order to apply section 2326, St. U. S., it may be necessary to vary some of the established rules of practice. That section, however, requires that an adverse claimant must commence proceedings in a court of competent jurisdiction to determine the controversy between the adverse claimants. The claimant must commence proceedings according to the rules of practice of the court in which the action is brought. If the claimant is out of possession, and his adversary in possession, ejectment is the appropriate remedy. If he is in possession, his appropriate remedy is action to quiet title.

In *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Nev. 240, the court says: "Congress did not, by section 2326, or by the acts of July 26, 1866, of July 9, 1870, confer any additional jurisdiction on the state courts. The object of the law, as we understand it, was to require parties protesting the issuance of a patent to go into the state courts of

competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein allowed, elect, and try the right of possession. Said section does not prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they bring their action under section 256 of the civil practice act, or, if they have been ousted from the possession, they should bring their action of ejectment. We are of the opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes, that apply to such actions in our courts."

This is a clear and comprehensive exposition of the statute as understood by one of the highest courts upon the Pacific coast. I know of no decision of the supreme court of the United States, or of the states or territories, which holds that a different practice should prevail.

If ejectment is not the appropriate remedy, and an action to quiet title is, the only question remaining is, to what jurisdiction does this action belong? Pomeroy, in his *Equity Jurisprudence*, (volume 3, § 1393,) says it belongs to the original general jurisdiction of equity. Of this there will be no controversy, unless, indeed, it is contended that there is something in section 2326 which changes this remedy from the equity to the law side of the court. It may be argued that this would deprive the parties of the benefit of a jury trial. This would be equally true of all equity cases. I see no reason in the nature of the questions involved which would not apply with equal force to an action of divorce, to reform a written contract on the ground of mutual mistake. The time may come when, under the law, all questions shall be submitted to a jury. At present the law is otherwise, and the court must apply the law to the issues made by the pleadings as it exists. If the issues made are equitable, then, under the authority of *Basey v. Gallagher*, a jury was discretionary with the court, and their findings but advisory only. Exercising its discretion, the court, upon the trial, submitted the issues to a jury. They having failed to agree, the court, exercising its equitable powers, as is common and appropriate in such cases, found the facts in the case, and rendered a decree thereon. There was nothing exceptional in this action. Indeed, the pro-

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cedure by action to quiet title is the usual one adopted under circumstances like those set forth in the pleadings in the case at bar. *Mining Co. v. Fremont*, 7 Cal. 317; *Pralus v. Mining Co.*, 35 Cal. 34; *City of San Diego v. Allison*, 46 Cal. 162; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. Rep. 894. In *Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. Rep. 308, the court says: "If the plaintiff is in possession, it may be a question whether, indeed, equity does not afford the only remedy appropriate in this case."

Section 2326 has the same effect upon the parties claiming the mine that an order of interpleader does upon the parties affected thereby. 3 *Estee, Pl. & Pr.* 235, § 4529. The United States holds the title to the premises in dispute, and is ready to transfer to either claimant entitled to receive it; and it directs, in this statute, that they commence an action within a given time to settle their respective claims thereto. This is in precise analogy to an order of interpleader in a court of equity. To this relief in equity there are four essential conditions given in *Pomeroy's Equity Jurisprudence*, (section 1322,) as follows: (1) The same thing must be claimed by all the parties. (The thing demanded in this controversy is the mining claim in dispute.) (2) All their adverse claims must be derived from a common source. (The adverse claimants in the case at bar claim from the United States.) (3) The person asking the relief must have a claim or interest in the controversy. (The United States has no interest other than to transfer the title to the one adjudged to be entitled to it.) (4) The party praying for interpleader must be indifferent between the parties,—merely a stakeholder. (The United States is indifferent in this controversy.) Finally, (section 1325) the stakeholder must have the thing in his possession, ready to deliver it upon a decree determining who is entitled to receive it. Section 2326 provides that the United States will deliver the patent to the one whom the judgment declares is entitled to it.

For these reasons I dissent from the opinion of the court. He brings his action to quiet title. If not in possession, his action is in ejectment. The plaintiff was nonsuited because the court held he had not proven possession in himself. The supreme court of the United States, in reviewing the case in a decision brought to the attention of this court, and much relied on, overrules the decision of nonsuit on the ground that the evidence estab-

lished possession in plaintiff, but recognizes the propriety of the action as brought. I think no case has been cited upon the brief or in the arguments that holds that an action to quiet title is not the appropriate remedy by a party alleging possession.

ON PETITION FOR REHEARING.

BRODERICK, J. Since announcing the opinion in this case counsel for respondents have petitioned for a rehearing. In support of this application, numerous authorities have been cited, but very few of them throw any light on the question we have been considering. As on the hearing, much theorizing has been indulged in on the law of ejectment as it formerly existed and now exists; but we are still unable to see the application of these rules of law to the case at bar. The common-law form of ejectment, with all its fictions, has long since been almost entirely superseded by statutory enactments, so that now, in most of the states and territories, there is substituted an action to recover specific real property, or to recover the possession of real property, which are clearly legal actions. The action to recover real property implies that the defendant is in actual possession by himself or tenant; hence, when it appears upon the trial that the defendant was not in possession when the action was instituted, the plaintiff will be nonsuited. But that is not this case, and there is very little analogy between the two. This is an action to determine the right of possession; and it makes no difference, so far as the form of the action is concerned, who is in possession. We think this view is amply sustained by the authorities.

In *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, and 8 Pac. Rep. 622, the supreme court of California, in considering a case brought under this act of congress, says: "The action is not brought to recover possession of the property, or damages for trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States." In *Steel v. Mining Co.*, 18 Nev. 87, 1 Pac. Rep. 448, HAWLEY, C. J., in considering the same question, says: "These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each

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party must prove his claim to the premises in dispute, and that the better claim must prevail." To the same effect is *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652.

Here are the latest adjudicated cases from the three great mining states of the Union, all agreeing that this is a special action, not to recover possession or to quiet title, but to determine who has the right of possession, or, in other words, to determine who is entitled to a patent to the disputed ground. This is the object of the action, and this object must not be lost sight of.

Section 2325, Rev. St., provides how any person entitled to a patent to a mining claim may procure the same where there is no adverse claim. The applicant must show, by his verified application and other proofs, that he has complied with the law in locating, marking the boundaries, etc.; that he has performed the necessary labor, and has in all other respects observed the requirements of the law. After notice of the application has been duly given by the register of the land-office, if no adverse claim has been filed, the applicant will be entitled to and will receive his patent. It will be observed, from an examination of the statute, that the applicant who claims under a location is not required to show actual possession of the claim in order to entitle him to a patent therefor. "Actual possession of a claim is not essential to the validity of the title obtained by a valid location." *Belk v. Meagher*, 104 U. S. 279.

When, during the period of publication, an adverse claim is filed, the proceedings in the land-office are stayed, and the controversy is transferred to the court for the trial of the questions necessary to determine who is entitled to a patent. In the land-office the controversy is between the applicant and the United States. When transferred to the court, the controversy is between the several claimants and the United States; but the same questions are tried that would have been had the proceeding remained in the land-office, except that the rights of an additional party or parties must be adjudicated in the court. But under the statute there is no issue as to the actual possession of the claim to be tried. It is not an issuable fact in the controversy; and, if it enters into the trial at all, it is only incidentally. It seems to us that any construction of the statute that would make the form of the action dependent on the question of actual possession would, in effect, interpolate into the statute a condition precedent to ob-

taining a patent to a mining claim which congress has not seen fit to impose.

Clearly, then, the question to be tried in this case is—*First*, as to the qualifications of the respective parties to hold such property by patent; and, *second*, the right to the possession of the disputed ground; and, if the jury find in favor of either, the general verdict should be, in substance, that such party has the right of possession to the ground. This strips the action of all fiction and technicality, and determines the facts which the commissioner of the general land-office must know before a patent issues, namely, who, if any one, is entitled to it. By the amendatory act of March 3, 1881, if, on the trial, neither party establishes a right of possession to the claim, or any part thereof, the jury is required to so find, and neither party will be entitled to a patent. This act indicates clearly that the general government is not a mere "stakeholder," but that it has an interest in these controversies.

Counsel seem to place much reliance on *Four Hundred and Twenty Min. Co. v. Bul lion Min. Co.*, 9 Nev. 248, and *Milligan v. Savery*, 6 Mont. 129, 9 Pac. Rep. 894. The former case was decided before the supplemental act of March 3, 1881, and has since been essentially modified in *Steel v. Mining Co.*, *supra*. The Montana case has been in effect overruled by the supreme court of the United States in *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289.

We are also referred to *Basey v. Gallagher*, 20 Wall. 680. The subject of the controversy in that case was a water ditch, or damages for a wrongful diversion of water, and we cannot see that it is authority in this case.

It is also contended that the words of the statute, "commence proceedings in a court of competent jurisdiction," etc., are significant. We think this means a court of general jurisdiction, whether federal, state, or territorial. In the territories the district courts are courts of original general jurisdiction, and in these courts a jury trial is allowed as a matter of right in all cases where it was allowed at the common law. This right is secured by the organic acts. *Chambers v. Harrington*, 111 U. S. 351, 4 Sup. Ct. Rep. 428.

It is unnecessary to pursue this subject further. We are still satisfied with the conclusions reached in our former opinion herein. Application for a rehearing denied.

HAYS, C. J., concurring.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1888.

SEBREE *et al.* v. SMITH.

(January 27, 1888.)

APPEAL—PRACTICE—TIME TO FILE TRANSCRIPT.

1. A transcript filed on Friday preceding Monday, the first day of the term of this court, is in time under the rules of the court.

SAME—BOND—SEVERAL APPEALS.

2. An undertaking on appeal, under section 4809, Rev. St. Idaho, intended to apply to several appeals in the same action, must specify each of such appeals, and will not be construed to apply to appeals not mentioned therein.

(Syllabus by the Court.)

Appeal from district court, Alturas county.

Action of claim and delivery by Howard Sebree and another against W. W. Smith. There was judgment for defendant. From an order denying a motion for a new trial, plaintiffs appeal. Appeal dismissed.

Kingsbury & McGowan, for appellants.
A. F. Montandon, for respondent.

BUCK, J. The respondent filed his motion to dismiss the appeal on two grounds, to-wit: *First*. Because the transcript was not filed in time; and, *second*, from the order overruling the motion for a new trial, because there was no undertaking filed on said appeal. The transcript was filed in this court on the sixth day of January, 1888. The first day of this term was the ninth day of January. Rule 2 provides that, in an appeal perfected 30 days before the commencement of the next

regular term or adjourned term of this court, the transcript shall be filed at least three days before the first day of said term. Rule 3 provides that if the transcript of the record is not filed within the time prescribed by rule 2 the appeal may be dismissed on motion, without notice, on Monday during the week in which the cause is subject to call under rule 8. Section 8 of our Code provides that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." We think this provision should control, and that the transcript was filed in time. The motion to dismiss the appeal on that ground is therefore overruled.

The motion to dismiss the appeal from the order overruling a motion for a new trial is based upon the alleged failure of appellant to file the necessary undertaking. There are two notices of appeal—one from the judgment, and one from the order overruling the motion for a new trial—and two undertakings on file in this case. The language of the undertakings is: "Whereas, the plaintiffs in the above-entitled action appeal to the supreme court of Idaho territory from the judgment made and entered against them on the twenty-fifth day of June, 1887: Now, therefore, in consideration of the premises and of such appeal we, Chas. G. Burnside and Chas. P. Doane, do jointly and severally undertake and promise on the part of the appellants that the said appel-

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lants will pay all damages and costs which may be awarded against them on the appeal." The language of the two undertakings is identical as far as quoted, and they were signed by the same sureties, and filed on the same day. No reference, in terms or otherwise, is made in either of these undertakings to an appeal from the order overruling the motion for a new trial. It is claimed, however, that under our Code these undertakings on appeal from the judgment are sufficient to sustain the appeal from the order overruling the motion for a new trial. Section 4809 provides "that when more than one appeal in the same action, whether from the judgment and an appealable order or orders, or from two or more appealable orders, are taken at the same time, but one such undertaking or deposit for damages and costs need be filed or made." While this provision would undoubtedly allow one undertaking to be so drawn as to be sufficient for several appeals in the same action, we think the language should designate that the undertaking is given in all such several appeals. The language in these undertakings refers to the appeal from the judgment alone, and specifies that it is given in consideration of such appeal. We think that the sureties would not be liable for damages or costs on any appeal not specified in the undertaking. We are therefore of the opinion that there is no undertaking on the appeal from the order overruling the motion for a new trial, and said appeal is hereby dismissed. Haynes, New Trials & App. § 211; Horn v. Water Co., 18 Cal. 142; Bornheimer v. Baldwin, 38 Cal. 671; Sharon v. Sharon, 68 Cal. 326, 9 Pac. Rep. 187; Chester v. Association, 64 Cal. 42, 27 Pac. Rep. 1104.

HAYS, C. J., and BRODERICK, J., concurring.

SEBREE *et al.* v. SMITH.

(February 25, 1888.)

COMPROMISE—ADMISSIBILITY OF OFFER OF SETTLEMENT AS EVIDENCE.

1. Offers of settlement of a suit, not accepted, are not admissible against the party making them on the trial of the action.

EXCEPTIONS, BILL OF—SETTLEMENT AND SIGNING—STIPULATIONS OF PARTIES.

2. An agreement of the parties to an action on trial appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial

judge to settle a bill of exceptions or statement after the trial.

APPEAL—FROM INFERIOR COURTS—PLEADING—AMENDMENTS.

3. Under section 4841, the district court may allow amendments to the pleadings in an action appealed from the justice or probate court.

PRACTICE IN CIVIL CASES—ORAL STIPULATIONS.

4. The court will not attempt to determine the nature or effect of disputed oral stipulations of litigants or attorneys affecting the rights of parties or the conduct of the trial, and it will not enforce such stipulations unless the attorneys agree in open court as to what they are; nor will they be considered on appeal, unless they are made a part of the record.

CLAIM AND DELIVERY—MEASURE OF DAMAGES.

5. In an action of claim and delivery, where the property sought to be recovered is valuable for use, aside from its intrinsic value, and the prevailing party claims damages for the loss of its use in the pleadings, the measure of damages is the value thereof, and the reasonable value of its use during its detention. In determining the reasonable value of its use the taxes which the prevailing party would have paid had he retained possession thereof, and the usual and ordinary risk incident to the possession thereof, should be considered.

WITNESS—ATTORNEYS.

6. Attorneys should offer themselves as witnesses for their clients only in case of extreme necessity.

(Syllabus by the Court.)

Appeal from district court, Alturas county; before Justice BRODERICK.

Action of claim and delivery by Howard Sebree and another against W. W. Smith. From a judgment for defendant, plaintiffs appeal. Reversed.

Kingsbury & McGowan, for appellants.

Any implied admission of liability in an offer to settle a suit cannot be given in evidence against the party making the offer. Marsh v. Gold, 2 Pick. 290; Laurence v. Hopkins, 13 Johns. 288; Rideout v. Newton, 17 N. H. 71; Perkins v. Railroad Co., 44 N. H. 223; Gerrish v. Sweetser, 4 Pick. 374; Batchelder v. Batchelder, 2 Allen, 105; Saunders v. McCarthy, 8 Allen, 42; Harrington v. Lincoln, 4 Gray, 563; Gay v. Bates, 99 Mass. 263; Durgin v. Somers, 117 Mass. 55.

Even where the offer is made under the statute, and admits as a fact there is an amount due, it cannot be given in evidence. Code, §§ 606, 678.

A. F. Montandon, for respondent.

For the breach of an obligation not arising from contract, the measure of

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damages is the amount which will compensate for all the detriment proximately caused thereby. Code Civil Proc. § 4453; Sedg. Dam. (4th Ed.) p. 88, and note; Boyle v. Case, 18 Fed. Rep. 880.

The value is the proper rule in the case in hand. Butler v. Mehrling, 15 Ill. 488; Kenyon v. Goodall, 3 Cal. 257; Allen v. Fox, 51 N. Y. 562; Williams v. Phelps, 16 Wis. 80; Crabtree v. Clapham, 67 Me. 326; Elder v. Frevert, 18 Nev. 446, 5 Pac. Rep. 69.

When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other. Lanfear v. Sumner, 9 Amer. Dec. 119, and note; Clow v. Woods, 9 Amer. Dec. 346.

BUCK, J. Action of replevin brought to recover two mules. Originally there were two actions, one for each mule, but they were consolidated on the trial by the consent of parties. The action was commenced in the probate court of Alturas county, and thence taken by appeal to the district court. It was tried in the district court, at the June term thereof, 1887, and judgment rendered for the defendant. Motion for a new trial was made and overruled, and an appeal taken to this court from the judgment and from the order overruling the motion for a new trial. The appeal from the order overruling the motion for a new trial was dismissed, on the ground that no undertaking had been filed as required by statute, and the cause now to be considered is on the appeal from the judgment alone.

In the district court the defendant was allowed to amend his answer on terms, under objection by the plaintiffs, to which ruling the plaintiffs excepted, and which they have specified as error. Section 4841, Code Civil Proc., provides that the district court has the same power to grant amendments on appeal from probate and justices' courts that it does in suits commenced in the district court. It is also claimed that said amendment was contrary to the stipulation of parties when the consolidation of the two actions was made; and affidavits are sent up in the transcript to prove such stipulation. No stipulation of the kind appears in the record of the case, and this court cannot go outside of the record to consider affidavits to prove oral stipulations of the parties. Such stipulations when made should be entered of record, or reduced to writing

and filed with the other papers in the case. The amendment was within the discretion of the court, and properly allowed.

The appellants specify as error the refusal of the court to strike out the evidence of A. F. Montandon, attorney for defendant, who was sworn as a witness in behalf of his client. The evidence objected to is as follows: "Mr. Holt came to my office, and offered to return the mules to Smith, if he wanted to dismiss the suit." This evidence was given by the witness without any warning of its character, and the attorney for plaintiffs had no opportunity to object to it before it was given. He immediately moved that it be stricken out as "testimony showing an offer of settlement," which motion was overruled, and exception noted. The overruling of the motion to strike this evidence out is assigned as error. In the case of Connolly v. Straw, 53 Wis. 648, 11 N. W. Rep. 17, referring to the practice of attorneys appearing as witnesses in behalf of their clients, the court says: "As a general rule, no doubt, attorneys should not be witnesses for their clients. The sentiment of the profession is against it, and for very satisfactory reasons; yet cases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney's testimony. The attorney will decide for himself whether he ought to become a witness. If he resolves the question in the affirmative, a nice sense of professional propriety will no doubt prompt him, as did the attorney in the present case,—that is, to surrender the management of the case to others. Of course, an attorney should not accept a retainer if he knows in advance that he will be a material witness for the party seeking to employ him. But a breach of professional ethics in this respect does not necessarily involve moral turpitude, or affect the credibility of the attorney who becomes a witness for his client. In such a case the jury may consider the relation of the witness to the parties in determining the weight which should be given to the testimony." In Alger v. Merritt, 16 Iowa, 121, the court says: "No attorney having a just conception of his true and proper position, will willingly unite the character of a counsel and a witness in the same case, for experience has shown that those who on repeated occasions al-

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low themselves to be thus used are certain to feel most keenly the consequences of their indiscretion. Some courts have excluded such testimony entirely, because public policy and the integrity and welfare of the profession dictate that no one should be at the same time both advocate and witness for his client. Such testimony is not excluded in this state; but if a party is really taken by surprise, we would not deny him a new trial because of his failure to throw his attorney into the witness box, to, if possible, save himself from the consequences of such surprise." The above extracts indicate the jealous care with which courts guard the interests of litigants and the ethics of the profession. They indicate clearly that courts will more readily grant new trials or other relief when the cause of complaint has its foundation in the indiscretions of the attorneys practicing under license of the court, and whose honesty and sense of honor the court guaranties in granting licenses to practice. The practice of an attorney giving evidence on behalf of his client should be indulged in, only in cases of urgent necessity, and when he does so he should give his evidence with absolute fairness. If he has no associate counsel, and makes his statement without questions, the opposing attorney is unable to protect his client from the effect of improper statements made within the hearing of the jury. Striking out such evidence cannot efface it from the memory of the jurors. The evidence given in this case seems inadmissible under the established rules of practice, and ought to have been stricken out. 1 Greenl. Ev. § 192; *Barker v. Bushnell*, 75 Ill. 220; *Rideout v. Newton*, 17 N. H. 71; *Williams v. Thorp*, 8 Cow. 201; *Marvin v. Richmond*, 3 Denio, 58; *Home Ins. Co. v. Warehouse Co.*, 93 U. S. 546.

The respondent objects to the consideration of the errors of law claimed to have been committed on this trial, for the reason that the exceptions thereto were not settled at the time that they were taken. Section 4426 of our Code of Civil Procedure enacts that, except as to such decisions as are deemed excepted to under section 4427 of the Code, "the exceptions must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exceptions at any other time, except by the agreement of parties." The record shows a stipulation of the parties made on the trial, and entered in the record, whereby

it was agreed that such exceptions might be settled at another time; and it is sufficient to authorize the judge to settle the same at any time within the terms of the stipulation.

The appellants object to the rule of damages given by the court in its instructions to the jury. It was as follows: "You are instructed that in case you find all or any part of the property was wrongfully taken from the defendant the measure of damages is the value of the property so wrongfully taken at the time of the taking, with the reasonable value of the use of the mules or mule from the taking to this date; but in estimating the value of the use of the animals you should take into consideration the taxes the defendant would have had to pay had he retained possession of them, and also the usual and ordinary risk incident to the possession of such property." We think this instruction states the correct measure of damages in this case.

For the reasons above given the judgment is reversed, and the cause remanded for a new trial.

HAYS, C. J., and BRODERICK, J., concur.

PEOPLE v. WOODS.

(February 2, 1888.)

CRIMINAL LAW—APPEAL—PRACTICE.

On appeal from a judgment in a criminal case, where no part of the evidence is brought to the supreme court, by bill of exceptions or otherwise, and the indictment is sufficient to support the judgment, this court will assume that the evidence was sufficient to warrant the verdict, and will further assume that the trial court's charge to the jury was pertinent to the facts found on the trial. The record herein examined, and judgment affirmed.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

Alexander Woods was convicted of murder in the first degree, and appeals. Affirmed.

Richard Z. Johnson, Atty. Gen., for the People.

BRODERICK, J. The defendant was indicted, charged with the willful and deliberate murder of Sarah Woods. At the May, 1887, term of the district court for Bingham county a trial was had, and the

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defendant found guilty of murder in the first degree, and judgment rendered upon the verdict. From this judgment the defendant appealed.

In this court no appearance was made on behalf of the appellant, and on motion of the attorney general the case was submitted on the record. The transcript contains the indictment, intermediate orders, minutes of the trial, etc., but the evidence is not before us, and no exceptions appear to have been taken in the trial court. Under the rule, we might have affirmed the judgment without inquiry, but as the life of a human being was involved, we deemed it our duty to carefully examine the record brought here, and have done so.

On the trial the defendant had able counsel, and no question was there raised as to the sufficiency of the indictment. But we have here examined it, and find it entirely sufficient to support the judgment. The evidence not being before us, we must assume that it was sufficient to warrant the verdict rendered; and we must also assume that the court's charge to the jury was given with reference to the facts found.

We have found no error in the transcript, and the judgment is therefore affirmed. A certificate of the judgment here will be remitted to the court below, and said court is directed to make such order as may be necessary to carry its judgment into effect. Judgment affirmed.

HAYS, C. J., and BUCK, J., concurring.

PEOPLE *v.* WILLIAMS.

(February 2, 1888.)

Appeal from district court, Bingham county. Frank Williams was convicted of murder in the first degree, and appeals. Affirmed.

Richard Z. Johnson, Atty. Gen., for the People.

BRODERICK, J. This appeal is here in the same condition as the appeal in *People v. Woods*, ante, 334, 16 Pac. Rep. 551, just decided by this court. The facts are also similar, and a like verdict and judgment were obtained in the trial court.

We have in this case examined the record, and discover no substantial error. The judgment of the district court is affirmed, and it is ordered that the judgment here be certified and remitted to the trial court, and said court is directed to make such order as may be necessary to carry its judgment into effect.

HAYS, C. J., and BUCK, J., concurring.

BROADBENT *v.* BRUMBACK *et al.*

(February 2, 1888.)

PLEADING—ADMISSIONS—FAILURE TO DENY ALLEGATIONS.

1. An allegation in the complaint, not denied in the answer, is sufficient to sustain a finding that the facts stated therein are true.

MORTGAGE—FORECLOSURE—PLEADING—NOTICE OF ELECTION TO SUE FOR WHOLE AMOUNT.

2. In an action to foreclose a mortgage, it is not necessary to allege in the complaint notice to the mortgagor that the plaintiff has elected to consider the whole sum due for default in payment of installments of interest.

SAME—STIPULATION FOR ATTORNEY'S FEES.

3. A stipulation in a mortgage for an allowance for an attorney fee, in case of foreclosure, is valid, but should be enforced only for a reasonable amount. In determining what amount is reasonable, the court should allow no more than is actually received or contracted for by the attorney for his services.

TRIAL—ISSUES AND FINDINGS—REVIEW ON APPEAL.

4. The findings of the court should be responsive to the allegations in the pleading, and a finding upon such allegation is conclusive as to each item of evidence offered to sustain it.

(*Syllabus by the Court.*)

Appeal from district court, Ada county.

Action by J. B. Broadbent against J. Brumback and another to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

John M. Lamb, for appellants.

When the principal sum may become due, upon a failure to pay interest at the option of the mortgagee, the mortgagee should have exercised his option, and given notice of it before the commencement of the suit to foreclose. *Basse v. Gallegger*, 7 Wis. 442; *Marine Bank v. International Bank*, 9 Wis. 57; *Rosseel v. Jarvis*, 15 Wis. 571; *Jesup v. Bank*, 14 Wis. 331.

Stipulations for attorneys' fees are against public policy, and void. *Bullock v. Taylor*, 39 Mich. 137; *Van Marter v. McMillan*, Id. 304; *Myer v. Hart*, 40 Mich. 517; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. Rep. 91; *Botsford v. Botsford*, 49 Mich. 29, 12 N. W. Rep. 897.

A stipulation in a mortgage allowing counsel fees for a foreclosure does not entitle the plaintiff to counsel fees unless he has paid them or become liable for them. *Reed v. Catlin*, 49 Wis. 686, 6 N. W. Rep. 326; *Bank v. Treadwell*, 55 Cal. 379.

He cannot recover such fees for personally prosecuting his foreclosure. *Patterson v. Donner*, 48 Cal. 369; *Reed v. Catlin*, 49 Wis. 686, 6 N. W. Rep. 326.

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The amount fixed on the note or mortgage is a mere limitation. It is in the nature of a penalty, and fixes merely the amount beyond which the court will not go. *Carriere v. Minturn*, 5 Cal. 435.

A general finding that all the allegations of the complaint are true is not a compliance with the law. *Johnson v. Squires*, 53 Cal. 37; *Bank v. Treadwell*, 55 Cal. 380; *Breeze v. Doyle*, 19 Cal. 102; *Ladd v. Tully*, 51 Cal. 277; *Hardenburg v. Hardenburg*, 54 Cal. 591.

Wood & Wilson and Richard Z. Johnson, for respondent.

A promise to pay for services may only be implied by the courts when they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of payment by the party soliciting performance. *Davidson v. Gaslight Co.*, 99 N. Y. 559, 566, 567, 2 N. E. Rep. 892; *Pew v. Bank*, 130 Mass. 391, 395; *Sawyer v. Bank*, 6 Allen, 209; *Crane v. Baudouine*, 55 N. Y. 256, 260; *Potter v. Carpenter*, 76 N. Y. 157, 159.

Appellant could not set up as a counterclaim a demand against respondent and another jointly. *Howard v. Shores*, 20 Cal. 281; *King v. Wise*, 43 Cal. 635; *Wat. Set-Off*, §§ 200, 383.

The right of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law, or *contra bonos mores*. *Sewing-Mach. Co. v. Moreno*, 6 Sawy. 35, 40, 7 Fed. Rep. 806, and cases cited; *Bank v. Ellis*, 6 Sawy. 97, 106, 2 Fed. Rep. 44.

When a promissory note, payable at a future time, provides for the payment of interest at certain times, and contains a clause that, if default be made in the payment of the interest at such time, then the note shall immediately become due, at the option of the holder, a failure to pay the interest makes the whole amount of the note due absolutely, at the option of the holder, if he so elect, without any notice from the holder to the payors. In such case the holder has no duty to perform to the payor, and the latter has no excuse to delay payment. *Whitcher v. Webb*, 44 Cal. 127, 130.

Any decisive act of the party, with knowledge of his rights and of the facts, determines his election, in the case of con-

flicting and inconsistent remedies. *Washburn v. Insurance Co.*, 114 Mass. 176; *Connihan v. Thompson*, 111 Mass. 272.

BUCK, J. This was an action to foreclose a mortgage tried at the April term, 1887, in Ada county, and brought into this court on an appeal from the judgment.

The appellants assign 13 errors, but group them in their brief, and rely upon five, to-wit: (1) Error in overruling a general demurrer to the complaint. (2) Error in overruling a special demurrer to complaint. (3) Error in finding the note and mortgage sued on were valid. (4) Error in not finding upon all the material issues raised by the findings. (5) Error in the findings of fact, in that they are not supported by the evidence, and are too general.

The first error assigned, to-wit, error in overruling defendants' general demurrer to the complaint, is based upon two propositions: (1) That the complaint contains no allegation of the failure of the defendant to pay the interest due on the mortgage, or any installment thereof, or that the mortgagee had elected to consider the whole sum due. (2) That the complaint contained no allegation that the mortgagee had given notice to the mortgagor that he elected to consider the whole amount secured by the mortgage due. That portion of the complaint alleging a breach in the conditions of the mortgage is as follows: "That eight thousand dollars, the principal sum mentioned in said promissory note and mortgage, together with interest thereon at the rate of one and one-fourth per cent. per month from said eleventh day of March, 1885, still remains unpaid, in whole and in part, from said defendants to this plaintiff, and the same is now due and payable." The condition in the mortgage is in the following words: "But in case default be made in the payment of the said principal or interest, or any installment of interest, as provided, then the whole sum of principal and interest shall be due, at the option of the said party of the second part, and suit may be immediately brought, and a decree be had to sell said premises," etc. While the statement of the breach in the complaint is not so exact and clear as the highest art in pleading might prescribe, yet its fault, if any, seems to be that it is not sufficiently definite. This defect does not, however, go to the substance of the

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pleading, and is not sufficient to sustain a general demurrer.

The second proposition of the appellants that the mortgagee cannot commence his action to foreclose until he has given the mortgagor notice that he has exercised the option specified in the conditions of the mortgage, and that he had elected to consider the entire sum secured by the mortgage due, and that the complaint must allege such notice, is elaborately considered in the briefs. It seems clear that in Wisconsin it is a rule of practice established by repeated adjudications that the complaint must allege that the mortgagee has elected to consider the whole amount due, and that he has notified the mortgagor of such election. *Basse v. Gallegger*, 7 Wis. 442; *Marine Bank v. International Bank*, 9 Wis. 57; *Rosseel v. Jarvis*, 15 Wis. 571. We are unable to find that this rule of practice extends beyond the state of Wisconsin. "In *Whitcher v. Webb*, 44 Cal. 130, it is held that the mortgagor was not entitled to notice, in advance of commencing the action; that if he failed to pay the interest, that the mortgagee would insist upon his right to the whole debt. He was bound to know that that consequence would follow." In *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. Rep. 375, the same doctrine is enunciated. In *Hunt v. Keech*, 3 Abb. Pr. 204, the court holds that the commencement of the suit to foreclose is a sufficient notice of the determination that the mortgagee intends to treat the whole sum as due. *Noyes v. Clark*, 32 Amer. Dec., note, 623; *Cardiff v. Brokow*, 7 Ill. App. 647,—are to the same effect. In *Trust Co. v. Munson*, 60 Ill. 371, the court says, where like provisions were in a deed of trust: "The deed of trust did not require any notice to be given to the debtor himself of the exercise of the option to make the whole indebtedness due. The maker of the deed knew that such a contingency was liable to occur at any time during a default of payment. If he wished personal notice of it to himself to be a condition precedent to the exercise of the power of sale, he should have so provided in his deed. To add to the power such a condition by implication might wrongfully disappoint the expectations of the creditor. To require a personal notice to the debtor, who, at the time, might be in distant or unknown parts, might create a very inconvenient delay in the collection of a claim evidently intended by the party to be speedy, and

the creditor might well have refused a security trammelled by such a condition." These observations commend themselves to the court as being reasonable and equitable. In the case at bar the provision is that the principal and interest shall be due at the option of the mortgagee, and suit may be immediately brought. We think, upon principle and upon authority, notice to the mortgagor of the election of the mortgagee to consider the whole sum due is not a condition precedent to the commencing of the action to foreclose, and that it is not necessary to allege such notice in the complaint.

The second alleged error in appellants' brief is the ruling of the court in overruling the special demurrer of the defendants, that the complaint does not state sufficient facts to entitle the plaintiff to attorney's fees. The allegation in the complaint referring to attorney's fees is as follows: "That ten per cent. upon the amount found due upon said note and mortgage, as provided for in said mortgage, is no more than a reasonable counsel fee in this action for the foreclosure of said mortgage." The provision of the mortgage is that, out of the money arising from the sale and foreclosure, counsel fees, at the rate of 10 per cent. upon the amount which may be found due for principal and interest, may be retained by the mortgagee. The language of the special demurrer is "that facts sufficient to entitle plaintiff to an attorney fee are not stated." The finding of fact upon this item was "that ten per cent. upon the amount due upon said note and mortgage, as stipulated and provided for in said mortgage, is a reasonable counsel fee for the foreclosure of said mortgage." The appellants claim in their brief that no evidence was introduced upon the value of counsel fees, and that under the pleadings and evidence the plaintiff is not entitled to attorney's fees. The complaint distinctly alleges that said attorney's fee is no more than is reasonable. The answer responds to this allegation with a denial "that, at the time of the commencement of this action, the plaintiff had either paid or become liable for any attorney's fees whatever in this action." There is no denial of the value of the attorney fee alleged in the complaint, and its value is therefore admitted as alleged. This admission is sufficient to sustain the finding of the court.

We recognize the correctness of the inter-

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pretation of the stipulation for attorney's fees usual in mortgages as given by Judge DEADY in *Burns v. Scoggin*, 16 Fed. Rep. 737, quoted by appellants: "That the true intent and purpose of the provision for such fee is the holding the plaintiff harmless from cost and expense of a suit to foreclose." In *Sewing-Mach. Co. v. Moreno*, 6 Sawy. 35, 7 Fed. Rep. 806, the court says: "When the fee is so large as to suggest that it is a mere device to secure illegal interest, or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought probably, on slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. It would be better if these stipulations were not made for a fixed sum or percentage. In this way regard might be had to the nature and value of the services actually rendered by the attorney." In *Griswold v. Taylor*, 8 Minn. 342, (Gil. 301,) the court quotes from *Tallman v. Truesdall*, 3 Wis. 443, with approval, to wit: "In regard to the stipulation for solicitor's fees in case of foreclosure, whenever it is resorted to as a cover for a greater rate of interest than is allowed by law, it then violates the contract; but when stipulated in good faith, as an indemnity for the necessary expenses of foreclosure, and is reasonable in amount, we see no objection to its incorporation in the contract, or its enforcement."

These decisions sufficiently indicate the correct principle upon which stipulations for attorney's fees should be sustained and enforced. Equity dictates that attorney's fees in actions to foreclose a mortgage should be reasonable, and that the amount allowed the plaintiff therefor should be limited to the amount actually paid for the services rendered. The practice of charging, as attorney's fees, 10 or 15 per cent. against the mortgagor, when a much smaller amount is actually paid to the attorney by the plaintiff, thus wrongfully increasing the burden of the debtor who seeks to redeem, is discreditable to the profession, and contrary to every principle of equity. The courts should not sustain such a fraudulent and iniquitous practice. In such suits no fee should be allowed as reasonable which is to be divided with the plaintiff to increase the amount over that stipulated for in the mortgage.

In the case at bar the defendants, having appeared, admit that the amount stipu-

lated for is reasonable, and on this appeal seek to avoid the same, not because it is unreasonable, but because stipulations therefor are contrary to public policy, and void. In considering this question, a clear distinction must be made between such a stipulation in a promissory note and a like agreement in a mortgage. While it is apparent that an adjudication sustaining such an agreement in a note would be authority for sustaining a like stipulation in a mortgage, it does not follow that adjudications sustaining an agreement for attorney's fees in a mortgage would sustain a like agreement in a promissory note. We now consider agreements of that character in mortgages, the question involved in the suit at bar. The decisions which sustain such agreements, as far as we have been able to find and classify them, are: *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Spalding v. Bank*, 12 Ohio, 544; *Martin v. Bank*, 13 Ohio, 250; *Thomasson v. Townsend*, 10 Bush, 114; *Van Marter v. McMillan*, 39 Mich. 305; *Myer v. Hart*, 40 Mich. 517; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. Rep. 91. These decisions establish the doctrine that in Kentucky, Ohio, and Michigan such stipulations are void as against public policy. Opposed to these adjudications, and holding such stipulations valid either in a note or mortgage, are: *Cox v. Smith*, 1 Nev. 133; *Sperry v. Horr*, 32 Iowa, 184; *Wood v. North*, 84 Pa. St. 410; *Johnston v. Speer*, 92 Pa. St. 227; *Bank v. Gay*, 63 Mo. 33, 71 Mo. 627; *Jones v. Radatz*, 27 Minn. 240, 6 N. W. Rep. 800; *Griswold v. Taylor*, 7 Minn. 342, (Gil. 301;) *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. Rep. 21; *Dietrick v. Bayhi*, 23 La. Ann. 767; *Seaton v. Scoville*, 18 Kan. 435; *Bank v. Rasmussen*, 1 Dak. 60, 46 N. W. Rep. 574; *Howestein v. Barnes*, (Kan.) 29 Amer. Rep. 406; *Machine Co. v. Moreno*, (Or.) 29 Amer. Rep. 406;¹ *Weatherly v. Smith*, 30 Iowa, 131; *Clawson v. Munson*, 55 Ill. 394; 1 Jones, *Mortg.* §§ 359, 635; 1 Daniel, *Neg. Inst.* § 62, and note. The weight of authority is clearly in favor of sustaining a stipulation in mortgages for an attorney fee.

The appellants make the point also in their brief that a stipulation in a mortgage allowing counsel fees for a foreclosure does not entitle the plaintiff to attorney's fees, unless he has paid them, or become liable for them, and that the complaint contains no such allegation. We have already intimated that attorney's fees allowed in a foreclosure should be reasonable, and

¹ 7 Fed. Rep. 806.

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that no such fee is reasonable unless the attorney receive it, and have the full benefit of it; and we think it to be the duty of a court granting a decree of foreclosure, whenever the fee is contested, and in all cases of default, to limit the amount of such fee to that actually paid, or to be paid, and in all cases to allow no more than is reasonable. It is therefore necessary to allege in the complaint that such fee is to be paid to the attorney, and that it is a reasonable one. If the fee is to be reasonable, its amount will depend upon the nature of the case, and the labor required in its prosecution. If we adopt a rule of practice that the amount of the fee must be alleged, we necessarily hold that the amount of such fee must be determined arbitrarily, before the action is commenced. It is often difficult, and sometimes impossible, to determine the value of a service before it is performed. This is especially the case in actions which may continue for years, and be finally determined only in the supreme court of the United States.

It may be observed that the theory upon which stipulations in mortgages are sustained is that they provide for expenses incurred by the plaintiff in foreclosure for the services of an attorney. If there is no attorney, such expense is not incurred. If there is an attorney, the plaintiff's expense is limited to the amount paid therefor, provided it is reasonable. If this is correct, it follows that the fact of payment or assumed liability is simply one element in the proof which is offered to establish the reasonableness of the allowance for the fee sought to be recovered. It is evidence offered to establish a substantive fact, and as such need not be set out in the pleadings. In this case it is admitted that the fee charged is reasonable, and we think this admission sustains the finding of the court; as under our Code, § 4217, it is expressly provided "that every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true."

The appellants claim also that the attorney fee is but usury in disguise, and ought not to be allowed. In *Lloyd v. Scott*, 4 Pet. 225, Justice McLEAN says: "Where a party agrees to pay a specified sum, exceeding lawful interest, provided he do not pay the principal by a day certain, it is not usury." This doctrine is adopted in *Cutler v. How*, 8 Mass. 257; *Tuttle v. Clark*, 4 Conn. 153; *Pollard v.*

Baylors, 6 Munf. 433; *Jones v. Hubbard*, 6 Cal. 211; *Gower v. Carter*, 3 Iowa, 244; *Shuck v. Wight*, 1 G. Greene, 128; *Fisher v. Anderson*, 25 Iowa, 28; *Rogers v. Sample*, 33 Miss. 360; *Gambril v. Doe*, 8 Blackf. 140; *Billingsley v. Dean*, 11 Ind. 331; *Lawrence v. Cowles*, 13 Ill. 577; *Sumner v. People*, 29 N. Y. 337; *Bank v. Curtis*, 19 Johns. 326; *Tyler, Usury*, 210.

The appellants urge that the court erred in not finding upon all the material issues made by the pleadings. In the answer of the defendants they set up, by way of counter-claim, in separate allegations, two items of account,—one for money laid out and expended for plaintiff's use and benefit in the sum of \$44; and the other for professional services rendered for plaintiff between the fifteenth day of December, 1882, and the first day of August, 1885, in the sum of \$7,360. There are two findings of fact responsive to these allegations, to-wit: One, that the defendants had not expended the sum of \$44, or any other sum, and, *second*, that the defendants had performed professional services between the dates named for plaintiff, but that they had been wholly paid for the same.

The appellants claim that there is no finding as to the value of services rendered for plaintiff in procuring the right of way for the Boise branch of the Oregon Short-Line Railroad, or that said services were performed at plaintiff's request, or paid for by plaintiff. These items come into the case upon the testimony of witnesses, and not by allegation in the pleadings. They are a part of the evidence, under the general allegation of service, and the finding upon the general allegation is conclusive as to each item of evidence offered to sustain it.

It is claimed also by appellants that the ninth finding of fact is too general. It is as follows: "That all the allegations in the plaintiff's complaint are true." While a general finding of this kind is very unsatisfactory, and justly criticised as being too indefinite, yet it is sustained by repeated adjudications in California; and, under the evidence submitted in the transcript, we are of opinion that it should not be disturbed.

The last point in appellants' brief is that the findings are not supported by the evidence. A careful examination of the evidence establishes certain facts, to-wit: It appears from defendants' evidence that the services for which they claim a set-off were performed prior to July 1, 1884; that

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on July 11, 1884, they receipted to the plaintiff for \$125, in full of all accounts to date; that the receipt was in the handwriting of the defendant, Jeremiah Brumback. In the evidence of said defendant, on page 89, Transcript, he says: "I do not recollect; but, if I gave a receipt in full, that would be a settlement of what the receipt covers." And on page 90 he says: "If I gave a receipt in full, I presume it would cover just what the receipt covers,—whatever the language covers." While a receipt may be disputed, and a mistake, if one exists, be corrected in the case at bar, this evidence seems to be corroborated by the defendant's testimony, and supports the findings in the case.

We find no error, and the judgment of the court below is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

HART, Probate Judge, *v.* BOISE COUNTY.

(February 2, 1888.)

PROBATE JUDGE—SALARY—REPEAL OF STATUTE.

As Act Feb. 20, 1879, (10th Sess. Laws, p. 61,) regulating the salary of the probate judge of Boise county, was repealed by Act Feb. 10, 1887, the probate judge of such county is not entitled to salary under the provisions of the former act for the quarter ending July 10, 1887.

Error to district court, Boise county.

T. S. Hart, probate judge of Boise county, filed a claim against said county for salary for the quarter ending July 10, 1887. The board of county commissioners rejected part of the claim, and Hart appealed to the district court. The district court rendered judgment affirming the action of the board, and Hart sued out a writ of error. Affirmed.

George Ainslee and *J. W. Huston*, for plaintiff in error. *Richard Z. Johnson*, Atty. Gen., and *C. S. Kingsley*, Dist. Atty., Boise Co., for defendant in error.

HAYS, C. J. The plaintiff in error, being probate judge of Boise county, filed his claim against said county for salary and fees for the quarter ending July 10, 1887, claiming the same under and by virtue of "An act regulating the salary and fees of the probate judges of Lemhi and Boise counties," approved February 20, 1879. See 10th Sess. Laws, p. 61. The board of county commissioners disallowed the claim

as filed, from which order the plaintiff in error appealed to the district court, where the order disallowing the claim was affirmed, and plaintiff now brings his cause to this court upon a writ of error.

Many questions have been discussed in this case which we will not consider; for we find that the act of February 20, 1879, upon which this claim was based, was repealed February 10, 1887.

Judgment of the district court is therefore affirmed.

BUCK, J., and BRODERICK, J., concurring.

MC GUIRE *v.* LAMB.

(February 6, 1888.)

SET-OFF AND COUNTER-CLAIM—WHEN ALLOWABLE—JOINT DEBTS.

1. A counter-claim alleging a debt due defendant and a former partner, or stranger to the suit, *held* to be bad, and a demurrer thereto properly sustained.

SAME—PLEADING—SUFFICIENCY.

2. A counter-claim which fails to allege that the debt existed at the commencement of the action, but alleged that it is now due, *held* to be bad, and a demurrer thereto properly sustained.

APPEAL—REVIEW—AFFIRMANCE.

3. Where the findings are responsive to all the material issues raised by the pleadings, and they support the judgment, judgment will be affirmed.

(*Syllabus by the Court.*)

Appeal from district court, Ada county.

Action by Robert McGuire against John M. Lamb on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Brumback, for appellant.

Defendant is permitted to set up as many defenses of new matter or as many counter-claims as he may have, whether legal or equitable. *Gage v. Angell*, 8 How. Pr. 335; *Waddell v. Darling*, 51 N. Y. 327.

Huston & Gray, for respondent.

The defendant cannot set up and maintain as a valid counter-claim a right of action subsisting in favor of another person. The test is whether the defendant could have maintained an independent action upon the demand. *Belleau v. Thompson*, 33 Cal. 495; *Chase v. Evoy*, 58 Cal. 348.

Where a demand sought to be counter-claimed exists in favor of the defendant and a stranger to the action, it cannot be set up. *Hook v. White*, 36 Cal. 299; *Campbell v. Genet*, 2 Hilt. 290; *Bird v. McCoy*, 22

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Iowa, 549; Weil v. Jones, 70 Mo. 560; Harris v. Rivers, 53 Ind. 216; Insurance Co. v. Pierce, 1 Wyo. 45.

The counter-claim must be between the same parties, in the same right, or in the same capacities, as they appear in the original proceeding. Naglee v. Palmer, 7 Cal. 543; Johnson v. Gunter, 6 Bush, 534; Gannon v. Dougherty, 41 Cal. 661; Ives v. Miller, 19 Barb. 196; Baldwin v. Berrian, 53 How. Pr. 81; Baldwin v. Briggs, 51 How. Pr. 477; Hopkins v. Lane, 87 N. Y. 501.

HAYS, C. J. This was an action brought by plaintiff against defendant upon a promissory note given by defendant to plaintiff. The defendant did not deny the cause of action set out in the complaint, but set up three counter-claims. The plaintiff demurred to each of the counter-claims. The demurrer was sustained as to the first and third, but overruled as to the second. The defendant duly excepted to the ruling of the court, and now assigns the same as error.

The first counter-claim is as follows: "That from July 1, 1884, to June 15, 1885, this defendant and one H. E. Prickett were partners in the practice of law, doing business under the firm name of Prickett & Lamb; that during said time said H. E. Prickett and this defendant were each attorneys and counselors at law, practicing as such in the various courts of Idaho territory; that on the 15th day of June, 1885, said H. E. Prickett deceased, leaving this defendant the surviving partner; that between the 1st day of December, 1884, and the 1st day of June, 1885, this defendant, as such partner, counseled and advised plaintiff, at his request, in and about certain matters and difficulties between said plaintiff and one Nora Gess, since become the wife of plaintiff, and in attending in and about the said business of the plaintiff; that said services were reasonably worth the sum of two hundred dollars, no part of which has been paid." The statutes provide that a counter-claim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract, any other

cause of action arising also upon contract, and existing at the commencement of the action. It seems to be well settled that the defendant cannot set up and maintain as a valid counter-claim a right of action subsisting in favor of another person. The test is whether the defendant could have maintained an independent action upon the demand. If it exists in favor of defendant and a stranger to the suit, it cannot be set up. Hook v. White, 36 Cal. 299; Weil v. Jones, 70 Mo. 560; 7 Wait, Act. & Def. p. 540, § 4, and cases there cited. Pomeroy, in his work on Remedies and Remedial Rights, § 751, says: "Where a party is sued, a demand in favor of himself and a former partner, not a party to the suit, is inadmissible as a counter-claim." This seems to be abundantly sustained by the authorities. It follows, therefore, that the demurrer to the first counter-claim was properly sustained.

The third counter-claim is as follows: "That from the 1st day of June, 1884, up to the 1st day of July, 1886, the plaintiff and this defendant were partners in the manufacture and sale of lumber and shingles in Idaho territory, under the firm name of Lamb & McGuire; that the interest of plaintiff in said partnership was one-third, and the interest of defendant was two-thirds; that the plaintiff and defendant, as such partners, during said time, engaged in the business of manufacturing and of selling and disposing of the same in Idaho territory; that the books of said partnership were kept by one George M. King and one J. C. Shainwald; that this defendant is informed and believes that the liabilities and losses of said partnership have been about twenty-five thousand dollars, all of which have been paid by this defendant; that this defendant is informed and believes that there is now due and owing to this defendant from said plaintiff for and on account of said partnership the sum of eight thousand three hundred and thirty-three dollars, no part of which has been paid." Did the court err in sustaining the demurrer to the third counter-claim? Clearly not, for, from an examination of the transcript before us, we find the action was commenced on the 7th day of September, 1886, and the answer was sworn to on the 11th day of April, 1887; and the defendant nowhere says that he had paid the liabilities and losses of the partnership before or at the commencement of this action. Again, the defendant says that there is now due and

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owing to this defendant from said plaintiff for and on account of said partnership the sum of \$8,333, no part of which has been paid. He does not say or claim that this demand existed at the commencement of this action. Not having alleged this, the demurrer was properly sustained. *Rice v. O'Connor*, 10 Abb. Pr. 362; *Chambers v. Lewis*, 11 Abb. Pr. 210. The third counter-claim of the answer may be true, and yet the defendant have no claim against the plaintiff at the commencement of the action, for he says it is now due. We think he should have stated that at the commencement of the suit the claim was due, or words to that effect. We think there is a marked difference between the case at bar and the cases of *Gage v. Angell*, 8 How. Pr. 335, and *Waddell v. Darling*, 51 N. Y. 327, cited and relied upon by defendant. In the former case the counter-claim alleges the partnership had been dissolved prior to the commencement of the action; and on page 337 of said case the learned judge says: "Counter-claims, to be available as a defense to an action, must arise upon contract, and must exist at the commencement of the action." In *Waddell v. Darling*, the defendant alleged the dissolution of the partnership at a time that was doubtless before the commencement of the action, and also asked for an accounting, and the application of the balance found due; while in the case at bar the dissolution of the partnership is not alleged, nor is any accounting asked for.

The case was tried upon the issues formed by the second counter-claim, before the court without a jury. Findings of fact and conclusions of law filed, and judgment entered thereon. After entry of judgment, exceptions were taken thereto, and during the term in which the case was tried the judge filed further and amended findings, to which defendant excepted. The object of an exception is to call the attention of the judge to the particular point complained of, so that he may have an opportunity to correct the same, and thus relieve the party objecting from the operations of the supposed error. To hold that the judge has no power to amend his findings after exceptions had been taken thereto would be to hold that the judge had no power to correct the error complained of, and would deprive the party complaining of the right which the exception was intended to give him. Of the right to amend findings before judgment we have no

doubt. *Hayes v. Wetherbee*, 60 Cal. 396, and cases there cited; *Haynes*, New Trials & App. § 347. That they could not do so after an appeal from the judgment had been taken we think equally clear; but whether the judge can amend or file new findings after entry of judgment, and before appeal is taken, is a query which we deem it unnecessary to discuss or decide at this time, for we think the findings, as entered before judgment, were responsive to all the material issues raised by the pleadings, and that they were sufficient to support the judgment.

We have carefully examined all the points discussed by appellant, and, finding no error, the judgment is affirmed.

BUCK and BRODERICK, JJ., concurring.

PALMER *et al.* v. UTAH & N. RY. CO.

(February 8, 1888.)

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE
—LESSOR AND LESSEE.

1. A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its road-bed or trains without the consent of the power whence it derives its franchise.

RES JUDICATA—EFFECT.

2. The decision by the appellate court upon any matter properly before it on the record becomes the law of the case in all subsequent proceedings therein.

(Syllabus by the Court.)

Appeal from district court, Bingham county; J. B. HAYS, Judge.

Action by Linnie M. Palmer and another against the Utah & Northern Railway Company to recover damages for the death of plaintiffs' intestate, an employe of defendant. There was judgment for plaintiffs, and defendant appeals. Affirmed.

P. L. Williams and W. H. Savidge, for appellant.

The procedure in death by wrongful act cases, and the particular parties to them, are subject to statutory regulation, and only the parties named in the statute can sue. *Hegen v. Kean*, 3 Dill. 124; *Kramer v. Railroad Co.*, 25 Cal. 435; *Carey v. Railroad Co.*, 48 Amer. Dec. 635, note 4, *Dye v. Dye*, 11 Cal. 163.

The essential facts in every case must be averred directly, and cannot be left to inference. *Harris v. Hillegass*, 54 Cal. 463; *Stringer v. Davis*, 30 Cal. 318.

The deceased was not a passenger, but an employe, at the time of his death. The

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court should therefore have admitted in evidence the pass on which the deceased was riding. *Vick v. Railroad Co.*, 95 N. Y. 267; 2 Ror. R. R. 1107; *Abend v. Railway Co.*, 17 Amer. & Eng. R. Cas. 614, and cases cited in note.

Smith & Smith, J. H. Hawley, and H. M. Bennett, for respondents.

Quasi public corporations, conducting great enterprises, like the operating of a railway, cannot absolve themselves from loss for the negligent conduct of that business, by simply leasing to some foreign or insolvent person or corporation, except such leasing be done by and with such consent of the legislative power which organized them and granted them their franchises. 2 Ror. R. R. § 22, p. 1115; *Railroad Co. v. Mayes*, 49 Ga. 355; *Railroad Co. v. Winans*, 17 How. 39; *Nelson v. Railroad Co.*, 26 Vt. 717; *Thorpe v. Railroad Co.*, 13 Hun, 70.

If the negligence of a master combines with the negligence of a fellow servant, and the two contribute to the injury of another servant, himself free from negligence, the master is liable. *Cayzer v. Taylor*, 10 Gray, 274; *Booth v. Railroad Co.*, 73 N. Y. 38; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Crutchfield v. Railroad Co.*, 76 N. C. 320.

BUCK, J. This is an action brought by the plaintiffs to recover damages for the death of William O. Palmer, alleged to have been killed in Bingham county on the eleventh day of December, A. D. 1885, through the negligence of the defendant in operating the train upon which deceased was riding at the time of his death. The cause was first tried in 1886, and on appeal to this court a new trial was granted. It was tried a second time, at the May term, 1887, and verdict rendered for the plaintiffs for damages in the sum of \$16,702.85 and costs, which was reduced to \$10,000 by the court as a condition upon which the motion for new trial was overruled. It now comes up on appeal from the order overruling defendant's motion for a new trial for errors occurring on the second trial.

The appellant assigns six errors in his brief upon which he relies: (1) In overruling defendant's demurrer to the second amended complaint. (2) The refusal of the court to allow the defendant to amend its answer. (3) Excessive damages appearing to have been given under the influence of passion or prejudice. (4) Insufficiency of the evidence to justify the verdict. (5)

That the verdict was against law. (6) Errors in law occurring at the trial and specified in the assignment of errors.

The order of the court in overruling the defendant's demurrer to the second amended complaint was considered on the former appeal of this case, reported ante, 290, 13 Pac. Rep. 425, and sustained, and the ruling thereon becomes the law of this case. 2 Haynes, New Trials & App. § 291; *Phelan v. San Francisco*, 20 Cal. 40; *Davidson v. Dallas*, 15 Cal. 82; *Ex parte Sibbald*, 12 Pet. 491; *Bridge Co. v. Stewart*, 3 How. 413; *Supervisors v. Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 462.

The second error assigned is the overruling of defendant's motion to amend its answer after a new trial had been granted. Amendments to pleadings rest largely in the discretion of the court, and rulings thereon by the trial court will not be disturbed on appeal, except it appear that the exercise of such discretion has deprived the party complaining of some substantial right. It has been held that such amendments should not be allowed after a new trial has been granted, (*Bliss*, Code Pl. § 430; *Spanagel v. Reay*, 47 Cal. 608,) nor when the amendments offered deny matters before admitted by the pleadings to be true. *Bliss*, Code Pl. § 430; *Harrison's Adm'rs v. Hastings*, 28 Mo. 346.

The complaint alleges that the defendant owned and operated its railroad and was a common carrier of passengers at the time the deceased was killed. This was not denied in the answer, and was therefore admitted and taken as true upon the first trial. The amended answer refused by the court denies that the defendant was operating said road or was a common carrier of passengers, and alleges that said road and trains upon it were operated by another company, to-wit, the Union Pacific Railway Company. The refusal of the court to allow the amendment is clearly sustained by the authorities above cited. An inspection of the proposed amended answer, however, sustains the ruling of the court upon the additional ground that it set up no defense to the action. Whether it was intended to set up matter in avoidance of facts alleged in the complaint, and not denied in the answer, or to deny such facts and to set up a new defense, is not clear. The purpose seems to have been to set up new matter which would shift the responsibility of operating the defendant's road from the defendant to the Union Pacific Railway Company,

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who are alleged therein to have been in the exclusive possession of defendant's road, and the owners of and operating the train upon which deceased was riding at the time of the accident, resulting in his death. The amended answer does not explain the relation existing between defendant and the Union Pacific Railroad. It simply alleges that said Union Pacific Railroad was at the time and since in the exclusive possession of its roads, and operating its trains. All that is set up in the said amended answer might be true, and yet the Union Pacific Railroad be but the employe of defendant. In either event, we think the defendant could not so shift the responsibility of operating the road without the consent of the power whence it obtained its franchise, and as no such consent was alleged, the proposed amended answer set up no defense to the action, and the motion to file the same was properly denied. *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railroad v. Mayes*, 49 Ga. 355; *Railroad Co. v. Brown*, 17 Wall. 445; 2 Ror. R. R. 1115, § 22.

The third point made by appellant is that the damages allowed by the jury were excessive, appearing to have been given under the influence of passion and prejudice. Our Code, section 192, provides that in actions of this nature "such damages may be given as under all the circumstances of the case may be just."

The fourth alleged error urged by appellant is that the evidence is insufficient to sustain the verdict. An examination of the evidence fails to convince the court that either the third or fourth assignment of error is well taken.

The fifth error assigned by appellant is that the verdict is against law, and the sixth error of the court occurring on the trial.

It is urged under these two points that the jury disregarded the instructions of the court in finding the damages given the plaintiffs, and that the court erred in its rulings as to the admission of evidence and as to the amendments of the pleadings. The ruling as to the pleadings we have already considered. We have carefully examined the instructions of the court and the rulings as to the admission of evidence, and find no error.

No error appearing on the record, the judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

UNITED STATES *v.* ALEXANDER *et al.*

(February 13, 1888.)

PLEADING—ANSWER—GENERAL AND SPECIFIC DENIAL.

1. Under our practice generally, where the complaint is not verified, a general denial by defendant puts in issue the substantive allegations of the complaint; but where the action is brought upon a written instrument, and a copy of such instrument is set out, or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted unless the answer specifically denies the same, and is verified.

EXCEPTIONS, BILL OF—SETTLEMENT AND SIGNING—SUFFICIENCY.

2. A bill of exceptions, settled and signed by the trial judge, will be treated as such, although it is called a statement on motion for a new trial.

APPEAL—REVIEW—PRESUMPTION.

3. Where the record shows that a general demurrer was filed, but is silent as to any disposition of the same, the presumption will be indulged, on appeal, that the demurrer was overruled or abandoned.

SAME—HARMLESS ERROR.

4. An offer of oral proof being made and rejected, and exception duly taken, the appellate court must be satisfied, from the record, that the offered evidence was material, or tended to support some issue involved, before it will be treated as error.

JURY—CHALLENGE FOR CAUSE—DISCRETION OF COURT.

5. Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where, on examination for cause, a juror states, in substance, that he has an opinion in favor of the defendant, but in spite of that opinion he could act upon the evidence and law of the case, and the juror was rejected, this court will not interfere with the discretion of the trial court, even though the members of this court should believe, from the record, that the juror so excluded was competent.

SAME—NUMBER OF PEREMPTORY CHALLENGES—SEVERAL PARTIES.

6. The legislature did not intend, when in an action there are several parties on either side, that each individual should have four peremptory challenges, but that they should join, and have one set on either side.

SAME—EXAMINATION FOR CAUSE—NEW TRIAL.

7. Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, but he was allowed to serve, *held*, that a substantial right of the party was denied, for which a new trial will be granted.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county.

Action by the United States against

United States v. Alexander.

Joseph Alexander and others, as sureties on the official bond of Isaac N. Hibbs, to recover a sum which it is alleged said Hibbs, as postmaster, received from plaintiff, and for which he failed and refused to account. There was judgment for plaintiff. From an order overruling their motion for a new trial, defendants appeal. Reversed.

Winston & Reid and Moody & Curtis, for appellants.

If an allegation can be made the subject of a material issue, it should not be stricken out. *Green v. Palmer*, 15 Cal. 412.

The plaintiff demurred in general terms. Either all or no part of the answer should have been stricken out on his demurrer. *Ferrier v. Ferrier*, 64 Cal. 23, 27 Pac. Rep. 960.

If a complaint contains several counts, and the defendant demur to the whole complaint, the demurrer should be overruled, if there is one good count in the complaint, although the other counts may be bad. *Stoddard v. Treadwell*, 26 Cal. 294; *Griffiths v. Henderson*, 49 Cal. 567; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. Rep. 369; *White v. Lyons*, 42 Cal. 279; *McPherson v. Weston*, 64 Cal. 281, 30 Pac. Rep. 842.

A general demurrer to an answer cannot be sustained when there is one count that presents an issue for trial. *Board v. Long*, 8 Colo. 438, 8 Pac. Rep. 923; *Caldwell v. Ruddy*, ante, 5, 1 Pac. Rep. 339.

The sufficiency of the justification of the postmaster was a matter for the jury to try. *Granniss v. Irvin*, 39 Ga. 22.

Parol evidence is admissible, not only to explain, but to apply, the writing. *Randolph v. Helps*, 9 Colo. 29, 10 Pac. Rep. 245; *Suffern v. Butler*, 21 N.J. Eq. 410.

If the ambiguity is raised by extrinsic evidence, it may be removed in the same manner. *Reynolds v. Jourdon*, 6 Cal. 109; *Reamer v. Nesmith*, 34 Cal. 624; *Callahan v. Stanley*, 57 Cal. 476.

The plaintiff, having made the paper writing purporting to be a copy of the bond sued on a part of the complaint, and the court having allowed the same in evidence, against the objection of defendants, all the words and figures written therein or indorsed thereon are proper subjects of argument and comment by counsel. *Hobart v. Tyrrell*, 68 Cal. 12, 8 Pac. Rep. 525; *Murdock v. Brooks*, 38 Cal. 596; *People v. Hagar*, 52 Cal. 172.

Each of the five defendants was entitled to four peremptory challenges. Gen. Laws 11th Sess. § 367; Civil Code, § 4379.

The defendants having introduced no testimony, the court erred in refusing to allow their counsel to conclude the argument to the jury. Laws 11th Sess. § 371; 18 Cent. Law J. 363.

James H. Hawley, U. S. Atty.

A statement on appeal must specify the particular points upon which the appellant will rely upon appeal, and so much of the evidence as is necessary to explain said points. Rev. Laws, § 4441, subds. 3, 4; *Barrett v. Tewksbury*, 15 Cal. 354; *Burnett v. Pacheco*, 27 Cal. 408; *Mining Co. v. Irvine*, 32 Cal. 303; *Ferrer v. Insurance Co.*, 47 Cal. 416; *Spencer v. Long*, 39 Cal. 700; *Brumagim v. Bradshaw*, Id. 33.

It is not sufficient to state matters rendering it possible that evidence may have been received that was improper, but the evidence itself must be stated in the statement. *Bush v. Taylor*, 45 Cal. 112; *Doyle v. Franklen*, 48 Cal. 540; Rev. Laws Idaho, § 4820; *Brown v. Gray*, 6 Jones (N. C.) 103; *Hill. New Trials*, c. 13, §§ 17, 25.

A juror is not disqualified by having expressed an opinion on a question involved in the litigation. *Hill. New Trials*, 147; *Royston v. Royston*, 21 Ga. 161.

Because a juror answers he can act impartially on the testimony, the court is not bound to accept him. *Hill. New Trials*, 149.

BRODERICK, J. This action was commenced against the sureties on the official bond of Isaac N. Hibbs, late postmaster at Lewiston, to recover the sum of \$10,000, alleged to have been received from the United States by said Hibbs, as postmaster, and which he failed and refused to account for. The complaint is in the usual form, is not verified, but a copy of the bond is annexed thereto, and made a part of the complaint. The cause was tried at the December, 1886, term of said court, and resulted in a judgment against the defendants for the sum demanded. The defendants moved for a new trial. The motion was overruled, and from the judgment, and the order overruling the motion for a new trial, the defendants appealed.

The record consists of the judgment roll, and what purports to be a statement on motion for a new trial. Upon the argument here, counsel for respondent contended that the statement was not properly made and should be disregarded. Under our statutes as construed by this court, there is no substantial difference

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between a statement and bill of exceptions. The name given to the document is of little consequence. If it brings here the rulings or decisions of the court below, the objections and exceptions thereto, and is duly certified, it should be treated for what it is, and not for what it may have been called. In this case it is clearly a bill of exceptions, is certified as such, and must be so considered. *Bradbury v. Improvement Co.*, ante, 221, 10 Pac. Rep. 620; *Schultz v. Keeler*, ante, 305, 13 Pac. Rep. 481.

The first assignment of error which we shall notice is the decision of the court in striking out, on motion, all the answer except the first paragraph thereof. This paragraph is, in substance, a general denial. Counsel for appellants argued at the bar that the several allegations of the answer, except the general denial, were stricken out on general demurrer, and that, as the answer contained a denial, and was good thus far, the demurrer should have been overruled. We were "almost persuaded" that this point was well taken. It was a good argument, and well put, but the record is at variance with the argument. The transcript shows that a part of the answer was stricken out on motion, and not on demurrer. It is true a demurrer was filed, and the record is silent as to what disposition was made of it. In such case, on appeal it will be presumed that the demurrer was either abandoned or overruled. *Guthrie v. Phelan*, ante, 89, 6 Pac. Rep. 108. After the motion to strike out was disposed of, the defendants had left a general denial of the allegations of the complaint, and a trial was had of the issues thus joined. The answer was not verified, and hence did not put in issue the execution of the bond sued on. Section 4200 of the Code of Civil Procedure provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the answer denying the same is verified." To have put in issue the execution or genuineness of the instrument, a specific, verified denial was necessary. This disposes of the objections raised to the introduction of the original bond. Its execution and genuineness having been admitted by the answer, it would seem unnecessary to have offered it in evidence unless for the purpose of having it

placed among the files, and hence no objection would lie to its reception.

Under the pleadings, the issues to be tried were whether Hibbs had, as postmaster, received this amount of money from the government, and had failed and refused to account for the same, or any part thereof, and whether demand had been duly made. In this state of the case the plaintiff was put to the proof of these allegations, and the defendants, under their general denial, could have introduced evidence to negative each and all of these averments. In other words, we understand that, under our practice generally, where a complaint is not verified, a general denial puts the plaintiff to the proof of the substantive allegations upon which his right of recovery depends, and that plaintiff's *prima facie* case, when made, may be controverted and overcome by defendant. But this is not so when the action is brought upon a written instrument, and a copy is set out, or annexed to the complaint, and the defendant questions the instrument itself; nor is a general denial sufficient where a defendant has an affirmative defense in the nature of an avoidance. *Bliss*, Code Pl. § 324; *Lattimer v. Ryan*, 20 Cal. 628. In this case there was clearly nothing in the paragraphs of the answer stricken out that would warrant or allow any evidence which could not have been introduced under the general denial, and hence there was no error in this ruling.

Appellants complain of the ruling of the court in excluding the offer to prove, by one Kress, the meaning of certain letters and figures indorsed on the original bond. The record does not show that any question was propounded, but the witness was produced, and counsel offered to prove by him what the letters "M," "O," and "P," and the figures "\$6,000" and "\$4,000," meant. An objection was interposed to this offer, and was sustained by the court. We understand the rule to be that, where an offer of oral proof is made, the court must be satisfied of the good faith of the offer, and of the materiality of the evidence, otherwise it may properly be excluded. In this case there is nothing in the transcript to show or indicate that it was relevant to any issue involved, or would in any manner have aided the defense. If it appeared in any view of the case to be relevant, or if counsel had stated, in connection with the offer, that they intended to follow it up with other evi-

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dence which would make it material, then we think it would have been proper to have allowed it to go to the jury; but the bare offer to explain the letters and figures that had at some time been written on the back of the bond, without a pretense that it was material to the issues, has nothing to commend it, and we think was properly excluded. *Scotland Co. v. Hill*, 112 U. S. 186, 5 Sup. Ct. Rep. 93; *Schmidt v. Pfeil*, 24 Wis. 321; *Wilson v. Noonan*, 35 Wis. 360.

While impaneling the jury, one juror stated that he had "formed an opinion in favor of the defendants, but in spite of that opinion he could render a verdict according to law and the evidence in the case." This juror was challenged for cause, the challenge sustained, and to this ruling the defendants excepted. Great latitude of discretion must necessarily be allowed to the court in the trial of challenges for cause, and the rule is now well settled that the decision of the court on challenges for cause will not be disturbed unless it clearly appears that there was an abuse of discretion. The reason for this rule is obvious. The judge who tries the cause, sees the person called as a juror, hears his answers, and observes his manner and demeanor in the jury-box, can much better judge of his fitness and qualifications than can an appellate court from an examination of the record. But, if the ruling in the case at bar was erroneous, we think it would still devolve upon the appellants to show prejudice, and this they have not attempted to do. It has been well stated, in treating of this subject, that "neither party can be said to have a vested interest in any juror; therefore, although in impaneling a jury one competent person has been rejected, yet, if another equally competent person has been substituted in his stead, no injury has been done." *Thomp. & M. Jur.* § 251, and cases there cited. Applying these rules to the question under consideration, we see nothing in the ruling on this point of which appellants can complain.

In impaneling the jury the defendants were restricted by the court to four peremptory challenges, and of this they complain. The number of peremptory challenges is fixed by the statute, which provides in civil cases that each party is entitled to four, and, where there are several parties on either side, they must join in a challenge before it can be made. We do not think the legislature intended that,

where there are several parties on either side, each individual should have four challenges, but that they should join, and have one set on either side. *Abb. Tr. Ev.* 23.

There is but one other question in the record we think deserves consideration. The bill of exceptions shows that when one of the jurors was called into the box, and sworn to answer as to his qualifications, he was asked by defendants' counsel the following question: "Have you formed or expressed the opinion that there is due the government any money from the bondsmen of I. N. Hibbs by reason of his defalcation?" This question was objected to, the objection sustained, and an exception taken. The record does not disclose the ground of the objection, nor does it indicate that any other question was propounded to the juror, or that any evidence was received as to his qualifications. All that is shown is the one interrogatory, the objection, the decision thereon, the exception, and that the juror served. It further appears that the defendants had, at this stage of the trial, exercised four peremptory challenges, and interposed another which was denied. The right given to challenge for cause carries with it the right to examine for cause, or have the court do so. While the court should control the examination, and may restrict it to the statutory grounds, yet the right of a party to know whether a juror is qualified and competent is a substantial right that cannot, under our law, be denied. This seems to be conceded, but it is suggested that, as the record is silent as to any other or further interrogation of this juror, we must presume that his competency was shown. We have held that the document in the transcript, denominated a statement, is in reality a bill of exceptions. Since this is so, we must presume that it contains all the evidence and other matters material to the exceptions. This presumption will always be indulged unless the contrary affirmatively appears from the record. *Haynes*, *New Trials & App.* § 258; *People v. English*, 52 Cal. 211, *Schultz v. Keeler*, *supra*. Under the facts of this case as disclosed by the record, we think the court erred in sustaining the objection to the question propounded to the juror. The judgment is therefore reversed, and cause remanded for a new trial.

HAYS, C. J., and BUCK, J., concurring.

*McGinnis v. Friedman.*MCGINNIS *et al.* v. FRIEDMAN.

(February 20, 1888.)

INJUNCTION—GROUNDS—APPREHENSIONS OF IMMEDIATE INJURY.

1. Where a party seeks relief by interlocutory injunction, he should show some clear legal or equitable right, and an apprehension of immediate injury to those rights. Where none such are shown, the injunction will be denied.

SAME—PROPERTY RIGHTS NOT INVADED.

2. Courts of equity will not interfere by injunction to prevent the commission of a crime where no property rights are invaded.

PUBLIC LANDS—PASTURAGE WITHOUT CLAIM OF TITLE—RIGHTS ACQUIRED.

3. The fact that a party has pastured the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give a legal or equitable right to the pasture grown thereon.

(Syllabus by the Court.)

Appeal from district court, Alturas county.

Action by Daniel McGinnis and others to restrain S. H. Friedman from pasturing sheep upon certain public lands of the United States, used by plaintiffs as a cattle range. From an order dissolving the temporary injunction, plaintiffs appeal. Affirmed.

George H. Roberts and *Vic Bierbower*, for appellants.

The law will not allow a person by repeated trespass to completely destroy another's property. Equity will interfere. *Stone v. Lumber Company*, 59 Mich. 24, 26 N. W. Rep. 216.

In relation to public lands, which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor; and, to proceed from him, this possession must be actual, and not constructive. *Feirbaugh v. Masterson*, 1 Idaho, 135.

Possession of a part draws after it the possession of the whole. *Plume v. Seward*, 4 Cal. 95; *Feirbaugh v. Masterson*, 1 Idaho, 135; *Hicks v. Coleman*, 25 Cal. 122; *McKee v. Greene*, 31 Cal. 418; *Donahue v. Gallavan*, 43 Cal. 573; *Ayers v. Bensley*, 32 Cal. 620.

Where the title to land rests in the possession only, the prior possessor has the better title. *Ayers v. Bensley*, 32 Cal. 620.

One in possession can maintain ejectment against an intruder, and such intruder cannot set up title in third person

to defeat the suit. *Southmayd v. Henley*, 45 Cal. 102.

If plaintiff shows possession in himself, or a better title to possession than the defendant, the defendant cannot overcome the title of plaintiff by showing title in a stranger, nor can he obviate the consequences of his trespass by showing that plaintiff was a trespasser upon a third person. *Carleton v. Townsend*, 28 Cal. 219; *Richardson v. McNulty*, 24 Cal. 347; *Hubbard v. Barry*, 21 Cal. 321.

Bruner, Parsons & Bruner, for respondent.

To warrant the interference of equity in restraint of trespass, complainant's title must be clear. 1 High, Inj. §§ 9, 651, 675, 698, 754; *State v. McGlynn*, 20 Cal. 275; *Harrell v. Hannum*, 56 Ga. 508.

Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. *Orton v. Smith*, 18 How. 263, 266.

Equity has no jurisdiction to restrain the commission of crimes. 1 High, Inj. §§ 20, 29; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 371; *Mayor, etc., v. Thorne*, 7 Paige, 261; *Village of Waupun v. Moore*, 34 Wis. 450; *Village of St. Johns v. McFarlan*, 33 Mich. 72.

In order for plaintiffs to maintain their action, they must reside upon the land in question, either in person or by agent. *Rev. St. Idaho*, c. 4, tit. 10; *Wolfskill v. Malajowich*, 39 Cal. 276.

The possession must be actual, and subject to the will and dominion of claimants. *Coryell v. Cain*, 16 Cal. 573; *Feirbaugh v. Masterson*, 1 Idaho, 135; *Preston v. Kehoe*, 15 Cal. 315; *Wolf v. Baldwin*, 19 Cal. 306; *Polack v. McGrath*, 32 Cal. 15.

The assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim or color of title or asserted right, is unlawful. 23 U. S. St. at Large, p. 321; *Villey v. Jarreau*, 35 La. Ann. 542; *Doran v. Railroad Co.*, 24 Cal. 257.

HAYS, C. J. This action was brought to restrain the respondent from herding, grazing, and pasturing his sheep upon certain public lands, the property of the United States. A temporary injunction was granted, and, the case coming on to be heard upon an agreed state of facts,

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the injunction formerly entered was dissolved, and from this order the appeal is taken to this court. It appears that the premises to which the injunction applied consists of a large tract of the public lands of the United States, only a part of which has been surveyed; one of the ranges being about fifteen miles long and five miles wide, as stated in appellants' brief. We are not informed as to the size of the other. These appellants have used said ranges for several years for the purpose of pasturing their cattle and horses on the same during the winter seasons; said ranges being very valuable for that purpose. The stock thus wintered upon said ranges is driven to other parts in the summer season. It is admitted that sheep, cattle, and horses will not thrive and prosper when on the same range; that sheep will thrive where cattle will not. Shortly before bringing this action, the respondent brought a large flock of sheep to this section of the country, and proposed to graze, pasture, and winter them on the ranges in controversy; whereupon this action was brought. It is claimed by appellants that they have a right to hold and use said grounds for winter pasturage, and to exclude the respondent from pasturing his sheep thereon for two reasons: *First*, because of their priority of possession, they having enjoyed that privilege for several years past; *second*, because of the provision of the Revised Statutes of this territory, which is as follows: Sec. 6872. "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle-grower, either as a spring, summer, or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

Although the case was ably presented at the bar, and marked industry and ability have been shown by appellants in the preparation of their briefs, they fail to cite us to any case directly in point, and we presume none could be found sustaining their position. As a general rule, it is incumbent upon the party seeking relief by interlocutory injunction to show some

clear legal or equitable right, and a well-grounded apprehension of immediate injury to those rights. This position is announced and abundantly sustained by 1 High, Inj. §§ 7, 9, 651, 652-698, and the cases there cited; Hil. Inj. 319. The appellants in this case do not pretend to connect themselves with the land by color of title, or to hold the same under any possessory claim or right, with a view of entering said lands under any of the general laws of the United States; hence we are unable to see that they have shown in themselves any clear legal or equitable right to the pastures grown upon the said lands. Such being the case, they would not be entitled to the equitable intercession of the court, and the injunction theretofore granted was rightfully dissolved.

The appellants claim, however, that they have held these ranges for several years, and therefore they hold the same now under an adverse possession, as to this respondent, from entering thereon with his sheep. We think a court of equity should not interfere to enforce such a claim by injunction, in view of the act of congress of February 25, 1885, (23 St. U. S. at Large, p. 321,) which provides, in substance, among other things, that the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States without claim, color of title, or asserted right, as therein specified, is declared to be unlawful, and thereby prohibited. When we take into consideration the object, purpose, and spirit of that law, and the fact that appellants do not claim to hold by virtue of any of the possessory acts, but only by their right of prior possession, we think that said act of congress is a complete answer to all authorities cited and arguments urged upon that point. If, therefore, the action cannot be maintained because appellants have no legal or equitable title to the pasture in dispute, we think that the second ground urged, that the threatened act will be a violation of the Revised Statutes before quoted, is equally untenable; for it is a general rule that a court of equity has no jurisdiction to restrain or prevent crime, or to enforce a moral duty, except so far as the same is connected with the rights of property. The appellants having failed to show any property rights to the pasture, the exception to this general rule cannot be invoked by them.

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Many reasons might be given in support of the correctness of the judgment in this case, but we think a further discussion of the subject unnecessary. Judgment of the court below is therefore affirmed.

BUCK and BRODERICK, JJ., concurring.

OREGON SHORT LINE RY. CO. v. YEATES,
Assessor.

(February 20, 1888.)

RAILROAD COMPANIES — TAXATION — MACHINE AND
REPAIR SHOPS.

Where machine and repair shops are situate upon lands other than the right of way, but are connected with the main line of the railroad by side track, *held*, that under section 1463, Rev. St., they should be assessed by the local assessor rather than by the territorial board of equalization.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county; before Justice BRODERICK.

Application by the Oregon Short Line Railway Company for an injunction to restrain W. W. Yeates, as assessor, from collecting a tax assessed against plaintiff's machine and repair shops. From an order granting the injunction, defendant appeals. Reversed.

R. Z. Johnson, Atty. Gen., *Vic. Bierbower*, and George H. Roberts, for appellant. P. L. Williams, for respondent.

HAYS, C. J. By the act of congress of March 3, 1875, (1 Supp. Rev. St. U. S. p. 91,) the right of way was granted through the public lands of the United States in this territory to any railway company duly organized under the laws of any state or territory, upon certain conditions, to the extent of 100 feet on each side of the center line of said road, "also grounds adjacent to such right of way for station buildings, depots, machine-shops, side tracks, turn-outs, and water stations,—not to exceed in amount twenty acres for each ten miles of road." The respondent company was duly organized, and obtained the right of way, under said act, through the lands of the United States in this territory, and built their road thereon. Section 1463 of the Revised Statutes of this territory is as follows: "The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this territory, whether incorporated under the law of

this territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath of the person so listing, all the following described property belonging to said corporation within the territory, viz.: Road-bed, superstructure, right of way, and all structures situate thereon, rolling stock, side track, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation. Such list shall contain, first, the number of miles of such railroad or telegraph line in the territory, and the number of miles of the same in each organized county therein; and such return must be made to the territorial comptroller on or before the 1st day of April, annually. If the return aforesaid be not received by said comptroller by the 3d day of April, he must thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that same purpose may address a written communication to the corporation, or to some officer of the corporation, who has failed or refused to make the return aforesaid. As soon as practicable after the comptroller has received said return, or procured the information to be set forth in said return, a meeting of the territorial board of equalization, consisting of the governor, territorial treasurer, and comptroller, shall be held at the office of said comptroller; and the said board must then value and assess the property of said corporation for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment, the said board shall examine and consider the return herein required to be made, or the information procured by the comptroller in default of such return, together with such other reliable information relative thereto as they may be able to procure. Said board shall not assess the value of any machine-shop or repair-shop or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this territory; but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops, or other buildings or grounds, or other real estate is situated, to assess the same, and make return thereof, in the manner pro-

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vided for the assessment and return of real estate belonging to individuals, on or before the second Monday of May, or as soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment. The territorial comptroller must certify to the clerks of the boards of county commissioners of the several counties in which property of the aforesaid corporations, or any part thereof, may be situated, the assessment per mile so made on the property of any such corporation, specifying the number of miles, and amount, in each of said counties. The county commissioners must thereupon divide and adjust the number of miles, and the amounts, falling within each precinct, city, town, school-district, or other division, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property, or assessment rolls, returned by the several assessors. The comptroller must certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by this act, or, being made, was not sworn to, it is the duty of the county commissioners to add any amount not exceeding ten per cent. to the valuation thus brought before them."

The officers of the railroad company, in listing its property, pursuant to this statute, for assessment by the territorial board of equalization, listed, together with their road and right of way, the machine and repair shops, and the other property described in the complaint, which is situate at Shoshone in Alturas county. The said board assessed the right of way, and such property as they found to be thereon, but did not assess the property described in the complaint, because they thought the same was not upon the right of way, and that they had no authority, under the statute, to do so, and notified the assessor of Alturas county of this fact. The county assessor then assessed the same, and made return thereof. The respondent then brought this action to restrain this appellant from assessing or collecting any tax on the property described in the complaint. The case coming on to be heard, the facts were stipulated as follows: "(1) It is hereby stipulated, by and between the parties hereto, that the machine and repair shops, round-house, and other buildings, mentioned in the pleadings here-

in, and situated at Shoshone station, in said county, are more than one hundred feet from the main track of plaintiff's railway, and within four hundred feet thereof; that the said main track, at and near shops and other buildings, runs in an easterly direction, and said shops are on the south side of said main track; that there are three side tracks, running through or near said shops and buildings, which are united, by means of switches, both to the east and west thereof, into a single side track; and such single track unites, by means of switches, with the said main track both east and west of said shops. (2) That said side tracks, so extending to, through, and near said shops and other buildings, afford the means of running locomotive engines and cars from said main track into and out of the said shops and round-house, and connect with a turn-table situate between said main track and said round-house, constructed and used for the purpose of turning engines. (3) That said side tracks, so extending to said shops, round-house, and turn-table, and the said turn-table and buildings, are used by the plaintiff for changing its engines and cars, affording the means of necessary repairs, and also to enable the plaintiff to supply its engines with coal from a large coal platform situated west of and near to said shops, and on either side of which there is one of said tracks extending to and near said shops and other buildings. (4) That said shops, round-house, turn-table, and tracks leading thereto, are used by the said plaintiff exclusively with, and in connection with, the operation of its said railway, and are necessary for such operation, but are not used for the purpose of running trains over the same, or for the transaction of its business as a common carrier." The injunction prayed for was granted, and an appeal taken to this court.

We are now called upon to construe the statute above quoted, so far as it relates to this action. In construing statutes of this nature, Judge Cooley, in his very excellent work on taxation, says: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it; and that when found it should be made to govern not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. Beyond the words employed, if the mean-

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ing is plain and intelligible, neither officer nor court is to go in search of the legislative intent, but the legislature must be understood to intend what is plainly expressed; and nothing then remains but to give the intent effect." Cooley, *Tax'n*, (2d Ed.) 264. We fully approve the above rule of construction. It is contended by respondent that a statute almost identical with ours has been construed by the supreme court of the United States in *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. Rep. 601. If such was the case, we would follow the construction placed upon it by that court, implicitly. After a careful examination of that case, we do not so understand it. There the territorial board of equalization had assessed the right of way, as it was clearly their duty to do; but the city authorities, disregarding such assessment, sought by virtue of their corporate power to assess the same property, and the question there litigated was as to which assessment was correct. The court there holds in favor of the assessment by the territorial board of equalization. We do not understand that the question in the suit at bar was litigated in that case. We presume that all of the machine-shops and other buildings there assessed were upon the right of way, otherwise the territorial board would not have assessed them. The respondent contends, however, that notwithstanding the property described in the complaint herein is not upon any of the lands obtained by congressional grant, and is more than 100 feet from the center line of said road, yet, because said machine-shops, repair-shops, etc., are connected with the main track of their road by switches and side tracks, that therefore the land upon which they stand all becomes right of way, and should be assessed as such, and, in support of this claim, cites us to *Keener v. Railway Co.*, 31 Fed. Rep. 126; *Pfaff v. Railway Co.*, 108 Ind. 144, 9 N. E. Rep. 93; *Railway Co. v. Goar*, 118 Ill. 134, 8 N. E. Rep. 682. In the first case the court says: "The term 'right of way' has a twofold signification. It sometimes is used to mean the mere intangible right to cross,—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its road bed." They there only determine how it is used in their statute, and how the term is to be construed under the facts in that

case. In the last two cases cited, the courts hold, in substance, that, under the revenue laws of their respective states, the term "railroad track" includes lands occupied by a railroad company with its main track, side tracks, depot, round-houses, coal sheds, and water-tanks. The reason for so holding is because they are so designated by their statutes. Hence they give us no light, except perhaps to impress upon our minds the necessity of looking to our own statutes to ascertain the true legislative intent. If the position taken by respondent is correct, then, as a sequence therefrom, we must give no force or effect to that portion of the legislative enactment which provides that the territorial board shall not assess any machine or repair shops not situate on said right of way, but that it shall be the duty of the assessor to assess the same,—unless we further find that the legislature presumed that the railroad company would have machine and repair shops which would not be connected with the main track by some kind of a railroad track. It is our duty to give force and effect to all parts of the enactment, where we can. It follows, we think, that the legislature intended that where the railroad owned machine and repair shops, or other buildings, not situate on that strip of land designated by the act of congress as a right of way, or where they owned other grounds than the right of way, that the assessor should assess the same, and that it should not be assessed by the territorial board. Of course, if the railroad company had obtained the strip of land 200 feet wide, or less, for constructing its main line or buildings thereon, through private property, it would still be "right of way," and assessed, with buildings thereon, by the territorial board. We do not think that the legislature expected the railroad company to have machine-shops and repair-shops without having a track to connect the same with the main line; and when they enacted that the territorial board "shall not assess the value of any machine-shop or repair-shop or other buildings not situate on said right of way or grounds or other real estate of any corporation or company within this territory, but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops or other buildings or grounds or other real estate is situated to assess

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the same," their intent seems plain, and that, under the facts of this case, we must therefore hold it was the duty of this appellant to assess the property in controversy. It has been ably argued that it would be better that the territorial board should assess all railroad property. Conceding such to be the case, that argument should be addressed to the legislature rather than the court; for it is not our province to pass upon the wisdom of the enactment, but rather to give effect to the legislative intent.

For the reasons before given we think the judgment of the district court should be reversed. It is so ordered.

BUCK and BRODERICK, JJ., concurring.

JOHNSON *v.* FRASER *et al.*

(February 20, 1888.)

TRIAL—INSTRUCTION—DIRECTION OF VERDICT.

1. When the court instructs a jury upon what state of facts they must find a verdict for either party, the instruction should include all the facts in the controversy material to the rights of the parties.

SAME — INSTRUCTIONS BASED ON EVIDENCE NOT MATERIAL.

2. Instructions asked are properly refused when they are not based upon some evidence material to the controversy, although, as abstract principles of law, they are correct.

REPLEVIN—PRACTICE—GENERAL VERDICT.

3. In an action of claim and delivery, a general verdict, finding for or against either party, is sufficient to enable the court to enter judgment thereon for the return of the property when such a return is the appropriate remedy.

SAME—SPECIAL FINDINGS OF VALUE.

4. In such actions, where several articles are sought to be recovered, if either party desire a finding of value of each article, he should request that such findings be made, or he cannot take advantage of a failure to do so.

SAME—JUDGMENT—FORM OF.

5. The judgment of the court in an action of claim and delivery, when verdict is given for defendant, should be in the alternative for the return of the property or its value. If a return cannot be had, where such return is the appropriate remedy, the verdict need not be in the alternative.

SAME — SPECIAL FINDING AS TO RETURN OF PROPERTY.

6. In such cases, if either party desire a finding for a return of the property, he should request such finding. If he fail to do so, he cannot take advantage of a failure to do so.

(Syllabus by the Court.)

Appeal from district court, Custer county.

Action of claim and delivery by L. H. Johnson, administrator of the estate of Harry Melrose, deceased, against William J. Fraser and another. There was judgment for defendants. From an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

Charles A. Wood, for appellant.

The verdict in claim and delivery should be in the alternative, either for the delivery of the property to the respondents, or, in case delivery could not be had, for the value thereof, with damages for its detention. Code, § 387; *Norcross v. Nunan*, 61 Cal. 640; *Holmberg v. Hendy*, (Cal.) 10 Pac. Rep. 394.

J. T. Morgan, for respondents.

The plaintiff, having sold the goods at public auction to different parties, will not be heard to complain that he is not given an opportunity to do that which he has put it out of his power to do. *Flagg v. Tyler*, 6 Mass. 33.

If the verdict is sufficient in substance, the fact that it is defective in form will not invalidate it. *Coit v. Waples*, 1 Minn. 134, (Gil. 110.)

If the court should be of opinion that the verdict covers all the issues, and that the judgment should be in the alternative, then this court should not order a new trial, but should correct the judgment. *Berson v. Nunan*, 63 Cal. 552; *Matlock v. Straughn*, 21 Ind. 128; *Freeborn v. Norcross*, 49 Cal. 313.

When the property cannot be returned, the defendant is entitled to recover the value of the property, with interest, during the period of detention. *Booth v. Ableman*, 20 Wis. 602; 2 Field, Lawy. Briefs, § 512.

BUCK, J. This is an action of claim and delivery, brought by the administrator of the estate of Harry Melrose for certain personal property claimed as a part of said estate. The defendants allege as a defense that they were partners of the deceased at the time of his death; that the property was partnership property, in which each is a one-third owner, and, as surviving partners, they are entitled to the possession thereof as such owners, and for the purpose of settling the estate. The action was tried at the June term of the district court, 1887, Custer county, Third judicial district, and comes into this court on a statement of the case on appeal from

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the order of the court overruling a motion for a new trial. The appellant specifies the refusal of the court to give the second, third, fourth, eighth, and ninth instructions to the jury, requested by plaintiff, and the giving of the first instruction asked by the defendants, as error of the court, and also error in the verdict, in that it is contrary to law, (1) because it is not in the alternative; and (2) because interest can only be allowed by way of damages.

The instructions asked by plaintiff, and refused by the court, are as follows: "No. 2. Unless the jury find from the evidence that a partnership existed, at the time of the death of Melrose, between Melrose, Fraser, and Doherty, of the kind and nature testified to by Fraser and Doherty, they will find for the plaintiff. (3) If the jury should find from the evidence that, at the time of the death of Melrose, only an agreement of partnership existed between these parties to take effect at some future time, they will find for the plaintiff. (4) Even if the jury should find from the evidence that Fraser had furnished Melrose the large amount of money he claims, or any other sum, still, if no actual partnership existed between the three parties at the time of the death of Melrose, the plaintiff must recover." These three instructions may properly be considered together. In *Deasey v. Thurman*, 1 Idaho, 775, it was held that, "when the court instructs a jury upon what state of facts they must find a verdict for or against either party, the instructions should include all the facts in the controversy material to the rights of the parties upon the claim of the plaintiff or the defense of the defendant." In an action of claim and delivery, the plaintiff must establish, as the foundation of his claim, either absolute ownership of the property, or his right to the possession thereof through some special interest in it. In this action the plaintiff alleges ownership in the property claimed, which is denied in the answer. It is not enough, therefore, for the jury to find that certain facts are established which, in connection with ownership, would establish plaintiff's right, but they must also find that the intestate was the owner, and of this the plaintiff has the burden of the proof. The instructions asked for make no reference to said ownership, and the ruling of the court thereon is sustained by the authority above cited. *Galagher v. Williamson*, 23 Cal. 334.

The eighth instruction asked by plaintiff, and refused, is as follows: "If the jury believe from the evidence that plaintiff acted on the representations of defendants that they made no claim to this property in taking possession of the same as special administrator of the estate of Harry Melrose, deceased, that he will be allowed out of said property all the expenses properly incurred by him in the management of said estate, as shown by the evidence, until he was properly notified of the claim of defendants to said estate." This instruction seems to be responsive to certain evidence tending to show that, soon after the death of the intestate, the defendants represented to the plaintiff that they had no claim to the property in dispute, in consequence of which statements the plaintiff took the same into his possession as special administrator, and afterwards returned it to defendants on their claiming the same. This is an entirely different matter than that set up in the complaint, not being declared on as a cause of action in the complaint, nor could it have been joined with it, and cannot be adjudicated in this action.

The ninth instruction asked by plaintiff, and refused, is as follows: "If the jury believe from the evidence that Fraser furnished Melrose all the money necessary to purchase and pay for the property in dispute, that fact alone can be no defense to this action. Without some special contract between them alleged and proven, Fraser can only be regarded as a creditor of the estate." While this instruction is correct as an abstract principle of law, yet an inspection of the evidence shows that there is no foundation for the claim that the money was loaned to Melrose. The evidence shows that, if furnished at all, it was furnished to the partnership. Hence we think it was properly refused as misleading.

The first instruction given by request of defendant, and excepted to by plaintiff, is as follows: "If the jury believe from the evidence that the defendant Wm. J. Fraser furnished the money for the purchase of the property in dispute under an agreement of partnership between Fraser, Melrose, and Doherty, and that said property was so held by them at the time of the death of Melrose, then the jury should find for the defendants." The appellant urges that this instruction is misleading, in that an agreement for a partnership at some future time is not an actual partnership,

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nor would it give a right of possession to such property to the survivors. We think the construction claimed by appellant for this instruction is not the true one. If an agreement of partnership was consummated, and the money furnished under it, it is a fair presumption that the agreement was *in præsenti*, unless the contrary appears, and we think the right of possession to the property was in the surviving partners for the purpose of settling the estate. Rev. St. § 5554.

The objection to the third instruction given at request of defendants is sufficiently considered in our discussion of the eighth instruction requested by defendants.

The appellant urges two objections to the verdict of the jury, and these objections seem the most important questions on this appeal. The first objection is that "it should have been in the alternative, either for the delivery of the property to the respondents, or, in case delivery could not be had, for the value thereof, with damages for its detention." The verdict is as follows: "We, the jury, find for the defendants, and we find the value of the property at the time of the taking to be \$2,226.88. We find the interest thereon, at ten per cent. per annum from the date of the taking to the present time, to be \$334.03. We assess the damages of defendants at five cents." Section 4399 of our Code of Civil Procedure provides that "in an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to the return thereof, and, if so instructed, the value of specific portions thereof, may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." In the case at bar the property had been delivered to the plaintiff. The defendant demands the recovery thereof, and the verdict of the jury finds its gross value. It does not, however, find the value of the several articles of property, or that the defendant is entitled to the return thereof in terms. The appellant urges that the failure to find the value of the several articles, and also as to whether the defendant is entitled to said return, is error which should give him a new trial. An

inspection of the provision of the statute shows that the law requires that the value of specific portions be found only when the instructions of the court require the jury to do so. This provision undoubtedly places the finding of the value of specific articles within the discretion of the court. The court may require it, or dispense with it, according to the circumstances of the case as shown by the evidence. If either party desire it, they ought to request that the jury be instructed so to find. If they fail to do so, they ought not to be allowed to take advantage of it on appeal.

The appellant makes the point that it is error in the verdict that the jury did not find whether or not the property should be returned to the defendant. It is difficult to understand why the jury should find upon that matter at all. If they find as a fact that the property belongs to the defendants, the law will adjudge that it will be returned to them unless some substantial reason be shown why it cannot be done. Wells, Repl. §§ 753, 754; Waldman v. Broder, 10 Cal. 378; Underwood v. White, 45 Ill. 437. In the latter case the court says, if the verdict is for the defendant, no reason is perceived why he should not be restored to the possession of the property of which he had been wrongfully deprived. Section 4471 of our Code of Civil Procedure provides that, "in the execution for the delivery of personal property, it must require the sheriff to deliver possession of the same to the person entitled thereto, and at the same time require the sheriff to satisfy any costs and damages recovered by the judgment out of the personal property of the person against whom it is rendered." Under this statute the plaintiff does not have the option to return or pay for the property as he may elect. It must be returned *in specie*, if it can be done; and, if it cannot be so returned, he must pay the value thereof. The statute does not in terms say that the jury must find whether or not the property must be returned. It declares: "If, finding for defendant, they also find for the return thereof, they must also find the value." But under what circumstances they must find for the return is not specified. It is possible that the party having taken the property in consequence of its loss or other cause may not be able to return it, and that he may desire a finding by the jury to that effect. If so, we think he ought to request such a finding; and, if he fails to do so, he cannot complain.

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Section 4395 provides "that when the verdict is announced, if it is informal or insufficient in not covering the issues submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." If the objection is not made at the time the verdict is received, it is too late to do so afterwards. The statute, indeed, saves an exception to the verdict, but it is to the verdict as it is received; and, if it is sufficient to sustain a judgment, it will not be disturbed. Section 4396 declares that verdicts are either general, which pronounce upon all or any of the issues; or special, by which the jury find only the facts, leaving the judgment to the court. In this case the verdict is general, pronouncing upon all of the issues in the case. Section 4453 provides that, in an action to recover the possession of personal property, "if the property has been delivered to the plaintiff, and the defendant demand a return thereof, [which is the case at bar,] judgment may be for a return thereof, or for its value in case return cannot be had." It will be observed that the provision requiring judgment for the return is not mandatory. The language is that judgment may be entered for a return. This would seem to give the court a discretion to omit in the judgment an order for its return under certain circumstances where the substantial rights of both parties could be subserved thereby. In *Brown v. Johnson*, 45 Cal. 76, the court had entered judgment for the value and damages, without any direction for the return thereof. On appeal the judgment was sustained; the court holding "that in support of such a judgment, where the record discloses nothing on the point, they will intend that the facts actually appearing below were such as to warrant its rendition." This authority would indicate that, in rendering judgment, the court would look to the evidence to determine whether the return of the property should be adjudged to the party. If this is correct, the finding of a jury as to a return thereof seems of little value in determining the rights of the party, unless, indeed, they should make a finding as to the actual *status* of the property, and thus give the court a finding upon all the facts necessary to the entry of a judgment. We think the verdict sufficient to enable the court to enter the proper judgment, under the authorities cited. See, also, *Wells*, Repl. § 509; *Waldman v. Broder*, *supra*;

Glann v. Younglove, 27 Barb. 480; *Coit v. Waples*, 1 Minn. 134, (Gil. 110.)

It is further objected that the verdict is against law, because it finds both damages and interest. These are simply distinct findings of fact. Either may be omitted in entering judgment, or, if an erroneous judgment has been already entered, it may be corrected in the lower court, or, on appeal, the judgment may be reversed, and the cause remanded, with direction to enter a judgment for the amount, less the damages, under the authority of *Benson v. Nunan*, 63 Cal. 550; *Freeborn v. Norcross*, 49 Cal. 313.

The order of the court overruling the motion for a new trial is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

MALAD VAL. IRRIGATING CO. v. CAMPBELL.

(February 20, 1888.)

WATERS AND WATER-COURSES—WATER-RIGHTS AND EASEMENTS—PRIOR APPROPRIATION.

1. Prior appropriation of all the waters of a stream, applied to a useful purpose, gives the better right to the tributaries, and all the direct and immediate sources of supply of the stream; and, when this right once vests, it must be protected and upheld.

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2. Rights cannot be acquired to the waters of springs situated along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against prior appropriations in good faith of the whole of the waters of the stream. Query, whether one can bring water from another or independent source into a natural stream, whose waters have been appropriated, and use the channel of such stream to conduct the waters, thus brought in, to another point, to be there diverted and used, suggested, but not decided.

(Syllabus by the Court.)

Appeal from district court, Oneida county.

Action by the Malad Valley Irrigating Company against Nephi Campbell to determine the right to the possession and use of the waters of a certain stream, and to restrain defendant from diverting or interfering with the same. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

D. W. Standrod and J. T. Morgan, for appellant.

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He who first appropriates the water of a stream, and connects his labor therewith for a beneficial use, is entitled to the same against the world. *Atchison v. Peterson*, 20 Wall. 507, 514, et seq.; *Basey v. Gallagher*, Id. 671, 682; *Tartar v. Mining Co.*, 5 Cal. 397; Rev. St. U. S. § 2339.

One who increases the flow of water in a stream by digging out springs, or turning in another stream may appropriate such increase to his own use. *Keeney v. Carillo*, 2 N. M. 490; *Ditch Co. v. Vaughn*, 11 Cal. 143; *Burnett v. Whitesides*, 15 Cal. 35; Rev. Laws Idaho, § 3158.

Adverse user of water stands upon the same footing as that respecting the adverse user of land, and the reasoning which will sustain the one will likewise uphold the other. *Vansickle v. Haines*, 7 Nev. 250; *Crandall v. Woods*, 8 Cal. 144.

Smith & Smith, for respondent.

Where a person has conducted some water to a stream, he will be restrained, at the suit of the owner of the water of the stream, unless the former can show that he has not diverted more water from it than he led to it. *Budd v. Railway Co.*, 15 Or. 404, 15 Pac. Rep. 654; *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. Rep. 108.

This general right over the stream of the party who has perfected a prior appropriation is that the water of the stream should continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriation, without diversion or material interruption. *Pom. Rip. Rights*, (Black's Ed.) § 60; *Lower Kings River, etc., Ditch Co. v. Kings River, etc., Canal Co.*, 60 Cal. 408; *Lorenz v. Jacobs*, (Cal.) 3 Pac. Rep. 654; *Mining Co. v. Hoyt*, 57 Cal. 44; *Barnes v. Sabron*, 10 Nev. 217; *Water Co. v. Fletcher*, 23 Cal. 481; *James v. Williams*, 31 Cal. 211; *Feliz v. City of Los Angeles*, 58 Cal. 73.

BRODERICK, J. This action was brought by the Malad Valley Irrigating Company against Nephi Campbell, in the district court in and for Oneida county, to determine the right to the possession and use of the waters of a certain stream in said county, known as "Campbell Creek," and to restrain the defendant from diverting or interfering with the use and enjoyment of the same. The complaint alleges that the plaintiff is a corporation, and is the

owner of and entitled to the control and use of all the waters of a certain stream known as "Devil Creek," situated in said county, together with all its tributaries; that it and its predecessors in interest have for a long number of years owned, controlled, used, and enjoyed said waters, and peaceably distributed the same among the farmers and residents along said stream for the irrigation of agricultural crops. It is further alleged "that the defendant on or about the 1st day of June, 1885, wrongfully and unlawfully, and without color of right or title, without the consent of plaintiff, and against its will, did enter upon one of the tributaries of said Devil creek, to wit, the stream known as 'Campbell Creek,' and which enters said Devil creek on the premises of the defendant, and did wrongfully and unlawfully construct certain dams, ditches, and flumes, and did divert the whole of the waters of said Campbell creek, and has ever since continued to divert said waters, and that plaintiff, by said wrongful acts of the defendant, has been, during the whole of said time, deprived of the use of all the waters of said stream, to the great and irreparable injury of this plaintiff." The defendant answered, specifically denying the allegations of the complaint; and, as a further defense, alleges that in the year 1877 he went upon the stream known as "Campbell Creek," and appropriated all the waters of said creek, by constructing dams, cleaning and digging out springs, clearing brush, and diverting the whole of said waters from their natural channel, and using the same for the purpose of agriculture, etc.; that, at the time, the whole of said stream ran to waste, and was entirely unappropriated; that, since the appropriation of said waters in the year last aforesaid, this defendant has continuously used said waters for the purpose of irrigating his crops. The defendant then pleads in bar the statute of limitations. At the November, 1886, term of said court, the cause was tried without a jury, and the following are the findings of fact and conclusions of law made and filed therein: "(1) It is found that the plaintiff and its predecessors in interest have for about twenty years used and enjoyed the waters of the stream known as 'Devil Creek,' in Oneida county, Idaho, for the irrigation of agricultural crops. (2) That plaintiff was incorporated in April, 1882; all parties owning water-rights in Devil creek, including the defendant, join-

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ing in such corporation. (3) That Campbell creek is a tributary of Devil creek, entering said stream above the dam at which plaintiff's grantors originally appropriated the waters of Devil creek. (4) That for the last three years the defendant has, at times, set up some claim to the right to the exclusive use of Campbell creek, but that previous to that time it had been used by and controlled by plaintiff and its grantors; that plaintiff and its grantors have never relinquished their claim to the use of the waters of said stream." As conclusions of law, it is found: "(1) That plaintiff is the owner and is entitled to the free use and control of all the waters of the stream known as 'Campbell Creek;' (2) that the defendant ought to be forever enjoined from using or in any way interfering with the waters of said Campbell creek, except under the license and permission of plaintiff. And it is ordered that judgment be entered accordingly." Judgment was thereupon entered, giving to the plaintiff the free use and control of the waters of Campbell creek. An application was made for a new trial, which was denied, and from the judgment and the order overruling the motion for new trial the defendant appealed, and assigns as error—*First*, that the fourth finding of the court is unsupported by the evidence, and that the findings are against law.

We will consider these questions together. Whatever conflict there may seem to be in the adjudged cases in this country relating to the subject of water-rights, the law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld. The legislative will is clearly expressed in the following language: "As between appropriators, the one first in time is the first in right." Section 3159, Rev. St. Idaho. See, also, *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, Id. 670. It will be observed from the answer in this case that the defendant does not claim to have brought any water into Campbell creek from an independent source, by reason whereof he is entitled to the use of the channel of the stream to conduct the waters, thus brought in, to his branch, so as to invoke the principle enunciated in *Ditch Co. v. Vaughn*, 11 Cal. 143. Nor is it alleged that the defendant improved the channel and sources of sup-

ply, and thereby increased the flow of the waters in the stream, and that he is entitled to such increased flow. The allegation is "that in 1877 he went upon the stream now known as 'Campbell Creek,' and appropriated all the waters of said creek by constructing dams, cleaning and digging out springs, clearing brush, and diverting the whole of said waters from their natural channel, and using the same for the irrigation of agricultural crops." It is further alleged that, when the defendant entered upon this work, the whole of the stream was unappropriated; and hence the question of the first appropriation of the waters of the stream was a material issue, and the one upon which the decision of the case turned. The fourth finding was responsive to this issue, and there is evidence in the transcript to support it. It is true, the defendant testified that by his labor in cleaning out springs, etc., he increased the flow of the water in the stream, but there is no predicate in the pleadings for this evidence. Had the pleadings justified the introduction of this testimony, it could not have warranted a different judgment from the one rendered. It is considered that Campbell creek has had a well-defined channel for more than 20 years, and that it is a tributary of Devil creek. The court found, in substance, that the plaintiff and its predecessors in interest had used and enjoyed the whole of the waters of Devil creek for about 20 years last past for the irrigation of agricultural crops. Campbell creek, being a tributary of Devil creek, was appropriated long before the defendant attempted to exercise any control over it, and the court so finds. The testimony all tends to show that the springs cleaned out by the defendant were along and in the immediate vicinity of Campbell creek, and that these springs constituted the principal and immediate sources of supply for the stream. If persons can go upon the tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it. We are of opinion, therefore, that the findings are not obnoxious to the objec-

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tions urged against them. *Strait v. Brown*, 16 Nev. 317. We do not wish to be understood as deciding that one cannot bring water from other or foreign sources into a natural stream, whose waters have been appropriated, and use the channel of such stream to convey the water, thus brought and emptied in, to another point, to be there diverted and used. This question is not now before us, and it will be time to decide it when presented. See, as to this point, *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. Rep. 108; *Burnett v. Whitesides*, 15 Cal. 35. The judgment of the court below is affirmed.

HAYS, C. J., and BUCK, J., concurring.

CURTIS v. WALLING.

(February 20, 1888.)

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—JUDGMENT CONTRARY TO LAW.

1. Insufficiency of the evidence to justify the judgment, and objection to the judgment as being contrary to law, are not grounds upon which a motion for a new trial can be granted.

TRIAL—BY THE COURT—AMENDMENT OF ORDER DIRECTING ENTRY OF JUDGMENT.

2. It is not error for the court to amend its conclusions of law after they are filed, and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount, when the findings of fact warrant it.

PRACTICE IN CIVIL CASES—WAIVER OF NOTICE OF MOTION.

3. Voluntary appearance of attorney, and participation in the argument of a motion, waives notice of such a motion.

(*Syllabus by the Court.*)

Appeal from district court, Ada county.

Bill in equity by Edward L. Curtis against J. B. Walling for an accounting of the rents and profits of a certain water-ditch. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

D. P. B. Pride, for appellant.

After findings are filed, they cannot be reversed or different findings substituted. *Prince v. Lynch*, 38 Cal. 528; *Haynes*, New Trials & App. § 247.

After the report of the referee had been approved by the court, and judgment had been entered up accordingly, it was

too late to amend the findings. *Pico v. Sepulveda*, 66 Cal. 336, 5 Pac. Rep. 515.

A judgment which is not what it should have been can be reformed only in a direct proceeding brought for that purpose. *Hobbs v. Duff*, 43 Cal. 485.

When a judgment roll contains defective findings, a motion for a new trial is proper. *Knight v. Roche*, 56 Cal. 15; *Soto v. Irvine*, 60 Cal. 436; *Brown v. Burbank*, 59 Cal. 535; *Warner v. Holman*, 24 Cal. 228; *Lucas v. San Francisco*, 28 Cal. 591.

R. Z. Johnson and *Huston & Gray*, for respondent.

During the term of court the records and judgment are within the control of the court, and may be altered, revised, revoked, or amended. *Freem. Judgm.* §§ 69-71, 90, 93; *De Castro v. Richardson*, 25 Cal. 49; *Doss v. Tyack*, 14 How. 297; *Bell v. Thompson*, 19 Cal. 706; *Goddard v. Ordway*, 101 U. S. 752.

Amendments may be made at any time, the data being in the record to amend by. *Freem. Judgm.* § 72; *State v. Hurlstone*, 92 Mo. 327, 5 S. W. Rep. 38; *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. Rep. 116; *Beatty v. Dixon*, 56 Cal. 619; *Swain v. Naglee*, 19 Cal. 127; *Solomon v. Fuller*, 14 Nev. 63; *Sheldon v. Gunn*, 57 Cal. 40.

It was proper for the court to disregard the erroneous conclusions of the referee, and render the proper judgment in place of a judgment founded on the report. *Sartor v. Strassheim*, 8 Colo. 185, 6 Pac. Rep. 215; *Calderwood v. Pyser*, 31 Cal. 337; *State v. Hurlstone*, 92 Mo. 327, 5 S. W. Rep. 38; *Bixby v. Bent*, 59 Cal. 531.

A party who appears and contests a motion cannot object, on appeal, that no notice of motion was served on him. *Wade*, Notice, §§ 1203, 1189; *Reynolds v. Harris*, 14 Cal. 677; *Williams v. Miller*, 1 Wash. T. 88; *Ex parte Cottrell*, 59 Cal. 419.

BUCK, J. This is a suit in equity, brought by the plaintiff, claiming to be a co-tenant in a certain water ditch, and praying for an accounting by his co-tenant, the defendant. It was tried at the April term, 1887, of the district court in Ada county, Second judicial district, and a decree entered adjudging the plaintiff to be the owner of one-fifth of said ditch. At the same term Jonas W. Brown was appointed referee to take an accounting between the plaintiff and defendant, and report his findings of fact and conclusions

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of law. At the October term, 1887, the report of the referee was filed and approved, and it was ordered that judgment be entered in accordance therewith for the sum of \$1,127.45. On the same day, to-wit, October 1, 1887, the plaintiff made a motion that the judgment herein be set aside, and the report of the referee herein be amended by setting aside the conclusions of law, and render judgment upon the facts reported; and thereupon the court ordered that the conclusions of law herein, and the order for judgment heretofore entered, be set aside, and judgment be, and is hereby, entered upon the findings of fact of the referee for plaintiff, and against defendant, for the sum of \$1,382.22. The cause comes into this court on appeal from the said judgment, and from the order of the court overruling the motion for a new trial. The errors assigned in appellant's brief are: (1) That the court erred in overruling the motion for a new trial; (2) that it was error in the court, after having approved the report of the referee, and judgment having been entered up accordingly by the clerk for \$1,127.45 and costs, to set the same aside, and enter a new judgment for the sum of \$1,382.22 and costs; (3) that the court erred in setting aside said judgment, and ordering the report of the referee to be amended by setting aside the conclusions of law, inasmuch as there was no legal service of order upon defendant to show cause; (5) that the judgment is not supported by the findings. The fourth suggestion of error by appellant is that the proper relief of plaintiff from the judgment of \$1,127.45 which he claims was first entered was a motion for a new trial. This will be disposed of in the consideration of the other specifications of error.

The motion for a new trial was based on the following specifications of error: (1) That the evidence does not support the judgment; (2) that the judgment is contrary to law. Neither of these objections can be considered on a motion for a new trial, and the motion was properly overruled. Haynes, *New Trials & App.* § 96; *Martin v. Matfield*, 49 Cal. 42; *Code Civil Proc.* § 4439.

The second assignment of error seems at variance with the record in its recital of facts. The judgment roll shows but one judgment in the case. Prior to the entry of such judgment, the court had made an order that the report of the

referee be approved, and that judgment be entered in accordance therewith for the sum of \$1,127.45. This was simply a direction to the clerk to enter judgment, but did not constitute a judgment. Afterwards on the same day the court made a second order that the conclusions of law therein, and the order for judgment heretofore entered, be set aside, and that judgment be, and is hereby, entered upon the findings of fact of the referee for plaintiff, and against the defendant, for \$1,382.22. That part of appellant's argument upon the power of a court to amend its findings cannot be considered, for the reason that the record fails to show that the findings were amended after judgment was entered.

The point is made that the order setting aside the conclusions of law of the referee, and for entry of judgment first made, was error, because no notice of said motion was served upon the attorney of defendant. The record shows, as recited in such order, that the attorney for defendant appeared and contested such order. Such appearance, unless made specially, would constitute a waiver of notice, if one was necessary; and this objection is therefore without merit. *Wade*, *Notice*, §§ 1189-1204; *Reynolds v. Harris*, 14 Cal. 677.

The last objection urged by the appellant is that the judgment is not supported by the findings. The findings of fact of the referee, and conclusions of law, were adopted by the court. The order of the court was not that the findings of fact be changed, but that the order, so far as it affected the conclusions of law, be set aside. *Haynes*, *New Trials & App.* §§ 243-247; *Bixby v. Bent*, 59 Cal. 532. We think the court had authority to change its conclusions of law and that there was no error in doing so. The judgment is affirmed.

HAYS, C. J., and BRODERICK, J., concurring.

BACK v. SIERRA NEVADA CONSOL. MIN. Co.

(February 27, 1888.)

MINES AND MINING — LOCATION OF CLAIM — TUNNELING — ADVERSE CLAIMS — RIGHT TO FILE.

A tunnel located and run for the development of veins or lodes, pursuant to the provisions of section 2323, Rev. St. U. S., becomes a mining claim, and entitles the owner

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thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence such tunnel owner is entitled to proceed under the provisions of section 2326, Rev. St. U. S.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; before Justice BUCK.

Action by H. S. Back against the Sierra Nevada Consolidated Mining Company to determine the right of possession to a certain mining claim. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. B. Heyburn, for appellant.

Persons rightfully in possession of the surface are adverse claimants, and have an adverse claim, within the meaning of the law, and are entitled to be heard in the local courts before patent is issued. *Shafer v. Constans*, 1 Morr. Min. R. 149.

F. Ganahl and Albert Hogan, for respondent.

Since the passage of the act of 1872 the location of a mining claim, or rather of a lode mining claim, is the location of a piece of land with all the veins it may contain. *Gleeson v. Mining Co.*, 13 Nev. 442, and cases cited; 9 Morr. Min. R. tit. "Location," p. 429 et seq.

There is no provision of law for patenting tunnel locations, but such lodes as are discovered in running a tunnel may be patented with a full compliance with the law. *Week*, Min. p. 112, § 65.

HAYS, C. J. This is an appeal from the judgment of the district court of the First judicial district of Idaho territory, in and for Shoshone county, rendered on failure of plaintiff to amend the complaint after demurrer thereto was sustained, the plaintiff having elected to stand on the complaint as filed. The action is one brought in support of an adverse claim filed in the United States land-office against the issuance of a patent for the Sierra Nevada lode mining claim, said adverse claim being made on behalf of the Pilgrim tunnel location made under the provisions of section 2323, Rev. St. U. S. At the time of filing the adverse claim and the complaint in this action, the Sierra Nevada lode mining claim was owned by the respondent, a corporation, and the said tunnel location was owned by the appellant. During the period of publication of the application of the Sierra Nevada claim the ap-

pellant filed an adverse claim, accompanied by a map made from actual survey, showing the relative position of the said mining claim and tunnel location, in the United States land-office in the district in which said claims were situated, and in which application for patent of said claim was filed, and said adverse claim was duly allowed by the register of said land-office, and within 30 days after so filing said adverse claim appellant filed his complaint in an action brought in support thereof in the district court aforesaid. Respondent appeared and demurred to said complaint on the grounds hereinafter stated.

Appellant in his complaint alleges that one Philip Kirby, a citizen of the United States, on April 5, 1886, located a tunnel site under the provisions of section 2323, Rev. St. U. S., 3,000 feet in length, in the Yreka mining district, Shoshone county, Idaho territory, and that at the time of making such location he marked the line thereof by planting posts at every 100 feet along the said line, each post being plainly marked "Pilgrim Tunnel Line," and that he posted a notice of the location of said tunnel at the face thereof; that he had cut out trails to said tunnel, three miles in length, and had cut out said tunnel six feet wide and six feet high, and run the same four feet under cover, prior to said location and during said month of April; that on April 12, 1886, said Kirby appeared before the recorder of the mining district in which said tunnel was located, and made the affidavit required by the regulation of the general land-office, and the same was duly attached to a copy of the notice of location posted at the face of said tunnel, and said copy of notice and affidavit were on said 12th day of April, 1886, filed in the office of said recorder, and have there remained; and said notice and affidavit were afterwards, on the 16th day of April, 1886, recorded in the office of the recorder of Shoshone county; that said Kirby and his grantee, the plaintiff, have continuously and diligently prosecuted the work of running said tunnel along the line as marked out ever since said 5th day of April, 1886; that at the time of making the location of said tunnel there were no known ledges existing or cropping along the course of said tunnel location as the same was located and marked on the ground; nor were there any known ledges that crossed said tunnel location in their course or trend; nor were there any ledges previously known to exist, or which

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crossed said tunnel location at the time of its location; that after said tunnel had been located as aforesaid, to-wit, on April 6, 1886, defendant's grantors entered upon the line of said tunnel location, at a point where post No. 9 on said line was planted, and with full knowledge of the existence of said post, and the location of said tunnel commenced to prospect for minerals, and in so prospecting sunk a shaft through the loose surface and slide earth and rock to a depth of 12 feet before entering upon any solid formation or rock in place; that at or near the place where the shaft was so sunk there was no lode or ledge of valuable mineral-bearing rock previously known to exist, nor did any such crop or show upon the surface of the ground; that at or about said depth of 12 feet in said shaft a ledge of valuable mineral-bearing rock was discovered by said grantors of defendant; that said discovery was made on and within the line of the said tunnel location while the same was being actively occupied and diligently worked; that said lode or ledge is, and was at the time of striking the same in said shaft, a blind lead or lode on the line of said tunnel; that the tunnel, on being continued in its present course on the located line thereof, would cut and intersect the said lode on its dip within the length and location of said tunnel; that said grantors of defendant located and recorded a mining claim based upon their said discovery, and called said claim the "Sierra Nevada;" that defendant, claiming to be the grantee of said locators, did on May 23, 1887, make application for United States patent for said claim, and filed its application for patent in the United States land-office at Cœur d'Alene, Idaho, and afterwards caused notice of said application to be published, as required by law, and during period of said publication the plaintiff filed a protest and adverse claim in said land-office against the issuance of a patent for said claim on behalf of said tunnel location, and within 30 days after filing such protest and adverse claim commenced the action in the district court of the county in which said claim and tunnel location is situated; that the plaintiff was and is by virtue of certain conveyances duly made the grantee of Philip Kirby, the locator of said tunnel location; that he is now, and intends to continue, diligently running said tunnel along the line of said tunnel site, and in the direction of said lode so discovered and called the "Sierra Nevada," for

the purpose of intersecting and cutting the same, and that he intends, when the same shall have been so intersected, to locate the same according to the provisions of section 2323, Rev. St. U. S.; that the ground upon which the discovery of the said lode was made by defendant's grantors was not vacant and unoccupied public mineral lands of the United States at the time of such discovery and location, and that such location was void; and prays the court to adjudge that the location of the Sierra Nevada mining claim was null and void. To which complaint the respondent demurred, and alleged as grounds of demurrer: "That the plaintiff herein has not legal capacity to sue in this action; that it does not appear from said complaint that the plaintiff has any right, interest, or adverse claim upon which he can base an action against the Sierra Nevada Mining Company, by reason of its application for a patent herein; that he is not the owner of any lode, vein, or surface ground, by location or otherwise, authorizing him to file any adverse claim herein, or to maintain any action upon any pretended adverse claim." "Second. That the said complaint does not state facts sufficient to constitute a cause of action." It is contended that the court erred in sustaining the demurrer, and a reversal of the judgment entered therein is now asked.

We have the light of but few adjudicated cases to aid us in an investigation of this subject. We are satisfied, however, from an examination of the provisions of section 2323, Rev. St. U. S., that it was the intention of congress that rights might be secured to all such as should run tunnels for the development of a vein or lode pursuant to its provisions, and to aid in securing such rights it was there enacted that "locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." It seems evident from this enactment that congress intended to withdraw from exploration for lodes not appearing on the surface so much of the public domain as lay upon the line of such tunnel and to reserve such for the benefit of the proprietor of the tunnel so long as he prosecuted work thereon with reasonable diligence, and to give to him the right of possession for this purpose. True, the act does not so state in direct terms, but this is the effect of its

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provisions, and any other construction would but imperfectly protect the rights of the proprietor of the tunnel. The rights of the tunnel locator being created by statutory enactment, the courts should be therefore clothed with power to protect such rights, and we are unable to see how they can be fully protected but by permitting such locator to avail himself of the provisions of section 2326. Doubtless it was the legislative will that he should have such privilege. Such being the case, we must hold that a tunnel location constitutes a mining claim within the meaning of the statute, as was held by Commissioner Kirkwood in his opinion of December 12, 1881, (Dec. Dep. Int. 594,) and that it is such a claim as may be asserted and protected under the provisions of section 2326, Rev. St. U. S., and the act amendatory thereof. While this appellant would have no right under his complaint to have a patent issued to him since he does not claim to have discovered any vein or lode, yet we think he has the right of possession for prospecting purposes to the area in dispute, and to show that respondent's location was made upon the line of his tunnel. The act of March 3, 1881, provides what shall be done when neither party shows title to the ground in conflict.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings according to law.

BUCK and BRODERICK, JJ., concur.

TERRITORY *v.* EVANS.

(February 27, 1888.)

INDICTMENT AND INFORMATION — DESCRIPTION OF OFFENSE—CONSTRUCTION.

1. In determining the offense charged in an indictment, all parts of the instrument will be considered together, and if, from the whole, it appears that a crime is sufficiently alleged, it will be sustained.

CRIMINAL LAW—TRIAL—INSTRUCTIONS.

2. In criminal prosecutions, as in other actions, instructions to the jury must be based upon some evidence in the case. If they do not, when requested they should be refused.

HOMICIDE—MURDER IN SECOND DEGREE—TRIAL—INSTRUCTIONS.

3. An instruction to the jury upon which defendant is convicted of murder in the second degree, though objectionable as defining murder in the first degree, is sufficient to sustain the verdict as found.

SAME—APPEAL—REVIEW—OBJECTIONS TO INSTRUCTIONS.

4. In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and, if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment.

SAME—PRESUMPTIONS.

5. Presumptions are in favor of the decision of the court, and, where a reversal of a judgment is sought on the ground of error, the rulings of the court will be sustained, unless sufficient facts appear in the record to show that error was committed.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; before Chief Justice HAYS.

Charles Evans was convicted of murder in the second degree, and appeals. Affirmed.

Charles A. Wood, for appellant.

When a known felony is attempted upon the person, be it to rob or kill, the party assaulted may repel force by force, and any person present may interpose to prevent mischief, and, if death ensues, the party so interfering will be justified. In such cases nature and social duty co-operate. *Com. v. Selfridge*, Horr. & T. Cas. 30; 1 Bish. Crim. Law. § 851; *Pond v. People*, Horr. & T. Cas. 814; *Dill v. State*, Horr. & T. Cas. 738; Crimes and Punishment Act, §§ 25, 30.

It is not necessary that the danger should be actual; simply apparent. 1 Bish. Crim. Law, 305, and notes; Archb. Crim. Law, p. 221; 1 Whart. Crim. Law, pp. 405, 488, 489; Crimes and Punishment Act, § 26; *Maher v. People*, Horr. & T. Cas. 290.

Whatever a man may lawfully do in defending himself he may lawfully do in defending another. *State v. Westfall*, 3 Amer. Crim. Rep. 343.

R. Z. Johnson, Atty. Gen., and *James H. Hawley*, for the Territory.

No person, even if an officer, is justified in taking life, unless the absolute necessity exists. No person can lawfully take life to prevent the commission of a misdemeanor, or to effect the capture or prevent the escape of one who has committed a misdemeanor. 2 Bish. Crim. Law, 630 et seq.; 2 Whart. Crim. Law, 1031.

If a person interferes in an affray with a view to keep the peace, and not to take any particular one's part, he may, if absolutely necessary, kill, in order to preserve his own life or that of a party thereto; but if

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he runs in, and takes the part of one party to the affray, it will be manslaughter. 1 Russ. Crimes, 898; 2 Whart. Crim. Law, 1039; 1 East, P. C. 291; 1 Hawk. P. C. 98.

And if he interferes, and kills with malice, it will be murder. Whart. Hom. 444.

Mere threats or abusive language will not justify an interference, nor, in case of death, will they reduce the crime from murder to manslaughter. *Johnson v. State*, 27 Tex. 758; *Stoffer v. State*, Horr. & T. Cas. 232.

If a defendant justifies on the ground that the act was necessarily committed in lawfully preserving the peace, as where he interferes to prevent A. from taking the life of B., and to that end kills A., he must show, to establish a defense, not that he had reasonable ground to believe that the act was necessary, but that it was actually necessary, and that he had no other way to prevent the execution of the felony. *People v. Cole*, 4 Parker, Crim. R. 35.

Where the evidence shows the accused was not forced to take the life of deceased to save his own life or limb from serious peril, an instruction which ignores the excuse of self-defense is not erroneous. *Taylor v. State*, 48 Ala. 180.

When there is no evidence of justification of a homicide, it is not error to tell the jury that the law of justification is not applicable. *Parker v. State*, 31 Tex. 132.

BUCK, J. The defendant was indicted, tried and convicted of murder in the second degree, at the April term, 1888, of the district court, Third judicial district, in the county of Lemhi, and comes into this court on an appeal from the judgment.

The first point made by appellant in his brief is that the indictment does not allege the crime of murder. The charging part of the indictment is as follows: "That the said Charles Evans, on the 11th day of November, A. D. 1886, did unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, in and upon one Jas. McKee, make an assault, and that the said Chas. Evans a certain pistol then and there loaded with powder and leaden bullets, which said pistol he, the said Chas. Evans, in his hands then and there had and held at and against the said Jas. McKee, then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did shoot off and discharge, and that the said Charles Evans, with the leaden bullets aforesaid, by means

of shooting off and discharging the said pistol so loaded, to, at, and against the said Jas. McKee, as aforesaid, did then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, strike, penetrate, and wound the said Jas. McKee, giving him, the said Jas. McKee, as aforesaid, one mortal wound, of which mortal wound the said Jas. McKee did die. And so the jurors aforesaid, upon their oaths aforesaid, do charge and say that the said Chas. Evans the said Jas. McKee, in manner and form aforesaid, then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did kill and murder," etc. The felonious and malicious intent herein charged in terms qualifies and characterizes the striking, penetrating, and wounding of the deceased, McKee, and does not in terms charge that the wound was intentionally and feloniously mortal.

The appellant in his brief urges the proposition that "under our statute there must be an intention to kill, or the crime will not be murder." Under our Penal Code, as it existed in April, 1887, the time when the indictment was found, (section 15, Rev. Laws, 323,) murder was the unlawful killing of a human being with malice aforethought, either express or implied. Section 21 of the same statute, page 324, provides also: "That involuntary manslaughter shall consist in the killing of a human being without any intent to do so," etc., "provided, that when such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." The indictment in the case at bar charges the wounding, striking, and penetrating of James McKee with leaden bullets, and with malice aforethought, of which wound the said McKee died. The wounding is charged to be with felonious intent, and, if so, the killing, under the statute referred to, is murder, even without the intent to kill. It is, however, urged by appellant that the indictment does not charge murder. The books contain various statements as to how an indictment should be drawn, and different authors divide it into different parts. Our statute (section 7632) defines it to be: "An accusation in writing presented by a grand jury to a competent court, charging

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a person with a public offense," and provides that it must contain: "*First*, the title of the action,—specifying the name of the court and the names of the parties; and, *second*, a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." If this is done, the defendant cannot complain. The order in which it is done is not one of the essential elements of the indictment. It is claimed by appellant that the averments in what is often designated as the "conclusions" of the indictment cannot be construed in connection with the allegations in the charging part. That portion of the indictment known as the "conclusions" is not necessary, and is placed there or not, as the taste of the pleader may dictate. We think when it is used it may reasonably be construed with the other portions of the indictment. This, we think, is the general understanding of grand juries. The indictment, construed together, charges the crime of murder in the second degree, under the adjudications of this court in *People v. O'Callaghan*, ante, 143, 9 Pac. Rep. 414; and we see no reason for changing that decision.

The other specifications of error urged by appellant are to the instructions of the court given, and to those requested and refused. There were seven instructions asked by defendant and refused, to which refusal exceptions were taken. Of these the fourth is disposed of by our ruling on the sufficiency of the indictment. The third, sixth, and seventh are based upon threats claimed to have been known to defendant, and to knowledge of the character of the parties Lyon and McKee, and to a certain assault alleged to have been made upon the witness Lyon upon a trial not connected with the assault and homicide set out in the indictment. The bill of exceptions contains no evidence whatever as to these threats, or the character of the parties Lyon or McKee, or the assault upon the trial. It does, however, state that it contains so much of the evidence as is necessary to explain the rulings and decisions of the court in the trial of the case. It is well established that the instructions should be based upon the evidence in the case, and the presumption is in favor of the ruling of the court. There appears in the record no evidence to justify these instructions, and we do not consider it necessary to consider them, for, if correct as

abstract principles of law, they do not appear by the record to be founded on any evidence in the case. *People v. Cochran*, 61 Cal. 548; *People v. Smith*, 59 Cal. 365; *People v. Dick*, 32 Cal. 213.

The first instruction asked by appellant is as follows: "If the jury believe from the evidence that on the occasion that James McKee received his mortal wound the defendant had reason to believe, and did believe, that McKee and Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that there was no other means to prevent it, he would be justified in killing McKee, even if it should be shown that he was mistaken in his belief." The second instruction asked by defendant and refused is as follows: "If the jury believe from the evidence that on the occasion that Jas. McKee received his mortal wound, the defendant had reason to believe, and did believe, that McKee and Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that he, the said defendant, was present and had the means and ability to prevent the same, he would have been criminally liable if he had not used every necessary means in his power to protect the life and person of the said Caleb Davis." These two instructions may properly be considered together. There is no pretense that the defendant was a peace officer in the discharge of his official duty at the time of the homicide. While it is stated in some authorities that a private citizen may, under some circumstances, interfere to prevent a felony, and if, in so doing, he kill the wrong-doer, the law will justify the homicide, (1 Archb. Crim. Pl. 805; Whart. Hom. § 533; 2 Whart. Crim. Law, 1039; 1 Russ. Crimes. *670; 1 East, P. C. 58; 1 Hale, P. C. 484,) yet it is argued that the one whom he seeks to protect must be an innocent party. A private citizen cannot thus interfere between two persons both of whom are in the wrong, and slay one to save the other. The instructions should have been so drawn as to submit to the jury not merely the question of the necessity of killing McKee, but also as to whether Davis himself was an innocent party in the affray, and whether he had done all he could to avoid the encounter. As submitted to the court, the instructions were likely to limit the inquiry of the jury simply to the necessity of killing McKee to save Davis, while, had the other questions been submitted to the jury, they might have found

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that Davis was the wrong-doer, and that McKee should have been protected instead of Davis. We think these instructions rightly refused.

Appellant excepts to the first, fourth, and seventh instructions requested by the prosecution. The first is a quotation from our statute defining murder and manslaughter, with instruction to the jury to find the defendant guilty of one of those two offenses, or not guilty. We think it justified by the evidence. The fourth instruction is as follows: "The jury are instructed that, while the law requires, in order to constitute murder, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent, deliberation, or premeditation shall exist for any length of time before the crime is committed. It is sufficient if there was a design or determination to kill distinctly formed in the mind at any moment before or at the time the pistol was fired; and in this case, if the jury believe from the evidence beyond a reasonable doubt that the defendant feloniously shot and killed the deceased, as charged in the indictment, and that before or at the time the pistol shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of deceased, and that the shot was fired in pursuance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the second degree." The seventh instruction is as follows: "The jury are further instructed that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill will towards the person shot, yet he is presumed to have had such malice at the time of shooting, and the person shooting will be guilty of murder." The seventh instruction quoted is supported by Instructions to Jurors, by Sackett, (2d Ed., p. 694, § 37,) and by *Johnson v. Com.*, 24 Pa. St. 387. It has been criticised as not containing the proper definition of deliberation and premeditation. In this case, however, the court instructed the jury to find only for murder in the second degree. The instruction undoubtedly at least defines malice aforethought, and would sustain a verdict of murder in the second degree. We are therefore of

the opinion that, as applied to the case at bar, the defendant has no cause of complaint. *Gardenheir v. State*, 6 Tex. 348; *People v. Nichol*, 34 Cal. 211; *People v. Ah Kong*, 49 Cal. 6; *People v. Siloera*, 59 Cal. 592; *People v. Messersmith*, 61 Cal. 246. The seventh instruction is sustained by Instructions to Juries, by Sackett, (2d Ed., p. 694, § 37.) It is criticised by appellant on the ground that it does not except justifiable or excusable homicide. This instruction must be taken in connection with the others given, and although it might not contain the precise accuracy which the most critical pleader might desire, yet, if taken as a whole, the charge is substantially correct, and could not mislead the jury. The judgment will not be disturbed. *People v. Cleveland*, 49 Cal. 577; *People v. Clementshaw*, 59 Cal. 385; *People v. Salorse*, 62 Cal. 139; *People v. Ye Park*, Id. 204.

The instructions carefully explain to the jury the statute affecting the rights of defendant, and the court sees no reasonable ground of complaint. Judgment affirmed.

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(February 27, 1888.)

CRIMINAL LAW—PRINCIPAL AND ACCESSORY.

1. By our statute, all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, are treated as principals, and should be prosecuted and punished as such; yet, if one who is in fact an accessory before the fact is indicted as such, this is not a defect of which the accused will be heard to complain.

SAME—INDICTMENT—JOINDER OF COUNTS.

2. Under our practice, the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. *Held*, that the indictment charging one defendant as principal, and the other as accessory before the fact, charges but one offense.

SAME—NEW TRIAL—ABSENCE OF WITNESSES—ADMITTING AFFIDAVIT AS TO TESTIMONY.

3. Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witness, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents; and it is not error for the court, after such admission, to deny the continuance.

*Territory v. Guthrie.***SAME — UNCERTAINTY OF SENTENCE — REVIEW ON APPEAL.**

4. When the indictment is good, and no error appearing in the trial, but the sentence is void for uncertainty, the appellate court may remand the case to the court below, with direction to enter a proper judgment upon the verdict.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; before Justice BUCK.

Terrence B. Guthrie was convicted of assault with intent to commit murder, and appeals. Judgment vacated, and case remanded, with directions.

Frank Ganahl, James H. Hawley, and Albert Hogan, for appellant.

It is competent to show bias and prejudice on the part of a witness that the jury may scrutinize and perhaps discredit his testimony. *Rosc. Crim. Ev.* 181, 182; 1 *Greenl. Ev.* 450; *State v. Dee*, 14 *Minn.* 35, (Gil. 27;) *State v. Tosney*, 26 *Minn.* 262, 3 *N. W. Rep.* 345.

Where an accusation against a person includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the inferior one; and hence it is within the province of the jury to convict of an assault only, although the indictment charges an assault with intent to murder, or an assault with a deadly weapon. 1 *Chit. Crim. Law*, 638; *Rev. St.* § 7859; *Stewart v. State*, 5 *Ohio*, 241; *Givens v. State*, 6 *Tex.* 343; *Gardenheir v. State*, *Id.* 348; 2 *Archb. Crim. Pr.* 74, 75; 2 *Whart. Crim. Law*, 1280; 1 *Whart. Crim. Law*, 385 et seq.; *Id.* 565.

The judgment is a fine or imprisonment, not a fine and imprisonment; and for that reason is void as to the imprisonment. *Ex parte Baldwin*, 60 *Cal.* 432; *Ex parte Ah Cha*, 40 *Cal.* 427.

The judgment in case a default is made in the payment of a fine imposed must direct imprisonment for payment of fine until paid, at a certain rate per day. *Ex parte Ellis*, 54 *Cal.* 264; *Ex parte Chin Yan*, 60 *Cal.* 78.

A party illegally arrested has the right to resist, and, if death ensues, he is at most guilty of manslaughter. *Noles v. State*, *Hor. & T. Cas.* 697 et seq.

Richard Z. Johnson, Atty. Gen., for the Territory.

Granting and refusing continuances rests very much in the discretion of the court below, and it is only in cases where that discretion has been abused that this court

will review the action of the lower court. *People v. Gaunt*, 33 *Cal.* 157, 158; *People v. Walter*, 1 *Idaho*, 386.

Though the jury may convict of the lesser offense, the court is not bound to instruct them as to the lesser offense, or that they may convict of the lesser offense, when there is no evidence to support such a verdict. *People v. Byrnes*, 30 *Cal.* 206; *People v. Ah Kong*, 49 *Cal.* 6; *People v. Estrado*, *Id.* 171; *People v. Welch*, *Id.* 174.

No instruction should be given which is not logically deducible from the evidence. *People v. Sanchez*, 24 *Cal.* 28; *People v. Best*, 39 *Cal.* 690; *People v. Atherton*, 51 *Cal.* 498.

The presumption that the officer did his duty in making the arrest is no more in conflict with the presumption of innocence to which a defendant is entitled on his trial than is the presumption of the regularity of judicial proceedings, or of malice, or from guilty possession, or from motive, or from flight, or any one of the thousand other presumptions that may confront the accused. *Whart. Crim. Ev.* §§ 833, 835, 836; *People v. Smith*, 59 *Cal.* 365; *State v. Howard*, 10 *Iowa*, 101; *Com. v. Fowler*, 10 *Mass.* 293; 3 *Russ. Crimes*, 220, and note; 1 *Bish. Crim. Proc.* (3d Ed.) § 1131; *Lawson, Pres. Ev.* 53.

The extent of the imprisonment is fixed and declared by the statute, and, when the defendant has been imprisoned the required length of time, he is entitled to be discharged. *Jackson v. Boyd*, 53 *Iowa*, 536, 5 *N. W. Rep.* 734; 4 *Crim. Law Mag.* p. 841, § 34.

BRODERICK, J. At the October, 1887, term of the district court for Shoshone county, Mathew Guthrie and Terrence B. Guthrie were jointly indicted for an assault upon Thomas F. Handly, with intent to commit murder. Separate motions were interposed to set aside the indictment on account of some alleged irregularity in summoning and impaneling the grand jury. These motions were overruled, and the defendants pleaded not guilty. Separate trials were ordered. The defendants then applied for a change of venue, which motion was granted, and the cases were transferred to Nez Perces county for trial. At the December, 1887, term of Nez Perces county, a trial was had, and Terrence B. Guthrie was found guilty "of an assault with a deadly weapon likely to produce great bodily injury." Motions were made for a new trial, and

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for an arrest of judgment, and were by the court overruled, and the following judgment was rendered: "It is therefore considered, and the judgment of the court is declared to be, that you, Terrence B. Guthrie, pay a fine of one thousand dollars, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this court to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and upon the payment of said fine you be released from said custody and confinement." From this judgment, and the order denying a new trial, the defendant Terrence B. Guthrie appealed to this court. The record is voluminous, and counsel for appellant have specified 30 alleged errors in the transcript. From an examination of the record, we are satisfied many of these assignments are not of sufficient interest to justify any further consideration of them.

It is claimed, first, that the indictment is not sufficient to sustain a conviction against the appellant, that the facts stated therein do not constitute a public offense, and that the motion in arrest of judgment should have been sustained. The defendants were indicted jointly; Mathew being charged with an assault with a pistol, etc., with intent to murder, and Terrence B., the appellant, being charged as accessory. Section 7697, Rev. St., abolishes all distinction between an accessory before the fact and a principal, and provides that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." The contention is that, by reason of this statute, one cannot be indicted as an accessory. We cannot agree with this view. The last clause of the statute quoted says: "No other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." It is true the statute makes an accessory before the fact a principal,

and it is wholly unnecessary to charge the accused in any other form than as principal; but, if the grand jury does charge one who is in fact an accessory before the fact as such, the effect is simply to inform him more clearly of what he must defend against, and therefore it is not a defect of which he can be heard to complain. The supreme court must give judgment without regard to technical errors or defects which do not affect substantial rights. Section 8070, Rev. St. We do not mean to assert that this is the better course, but only that the defendant was not prejudiced by this form of charging the offense. Indeed, we think, when the statute clearly provides what shall be a sufficient pleading, that it is always better that the statute should be closely followed.

It was said, on the argument, that the indictment charges two offenses. We do not think it is open to this objection. It is true, the statute provides that the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. Section 7681, Rev. St. The rule established by this statute is not violated by setting forth the same offense in different forms; and this is all that is herein done.

The case was set for trial on the 15th of December, and, when called, the defendants, by their counsel, moved for a postponement of the trial, on the ground of absent witnesses, and supported the motion by their joint affidavit. The motion was overruled, and an exception taken. The record shows, however, that an attachment for the absent witnesses was at once issued, and that the appellant was not put upon his trial until December 21st. The motion for postponement was then renewed, upon the affidavit theretofore presented, but no further showing was made or offered. The prosecution admitted that one of the absent witnesses would, if present, testify to the matters and facts as stated in the affidavit, and thereupon the court overruled the motion. It is conceded that the testimony of this witness was material to the defense. An application for a continuance is addressed to the sound judicial discretion of the court, and appellate courts have uniformly refused to disturb a ruling on such questions, unless it appears that there was an abuse of discretion. In this case, after looking into the whole record, we are satisfied there was not a

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sufficient showing of diligence on the part of the defendant, and hence there was no abuse of discretion in overruling his motion. *People v. Walter*, 1 Idaho, 386. But it is urged, on behalf of appellant, that, pending an application for a continuance, the admission by the prosecution in a criminal case that an absent witness would testify to certain facts if he were present, is an admission that the facts set forth in the affidavit used in support of the motion are true; and we are referred to *People v. Diaz*, 6 Cal. 249, as supporting this rule. Our statute makes the rule of evidence in civil actions applicable to criminal actions, except as otherwise provided in the Code. Section 7864, Rev. St. Section 4372, Rev. St., establishes the rule for a continuance upon the ground of the absence of evidence, and, among other things, says: "The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given, on the trial, or offered and overruled as improper, the trial must not be postponed." We think it would be a strained construction of this statute to hold that when, under it, a party makes the admission, to avoid the expense and delay incident to a continuance, he thereby admits the absolute truth of the evidence set out in the affidavit. Such a construction was certainly not in the contemplation of the legislature, nor do we think it supported by any well-considered authority. We think the correct rule is that, when the admission is made, the affidavit becomes evidence, but not conclusive of its contents. *Whart. Crim. Pl. § 645*; *State v. Mooney*, 10 Iowa, 506; *King v. Com.*, (Ky.) 3 S. W. Rep. 430; *State v. Jewell*, 90 Mo. 467, 3 S. W. Rep. 77, 79; *Boggs v. Merced Co.*, 14 Cal. 358.

It is contended that the court erred in giving to the jury, of its own motion, certain instructions, and also in refusing certain others asked by the defendant. The record shows a number of instructions refused, but the charge given was full and comprehensive, and was warranted by the evidence in the case. We have failed to find anything in the charge that was prejudicial to the substantial rights of the defendant, or that will warrant a reversal of the judgment. Objection is here taken to some remarks of the

judge addressed to counsel while refusing instructions presented on behalf of the defendant; but the record does not show that the words were spoken in the presence or hearing of the jury, nor were the remarks excepted to at the time they were made.

It is further contended that the judgment as pronounced is void. The conviction was had under the following statute: "Sec. 6732. Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the territorial prison not exceeding two years, or by fine not exceeding five thousand dollars, or by both." Several objections are urged against the judgment, but the one most strongly insisted upon is that, when the court imposes the fine, the offense must thereafter be deemed a misdemeanor, and that the defendant could not be imprisoned in the territorial prison by reason of the non-payment of the fine. The following statute is cited: "Sec. 6311. A felony is a crime which is punishable with death, or by imprisonment in the territorial prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the territorial prison is also punishable by fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor, for all purposes, after a judgment imposing a punishment other than imprisonment in the territorial prison." It seems to us that the real objection to this judgment is its uncertainty. The language is: "That you, Terrence B. Guthrie, pay a fine of one thousand dollars, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this court-room to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and that, upon the payment of said fine, you be released from said custody and confinement." Section 7994 provides that, "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day

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for every two dollars of the fine." See, also, section 7238, Rev. St. We are not satisfied that in a case where the defendant is tried and found guilty of a felony, and wherein he may be fined or imprisoned, in the discretion of the court, he may not be imprisoned in the territorial prison in default of payment of the fine. We find nothing in the statute that forbids it in such case. *People v. War*, 20 Cal. 117.

We find no error in the record except that the judgment pronounced is not sufficiently definite, and for this reason the judgment is vacated, and the case is hereby remanded to the court below, not for a new trial, but with direction to pronounce such judgment upon the verdict as may seem proper. *Reynolds v. U. S.*, 98 U. S. 168; *People v. Cozad*, 1 Idaho, 167; *People v. O'Callaghan*, ante, 143, 9 Pac. Rep. 414. It is so ordered.

HAYS, C. J., and BUCK, J., concurring.

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RY. & NAV. Co. *et al.*

(March 6, 1888.)

INJUNCTION — PRELIMINARY — GRANTING — REVIEW
ON APPEAL.

The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same, where there is no abuse of discretion.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; before Justice BUCK.

Application by the Washington & Idaho Railroad Company for an injunction to restrain the Cœur d'Alene Railway & Navigation Company and another from constructing a railroad along plaintiff's right of way. From an order refusing to grant a preliminary writ, plaintiff appeals. Affirmed.

W. B. Heyburn and J. T. Morgan, for appellant.

The lands or right of way of one railroad company cannot be taken as a right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy. *Cake v. Railroad Co.*, 87 Pa. St. 307; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *In re City of Buffalo*, 68 N. Y. 167; *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 248; *In re New York & B. B. R. Co.*, 20

Hub, 201; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561; *Boston & Maine R. Co. v. Lowell & Lawrence Co.*, 124 Mass. 368.

Laying tracks within the company's location is a "taking," within the statutes. *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561.

Courts of equity will interfere to prevent interference with corporate franchise or private property, where such interference is in the nature of a nuisance, or amounts to an exclusion, and when the intruder has no title or color of title. *Commonwealth v. Pittsburgh & C. R. Co.*, 24 Pa. St. 159; *Bigelow v. Bridge Co.*, 14 Conn. 565; *O'Brien v. Railroad Co.*, 17 Conn. 72; *Cory v. Railroad Co.*, 3 Hare, 593; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554; *Bell v. Railroad Co.*, 25 Pa. St. 161.

Where a party claims a franchise under a statute, and is in the possession and enjoyment of such franchise, equity will interpose to protect and secure the enjoyment of such franchise, because it affords the only plain and adequate remedy. *Turnpike Road v. Miller*, 5 Johns Ch. 101; *Boston Water Power Co. v. Boston & W. R. Corp.*, 16 Pick. 525.

Richard Z. Johnson, for respondents.

The granting or refusing the preliminary injunction rests in the sound discretion of the court. *Hicks v. Michael*, 15 Cal. 108, 117; *Slade v. Sullivan*, 17 Cal. 102, 106; *Goldstein v. Kelly*, 51 Cal. 301.

And this discretion should always be exercised in favor of the party most liable to be injured. *Hicks v. Compton*, 18 Cal. 210; 1 High, Inj. §§ 598, 601; 3 Wait, Act. & Def. pp. 683, 688; 4 Field, Lawy. Briefs, §§ 253, 254.

When an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to any one, not even to the person asking such relief, it will not be granted. 1 High, Inj. § 598; 3 Wait, Act. & Def. p. 723.

The supreme court will not interfere with the action of the court below, unless there has been an abuse of discretion. *Parrott v. Floyd*, 54 Cal. 534; *Efford v. Railroad Co.*, 52 Cal. 277-279; *Coolot v. Railroad Co.*, Id. 65; *Patterson v. Supervisors*, 50 Cal. 344; *Payne v. McKinley*, 54 Cal. 532; *White v. Nunan*, 60 Cal. 406.

Equity will not restrain trespass, unless injury is irreparable, and cannot be com-

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pensated in damages. *Waldron v. Marsh*, 5 Cal. 119; *Schurmeier v. Railroad Co.*, 8 Minn. 113, (Gil. 88;); *Burnett v. Whitesides*, 13 Cal. 156; *Tomlinson v. Rubio*, 16 Cal. 202, 206; *Tevis v. Ellis*, 25 Cal. 519; *Leach v. Day*, 27 Cal. 643, 646; *Mechanics' Foundry v. Ryall*, 62 Cal. 418; *Roebeling v. Bank*, 30 Fed. Rep. 744, 745.

Nor where there is an adequate remedy at law. *Schurmeier v. Railroad Co.*, 8 Minn. 113, (Gil. 88;); *Richards v. Kirkpatrick*, 53 Cal. 433; *Canal Co. v. Kidd*, 37 Cal. 307; *Rahm v. Minis*, 40 Cal. 422; *San Francisco v. Beideman*, 17 Cal. 464.

HAYS, C. J. This action was brought to obtain a temporary and also a perpetual injunction. At the hearing of the application for a preliminary injunction the court refused to grant the writ upon the showing then made, or at that time, but postponed the hearing of such application to a future time. From such order an appeal has been taken to this court.

The granting or refusing of a temporary injunction rests in the sound discretion of the court. *Hicks v. Michael*, 15 Cal. 108; *Slade v. Sullivan*, 17 Cal. 103; *Goldstein v. Kelly*, 51 Cal. 301. This court will not disturb the action of a trial court unless there has been a clear abuse of such discretion. 2 High, Inj. § 1696; *Payne v. McKinley*, 54 Cal. 532; *Parrott v. Floyd*, Id. 534; *Patterson v. Board*, 50 Cal. 344; *White v. Nunan*, 60 Cal. 406. After a careful examination of this case, we think the rights of the appellant may be fully protected upon the final hearing; or, if deemed necessary, upon a future hearing of the application for a temporary injunction, as provided for in the order herein appealed from. We are therefore not prepared to say that there has been such an abuse of discretion as would warrant us in interfering.

The order of the court below is affirmed, and the case remanded for further proceedings according to law.

BUCK and BRODERICK, JJ., concur.

INNIS v. BOLTON *et al.*

(March 6, 1888.)

ELECTIONS AND VOTERS—QUALIFICATIONS—TERRITORIES—LEGISLATIVE POWERS.

1. The legislative assembly of a territory, having authority concurrent with congress, may legislate upon the subject of suffrage, ob-

serving, of course, the constitutional limitations, and also the restrictions imposed by congress.

SAME—TEST OATH—CONSTITUTIONAL LAW.

2. The act of the legislative assembly of the territory of Idaho, passed at its thirteenth session, creating additional disqualifications for voting, and prescribing a test oath as a mode of ascertaining the qualifications of persons offering to vote, is not in violation of the constitution of the United States.

SAME—RIGHT OF SUFFRAGE IN TERRITORIES.

3. The right of suffrage is not a natural right, nor an unqualified personal right, but in a territory is a right conferred by law, which may be abridged or withdrawn by the authority that conferred it, subject to constitutional limitations and restrictions.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county; before Justice HAYS.

Action by James B. Innis against Robert Bolton and others, judges of election, for damages for wrongfully depriving plaintiff of his elective franchise. From a judgment awarding defendants their costs, entered upon an order dismissing the complaint, plaintiff appeals. Affirmed.

Richard Z. Johnson, for appellant.

Ensign & Stull, for respondents.

There is nothing in the first amendment to the federal constitution which can give protection to those who practice what is forbidden by the statutes as criminal, on the pretense that their religion requires or sanctions it. *Reynolds v. U. S.*, 98 U.S. 145.

BRODERICK, J. This action was commenced in the district court in and for Bear Lake county. The complaint alleges "that, at a special election duly held in and for said county of Bear Lake, on the 20th day of November, 1886, for the election of a county surveyor, in and for said county, said defendants were the judges of election for Paris election precinct in said county, and being duly appointed and qualified as such judges, and acting as such, the defendants had the polls open for said election at the First ward school-house, in said Paris precinct, between the hours of 8 o'clock in the forenoon and 7 o'clock in the evening of said day. That this plaintiff then was a male inhabitant of said county and territory, over the age of 21 years, and a native-born citizen of the United States, and then resided, and, for the space of more than four months and for more than twenty years immediately preceding the day of said election,

had resided continuously in said territory, and in said county of Bear Lake, and in said Paris precinct. That, as said defendants then and there well knew, this plaintiff was not, at the time of said election, under guardianship, *non compos mentis*, or insane, and was not and had not been convicted of treason, felony, or bribery in this territory, or in any other state or territory in the Union, or elsewhere, and was not a bigamist or polygamist, and did not cohabit with more than one woman. That, as an elector of said county and precinct, this plaintiff, while the polls were then and there open for the reception of votes as aforesaid, duly offered to the defendants, judges of said election as aforesaid, his vote or ballot for the election of said county surveyor for said county, and then and there requested defendants to receive and deposit the same. That this plaintiff being thereupon challenged by an elector entitled to vote at said poll, and one of the defendants having declared to this plaintiff the general qualifications of an elector, this plaintiff then and there declared himself duly qualified; whereupon, said challenge not being withdrawn, this plaintiff offered to take, and requested said defendants to administer to plaintiff, the following oath: 'I do solemnly swear that I am a male citizen of the United States, over the age of twenty-one years; that I have actually resided in this territory for four months last past, and in this county thirty days; that I am not a bigamist or polygamist; that I do not cohabit with more than one woman, and that I have not previously voted at this election. So help me God.' But said defendants then and there refused to administer, or permit this plaintiff to take, said oath. That said defendants, and each of them, not regarding their duty as judges of said election, and intending to wrongfully deprive this plaintiff of the elective franchise at said election, wrongfully, willfully, and maliciously refused to receive or deposit said ballot, although they, and each of them, then and there well knew that plaintiff was a qualified voter, and entitled to vote at said election; whereby plaintiff was deprived of his vote at said election, to his damage in the sum of ten thousand dollars. Wherefore plaintiff demands judgment against the defendants for the sum of ten thousand dollars and his costs and disbursements in this action." The defendants demurred on the ground that it appeared on the face there-

of that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, plaintiff declined to amend, and elected to stand upon the pleading. The court thereupon ordered the complaint dismissed, and judgment was rendered in favor of defendants for their costs. The plaintiff duly excepted and appealed from the judgment.

In 1885 the legislative assembly of the territory enacted what is commonly known as the "Test Oath Statute." Section 16, 13th Sess. Laws, 106, reads as follows: "If any person offering to vote shall be challenged by any judge or clerk of the election, or any other person entitled to vote at the same poll, and either judge shall challenge any person offering to vote whom he shall know or suspect not to be qualified, one of the judges shall declare to the person so challenged the qualifications of an elector. If such person shall then declare himself duly qualified, and the challenge be not withdrawn, one of the judges shall then tender him the following oath: 'You do solemnly swear (or affirm) that you are a male citizen of the United States, over the age of twenty-one years; that you have actually resided in this territory for four months last past, and in this county thirty days; that you are not a bigamist or polygamist; that you are not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization; that you do not either publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law either as a religious duty or otherwise; that you regard the constitution of the United States, and the laws thereof, and of this territory as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding; and that you have not previously voted at this election; so help you God.'" It is contended on behalf of the appellant that this act is void—*First*, because it is in violation of the first amendment to the constitution of the

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United States; and, *second*, because it is in conflict with the act of congress of March 22, 1882. Congress has the superior power to legislate for the territories upon this subject, as well as all others; but its policy has usually been to prescribe the qualification of electors at the first election after the organization of a territory, and thereafter allow the legislative assembly of the territory, under certain restrictions and limitations, to regulate and fix the qualifications for the exercise of the elective franchise at all subsequent elections. Section 1860, Rev. St. U. S., was in force at the time the territorial statute was enacted, and is as follows: "At all subsequent elections, however, in any territory hereafter organized by congress, as well as at all elections in territories already organized, the qualifications of voters, and of holding office, shall be such as may be prescribed by the legislative assembly of each territory; subject, nevertheless, to the following restrictions on the power of the legislature, namely: *First*. The right of suffrage and holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States. *Second*. There shall be no denial of the elective franchise, or of holding office, to a citizen on account of race, color, or previous condition of servitude. *Third*. No officer, soldier, seaman, mariner, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote in any territory by reason of being or service therein, unless such territory is and has been for the period of six months his permanent domicile." It cannot be doubted for a moment that this act clearly delegates to the territories legislative power over the subject of suffrage, subject to the restrictions enumerated therein. But of course, like all other grants in the organic act, this was subject to the constitutional limitations upon the granting power, and it is equally true, as contended, that by the grant congress did not and could not divest itself of the power subject to the same restrictions. The act quoted, except the last two subdivisions thereof, has been in force ever since the organization of the first of the now existing territories, and during all this time the power to fix the

qualifications for voting and holding office has been a concurrent power of congress and the territorial legislature; the power of the former being limited by the federal constitution, and the power of the latter being limited by the constitution and by the acts of congress. March 22, 1882, congress, in the exercise of its power, passed an act, the eighth section of which is alike applicable to all the territories, and declares as follows: "Sec. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any person described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States." Counsel contends that by this act congress undertook to legislate upon the whole subject of disfranchisements growing out of polygamy, bigamy, and unlawful cohabitation, and thereby, by implication, withdrew or revoked the former grant of legislative power to the territories. We are unable to find anything in the act itself to warrant this conclusion. The act creates additional disqualifications, and it is to that extent, we think, to be regarded as an amendment to the organic law. Repeal by implication is not favored, and we cannot believe it was the intention of congress to take away the power over this subject delegated by section 1600 of the Revised Statutes, but think the intention was only to engraft or place another limitation upon that power. This view seems more in consonance with the policy heretofore pursued by the general government towards the territories. It is true that the congress has the paramount right, and may directly legislate for the government of any territory, and may directly repeal or abrogate any act of the territorial legislature. But it is also true that when congress confers power upon the legislative assembly of a territory, and, in pursuance of this power, laws are enacted for the government of the people thereof, such enactments must be respected and upheld, unless clearly in conflict with some higher law.

The act of March 22, 1882, disfranchises bigamists, polygamists, and those who

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are guilty of unlawful cohabitation, and disqualifies them from holding office. Section 2 of our statute contains substantially the same provision, as to this class of persons, and then further disqualifies all who counsel, advise, aid, and abet in the commission of these offenses. Section 16 of the statute (hereinbefore quoted) establishes the mode by which the disqualifications fixed by the former section and by the act of congress may be ascertained and determined. We see no reason why the legislature, under the delegation of power, could not do this, and therefore conclude the power was concurrent, and, so far as this question is concerned, that these acts may stand together. This brings us to the consideration of a more important question, and one which we approach with a full appreciation of the responsibility. Is this territorial enactment in violation of the provisions of the federal constitution which guaranties religious freedom? It is at once conceded that if the statute prohibits or interferes in any substantial manner with the free exercise of religion then it is void and of no effect. The first amendment to the constitution declares that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and in another place that "no religious test shall ever be required as a qualification to any office or public trust under the United States." These provisions are limitations upon the power of congress, but it is readily conceded that congress could not confer any authority upon a subordinate legislative body that it did not itself have and could not exercise. Therefore the inquiry will be confined to the one question. There is much general discussion of these constitutional inhibitions found in the books, but we have not been referred to any authority, nor do we know of any, upon the precise point involved in the case at bar. The authors, however, agree as to the object and purpose of the amendment, as well as to the causes which led to its adoption. "This amendment," says Judge STORY, "cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon, almost from the days of the apostles to the present age. The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head; and even New Eng-

land, the land of persecuted Puritans, as well as other colonies where the Church of England had maintained its superiority, would furnish out a chapter as full of the darkest bigotry and intolerance as any which could be found to disgrace the pages of foreign annals." Judge Cooley, in his valuable work on Constitutional Limitations, 576, says: "Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the state assuming supervision and control of religious affairs, under other circumstances, the general voice has been that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as the public order is not disturbed, are not to take cognizance except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters." Authorities might be multiplied, but the result of all is that the government must not interfere with opinion, but may with conduct. Laws are made for the government of actions, and when the conduct and actions are criminal it is no excuse to say that these things, though forbidden by the law, are done in the name of religion. In *Reynolds v. U. S.*, 98 U. S. 166, Mr. Chief Justice WAITE said: "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Governments could exist only in name under such circumstances."

Perhaps the constitutional provision of the state of New York, on this subject, is as sound a commentary as can be given of religious freedom. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby

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secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." But counsel for appellant strenuously argued that the oath here prescribed and required to be taken does in effect interfere with the rights of conscience in religious matters, and thereby with free exercise of religion. The most objectionable clause, and the one said to come within the inhibition, is as follows: "That you are not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization." This clause is undoubtedly open to criticism, but the intention of the legislature was to withdraw the right of suffrage from persons who encourage, aid, and abet those who are endeavoring, not by constitutional methods, but against all law, to overthrow a sound public policy of the government, and one that has existed from its foundation. In *Murphy v. Ramsey*, 114 U. S. 43, 5 Sup. Ct. Rep. 747, Mr. Justice MATHEWS, in construing the act of March 22, 1882, and speaking for the entire court, says: "Disfranchisement is not prescribed as a penalty for being guilty of the crime and offense of bigamy or polygamy; for, as has been said, that offense consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years by section 1044 of Revised Statutes. Continuing to live in that state afterwards is not an offense, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state, without cohabitation with more than one woman, he is in that sense a bigamist or polygamist, and yet guilty of no criminal offense. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecuting for crime."

This case shows clearly that the test is not whether the persons excluded could be prosecuted for any crime, but whether the facts bring the parties within the scope of the act. The decision rests, however,

upon the ground that congress may take from the people of a territory any right of suffrage it may have previously conferred, or at any time modify or abridge it, as it may deem best. It should be observed, however, that the right of suffrage is not a natural right, nor an unqualified personal right. The elementary writers do not include this right among the rights of property or persons. 2 Kent, Comm. 587. But, as applied to a territory, it is a right conferred by law, and may be modified or withdrawn by the authority which conferred it, without inflicting any punishment on those who are disqualified. Since the decision of the case of *Murphy v. Ramsey*, supra, the power of congress over this subject has not been disputed, and, if we are correct in the conclusion that the power of the territorial legislature is concurrent, we see no reason why it may not impose additional disqualifications, in so far as it acts within the scope of the authority committed to it. It has been well said that "every government ought to contain, in itself, the means of its own preservation." This, in our judgment, enunciates the principle which lies at the foundation of this whole question, and that must finally determine and set it at rest. But the only question for us to determine is purely a question of power. The courts are not warranted, nor are they authorized, to abrogate laws merely because they may be deemed unwise or impolitic. These are questions entirely within the cognizance of the law-making branch of the government, and with which the courts have nothing to do. A statute will not be held void unless its invalidity is clear. If unwise laws are enacted the remedy is with the people, who must correct such legislation through the exercise of their political power. As applied to this case, if the law is impolitic or unjust, the legislature may repeal it, or the congress may abrogate it.

It will be conceded that if the statute is valid, as the plaintiff did not offer to negative all the disqualifications imposed, his vote was not wrongfully rejected. Test oaths are not new in this country. They have been prescribed at different times in our history, and were justified by some real or supposed public danger or public necessity. But our attention has not been called to any similar to the one before us. The nearest approach to it is the one prescribed by the registration officers of Utah, which will be found in the statement of the

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case of *Murphy v. Ramsey*, 114 U. S. 19, 5 Sup. Ct. Rep. 750. In that case the same objection was raised to the validity of the rule that is here insisted upon; but in that case the court held that the oath required was a proper mode of ascertaining the disqualifications imposed by the law, and that it did not interfere with the free exercise of religion. So we conclude in this case. If we are wrong in this, we congratulate ourselves that there is a court above us for the final adjudication of such questions, where our judgment may be corrected. To this we defer, confident that none will more cordially concur in the result.

Judgment affirmed.

HAYS, C. J., and BUCK, J., concur.

HAYWARD *v.* BOLTON *et al.*

(March 6, 1888.)

Appeal from district court, Bear Lake county; before Justice HAYS.

Action by William Hayward against Robert Bolton and others, judges of election, for damages for wrongfully depriving plaintiff of his elective franchise. From a judgment awarding defendants their costs, entered upon an order dismissing the complaint, plaintiff appeals. Affirmed.

Richard Z. Johnson, for appellant. *Ensign & Stull*, for respondents.

BRODERICK, J. The same questions are involved in this case which were presented in the case of *Innis v. Bolton*, ante, 407, 17 Pac. Rep. 264, just decided by this court; and for the reasons given therein, and upon the authority of that case, the judgment of the court below in this case is hereby affirmed.

HAYS, C. J., and BUCK, J., concur.

BOHANON *v.* HOWE *et al.*

(March 7, 1888.)

MINES AND MINING—LOCATION AND ACQUISITION OF CLAIM—CITIZENSHIP.

1. Under the act of congress of May 10, 1872, only citizens of the United States, and persons who have declared their intentions to become such, can acquire any right of possession, by location or otherwise, of mineral lands on the public domain.

SAME—TRESPASS—PLEADING AND PROOF.

2. In an action for trespass upon mining ground, and for damages, where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a

material issue, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States, or that he has declared his intention to become such.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; before Justice HAYS.

Action by Isaiah Bohanon, Jr., against Mel. F. Howe and others, for damages for trespassing upon plaintiff's placer mining ground, and for an injunction to restrain future trespasses. From a judgment for plaintiff, defendants appeal. Reversed.

J. T. Morgan, for appellants.

In an action between claimants to determine the right of possession to a mining claim, the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that the plaintiff is a citizen, or has declared his intention to become such; and, when the action is tried by the court alone, all these facts must be found. Rev. St. U. S. § 2319; Act July 26, 1866, § 1; *Rosenthal v. Ives*, ante, 244, 12 Pac. Rep. 904.

No mining customs or rules and regulations can be made which will dispense with the requirements that the location must be distinctly marked on the ground, so that its boundaries may be readily traced. Rev. St. U. S. § 2324; *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 4 Morr. Min. R. 411; *Barnes v. Sabron*, 10 Nev. 217.

The provisions of section 2324, Rev. St. U. S., requiring the location to be distinctly marked on the ground, so its boundaries may be readily traced, and a record of the claims to be made in manner set forth, are equally applicable to lode and placer claims. *Sweet v. Webber*, 7 Colo. 443, 4 Pac. Rep. 752; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; Rev. St. U. S. § 2329, passed July 9, 1870.

The claim must in some way be defined as to limits, before possession of or working upon a part gives possession to any more than that part so possessed or worked. *Attwood v. Fricot*, 17 Cal. 43; *English v. Johnson*, Id. 115; *Rogers v. Cooney*, 7 Nev. 213; *Hess v. Winder*, 30 Cal. 355.

If defendants were in the actual adverse possession, plaintiff cannot recover. *Raffetto v. Fiori*, 50 Cal. 363; *Uttendorffer v. Saegers*, Id. 496.

Charles A. Wood, for respondent.

When it has been proven that the lands in question have been located in accord-

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ance with law and local custom, and in possession of plaintiff and his grantors for more than 17 years last past, no rights can be acquired thereto by an adverse location. *Belk v. Meagher*, 104 U. S. 279.

Actual possession of a portion of a mining claim, according to the custom of miners, extends by construction to the limits of the claim held in accordance with such custom. *Hicks v. Bell*, 3 Cal. 220; *Attwood v. Fricot*, 17 Cal. 37.

Actual possession of a mining claim is not essential to the validity of the title obtained by a valid location, and, until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof. *Belk v. Meagher*, 104 U. S. 279; *Gropper v. King*, 4 Mont. 367, 1 Pac. Rep. 755; *Pralus v. Mining Co.*, 35 Cal. 36; *Weeks*, Min. 109, 150, 157.

When the grantor is in actual possession of a mining claim, he may convey the same by verbal sale, accompanied by a transfer of the possession. *Jackson v. Water Co.*, 14 Cal. 18; *Tunnel Co. v. Stranahan*, 20 Cal. 198; *Gatewood v. McLaughlin*, 23 Cal. 178; *Kinney v. Mining Co.*, 4 Sawy. 386.

BRODERICK, J. This action was commenced in the district court in and for Lemhi county against the defendants for trespassing upon certain placer mining ground, for damages, and for equitable relief by injunction to restrain future trespasses. The case was tried by the court without a jury. Judgment for the plaintiff, and defendants appealed. The plaintiff alleged, among other facts, that he was the owner, entitled to the possession, and had been in the actual possession, by himself and through his grantors, for more than 15 years last past. The answer for the defendants denies the essential allegations of the complaint, and further alleges that the lands were on the 23d day of March, 1885, vacant and unoccupied public lands of the United States, and subject to location under the laws thereof; and that said defendants then located all of said ground.

Neither plaintiff nor defendants have alleged any facts as to citizenship. This

seems to us to have been requisite. By the act of congress of May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the laws, customs, and rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States. It is conceded that if this were an action in support of an adverse claim, and to determine the right of possession therein, it would have been necessary to have pleaded and proved citizenship, or what is its equivalent, in such action. But it is contended that in an action for trespass upon mining ground and for damages by reason of such trespass it is unnecessary to show any fact in relation to citizenship. We cannot adopt this view. The record here shows that the legal title to the ground is in the United States. The right of possession is by the pleading made a material issue. Unless plaintiff can establish this right he cannot recover; and as a prerequisite he must show himself to be a citizen, or to have declared his intention to become such. *Rosenthal v. Ives*, ante, 244, 12 Pac. Rep. 904; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522; *Hess v. Winder*, 30 Cal. 355; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, and 8 Pac. Rep. 621.

The objection was first raised in this court that the complaint herein does not state facts sufficient to constitute a cause of action. This objection may be taken at any time before final judgment. We think the point well taken, for the reason hereinbefore given; but as the objection was not raised in the trial court, where the plaintiff would doubtless have been allowed to amend his pleading, we have concluded to reverse, with leave to either party to amend. The judgment is therefore reversed, and the cause remanded for a new trial, with direction to the court below to allow, on application, either party to amend generally.

HAYS, C. J., and BUCK, J., concurring.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1889.

STEM-WINDER MIN. CO. *v.* EMMA & LAST
CHANCE CONSOLIDATED MIN. CO. *et al.*

(January Term, 1889.)

MINES AND MINING—ADVERSE CLAIMS—EVIDENCE.

1. Testimony of an engineer who surveyed defendants' mining claim—that a certain "compromise" monument was pointed out to him by the parties who then claimed the ground, established by them for the mere purpose of showing where they understood the location to be, and that he referred to such monument only to show how and in what manner he had made the survey, was admissible, no attempt being made to establish the boundary by means of such parol compromise.

SAME—LOCATION OF BOUNDARIES—MISTAKE IN MEASUREMENT.

2. The mere fact that in marking the boundaries of their location defendants' grantors set their stakes more than 1,500 feet in length and 600 in width does not invalidate the location, except as to the excess, where such excessive measurements were made by mistake and without fraud, and were duly corrected before the rights of third parties attached.

SAME—INSTRUCTIONS.

3. Where it was not contended that plaintiff corporation made the location under which it claimed, an instruction that a corporation cannot make a mining location was not prejudicial.

SAME—INSTRUCTIONS.

4. The court properly charged the jury that at the time of a mining location "the measurement must be from the point of discovery,—the middle of the point of discovery,—unless there is evidence before you that the vein had been actually established and run; but, if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery."

SAME—INSTRUCTIONS.

5. In a case involving a question of conflicting boundaries between plaintiff's and defendants' mines, defendants' measurements being claimed to be excessive and void, the decision of which would determine the question whose location was prior in point of time, there was no error in charging the jury that "there is really but one question in this case, and that is, who first made a valid location on this ground?"

Appeal from district court, Shoshone county.

Action by the Stem-Winder Mining Company against the Emma & Last Chance Consolidated Mining Company and another to determine the right of possession to a certain mine and mining claim. From a judgment for defendants, entered upon the verdict of a jury, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Frank Ganahl and *Albert Hagan*, for appellant.

A location of a claim upon mineral lands of the United States carries with it a grant from the government to the person making the same, and confers upon such person the right to the exclusive possession and enjoyment of all the surface ground within the lines of such location. *Belk v. Meagher*, 104 U. S. 284.

No estate or interest in real property or in any manner relating thereto or concerning it can be created, granted, assigned, or surrendered unless by an operation of law, or a

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conveyance or other instrument in writing, subscribed by the party. *Melton v. Lombard*, 51 Cal. 259; Rev. St. §§ 2920, 6007; *Jackson v. Shearman*, 6 Johns. 19; *Jackson v. Vosburgh*, 7 Johns. 186; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. Rep. 93.

It is not necessary to plead the statute of frauds to take advantage of evidence of this class when offered. *May v. Sloan*, 101 U. S. 231; *Dunphy v. Ryan*, 6 Sup. Ct. Rep. 486; *Dung v. Parker*, 52 N. Y. 494; *Purcell v. Miner*, 4 Wall. 573.

So the amended location of the Stem Winder having been made before the Emma location had ever been properly staked or amended, the plaintiff has the only valid location on the vein. *Belk v. Meagher*, 104 U. S. 284; *Mining Co. v. Deferrari*, 62 Cal. 160; *Lakin v. Mining Co.*, 25 Fed. Rep. 337; *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. Rep. 643.

A notice of location of itself is only a proof of the performance of one step in the location of a mine, the last step in perfecting the location; and even when the certificate, for any of the reasons set forth in the statute, is deemed void, it is admissible, in connection with an amended location correcting the defects of the original. *Van Zandt v. Mining Co.*, 2 McCrary, 159, 8 Fed. Rep. 725; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. Rep. 111; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652.

A claim located within the boundaries of another existing location is void. *Mining Co. v. Smith*, 2 Dak. 399, 11 N. W. Rep. 98.

The location of a mining claim is absolutely void if the discovery be made on a claim already located; and continues void, and is not cured or made effectual by a subsequent discovery on the claim located. *Upton v. Larkin*, 5 Mont. 600, 6 Pac. Rep. 66.

A location of a mining claim cannot be made by a discovery shaft upon any claim which has been previously located, and which is a valid location. *Little Pittsburgh Consol. Min. Co. v. Aimie Min. Co.*, 17 Fed. Rep. 57.

No rights can be acquired under the statute of location before the discovery of a vein or lode within the limits of the vein located. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. Rep. 666.

No valid location of a mining claim can be made until a vein or deposit of gold, silver, etc., has been discovered. *Mining Co. v. Corcoran*, 15 Nev. 147.

No location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim. Discovery of one, after location, in a different part of the claim, will not avail. *Van Zandt v. Mining Co.*, 2 McCrary, 159, 8 Fed. Rep. 725.

The statute contemplates that the location of a vein shall be along the course of the lode or vein. *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 485, 7 Sup. Ct. Rep. 1356.

Side lines are side lines only when they are parallel with the course of the vein. When they cross the vein they become end lines. *Mining Co. v. Tarbet*, 98 U. S. 463; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356; *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177.

Woods & Heyburn, for respondents.

A locator, having selected his point or location, could not claim the surface of the ground to exceed 300 feet on either side of it for the width of his claim, nor to exceed 1,500 feet along the course of the vein measured from the point of discovery; and if, in marking his claim upon the ground, he inadvertently or from any cause included more ground than 300 feet on each side of his discovery, his claim would be void as to the excess. *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.

A thing which is void from the beginning cannot be so amended as to give it validity. *Belk v. Meagher*, 104 U. S. 284; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356.

Locations in excess of the length or width allowed by law are void only as to the excess. *Mining Co. v. Tarbet*, 98 U. S. 463.

Recording notice of a mining claim is directory, and not imperative. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. Rep. 666.

WEIR, C. J. This is an appeal from a judgment in favor of the defendants and against the plaintiff, entered upon the verdict of a jury, and also from an order deny-

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ing a motion for a new trial. The cause of action arose in the county of Shoshone, in the First district. The complaint substantially alleges that the plaintiff is a corporation duly organized and existing under the laws of the state of Oregon, and that one of defendants is likewise a corporation organized and existing under and by virtue of the laws of the same state; that since the 11th day of March, 1887, plaintiff has been, and is now, the owner of the premises in dispute, subject only to the paramount title of the United States, and is entitled to the possession of a certain mine and mining claim, called "Stem-Winder Mining Claim," and then proceeds to set out the description of the claims of the plaintiff and of the defendants, and that the grantors of the defendants, on the 6th day of March, 1887, filed with the register of the land-office an application for a patent, and in such application wrongfully, and without right, set up title to certain premises which the plaintiff claims is the property of itself, and that the suit is brought for the purpose of ascertaining the ownership of the said alleged tract of land in dispute; and then prays judgment against the defendants—*First*, that the plaintiff is the owner of, and lawfully in and entitled to the possession of, the premises described,—the area in conflict between the Stem-Winder mining claim and the alleged Emma mining claim,—and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof; and that the defendants have no title to or right of possession of said conflicting area, or the lode therein, or any part thereof. The defendants demurred to the complaint in the action, which demurrer was overruled by the court, and the defendants were given five days in which to prepare and serve an answer. The answer, though very long, contains substantially general denial, and sets up title or claim to the premises in dispute by reason of a location thereof by certain parties, and the transfer thereof to the defendants, and that such location was prior to the location made by plaintiff's grantors; and further claims that the location under which the plaintiff claims was never, at any time, located, staked, marked, and defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma

mining claim by the locators thereof; and that the plaintiff is not, nor has it ever been, in possession of the area so in conflict, as aforesaid. Upon these issues the case came to trial.

The plaintiff offered such evidence as it saw fit as to the location of its claim, and the defendants did the same. Strictly, there was but one issue in the case, and that was, which of the parties made the first valid location of the area in dispute? The evidence on that point was conflicting, and presented a question of fact for the jury. Upon this question the jury rendered a verdict in favor of the defendants, and against the plaintiff, whereupon the plaintiff made a motion for a new trial upon the proper papers, which motion was denied.

The questions presented for our consideration are alleged errors made by the court in the admission of certain testimony, and as to the charge made by the court to the jury, and its refusal to charge certain requests made by the plaintiff. The only exception taken to the admission of alleged improper evidence by the court was in regard to a compromise monument erected along the alleged line between the claim of the plaintiff and defendants. The defendants offered evidence to show that the compromise point was erected by agreement, not for the purpose of establishing a location, but for the purpose of showing where the location was, as it was then understood by all parties. This evidence the court, upon objection by the plaintiff, excluded, but it appears that a map used for other purposes on the trial contained upon its face the compromise monument, and that it was frequently referred to as the compromise monument, and, as so referred to, the question was really before the jury. It appears that the court permitted evidence by the engineer who surveyed the defendants' claim in December, 1886, in regard to having this compromise monument pointed out to him, by the parties then claiming the ground, as the compromise monument agreed upon by such parties themselves.

We are by no means prepared to say that the evidence, as offered by defendant, was not admissible. Such evidence was not within the rule laid down by the authorities cited by the plaintiff, and did not seek, in any man-

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ner, to establish the location of a mining claim by parol; but, on the contrary, really sought to show that the claims, as located, were in some dispute, and the parties ran the lines by agreement so as not to interfere with each other, and placed this monument only for the purpose of showing that they had done so. But, even though this was error, the testimony admitted by the court was clearly right and proper. The engineer, in making the survey, referred to this compromise monument only to show how, and in what manner, he had made the survey. We see nothing in the admission of this testimony which was improper, or which in any manner tended to prejudice the rights of the plaintiff.

We shall not notice the many exceptions taken by the plaintiff in regard to the charge of the court, and the refusal of the court to make certain charges at the request of the plaintiff. Most of them are utterly without merit, for the reason that the court had already fully charged upon propositions requested, and also for the reason that many of the requests practically called for a decision upon the same propositions of law rejected by the court, couched in different language. The charge of the court as delivered was very full and complete, and really presented to the jury every question necessary for their consideration; and the many requests made by the plaintiff were but a repetition of the charge already delivered.

We shall notice, however, three of the plaintiff's exceptions: *First*, those which relate to the defendants' location being in excess of the quantity of land allowed by law; *second*, the right of a corporation to locate a mining claim; and, *third*, the question raised by the plaintiff as to what distance the plaintiff was entitled to from the middle of the vein or point of discovery.

It is perfectly clear in our mind that the location of the defendant was not wholly void for the reason that the defendants' grantors did, in marking the boundaries of the location, place their stakes more than 1,500 feet in length and 600 feet in width. Under the evidence in this case no fraud is alleged or claimed. No rights of third parties were infringed upon, and the evidence is conclusive that the location was made by measurements

by the eye and by stepping off the distances; and it also appears that in December, 1886, the alleged location was surveyed, and the lines were drawn in such manner that the amount of the claim was not in excess of the amount allowed by law. This occurred prior to the plaintiff's making its amended location; and, under the facts of this case, there can be no question that the location or claim of the defendant was void only as to the excess. The authorities would seem to be conclusive upon that point: *Atkins v. Hendree*, 1 Idaho, 95; *Mining Co. v. Tarbet*, 98 U. S. 464; *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.

It appears conclusively from the location notice placed upon the ground by the defendants' grantors at the time of location that they only claimed 1,500 feet along the lode or vein and 300 feet on each side, and no more. There is nothing in the contention that the decision of the court in the last case does not apply in principle to the present case. It is true that that case was decided under the act of 1866, and the present case arises under the act of 1872; yet the principle is the same. In that case the court says: "We hardly think it needs discussion to decide that the inclusion of a larger number of linear feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law? We can see no reason in justice or in the nature of the transaction why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with the rights previously acquired." We do not, therefore, think it necessary to further consider this point, except to say that we find no error in the refusal of the court to charge on the subject as was requested by the plaintiff. Moreover, there was no merit in the plaintiff's requests. The location of the plaintiff, as proven, showed the same state of facts in relation to itself as did the defendants'; and the court would not have been justified, under the evidence, in charg-

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ing the jury that the defendants' location only would be void.

The defendants requested the court to charge the jury that the plaintiff was a corporation organized under the laws of the state of Oregon, and that no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States. This the court charged. Without deciding whether this was error or not, we can safely say that it is not such an error in this case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location. On the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this, the defendants' claim was in precisely the same condition, and the evidence was conclusive that the defendants did not make the location, but stood in the same position as the plaintiff did; namely, they had purchased their claim from citizens, who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not error, as such charge could not, in any manner, have injured any one. We therefore conclude that as to this point there was no error to justify us in reversing the judgment.

As to the third and last point which the plaintiff raises, we think there is nothing whatever in it, and that the charge, as delivered by the court, was perfectly correct under the facts in every respect. Under the circumstances the court would have been perfectly justified in refusing to consider the requests made by the plaintiff at that time; but, even as delivered and refused, we find no error. The court stated to the jury that "at the time of the location, the measurement must be from the point of discovery,—the middle of the point of discovery,—unless there is evidence before you that the vein had been actually established and run; but, if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of

the middle of the vein at the point of discovery, as they had so located this claim. It must not exceed 300 feet,—that is, they are entitled to 300 on each side of the vein." This we think was proper, and was the only charge that could have been given to the jury under the state of the evidence.

The plaintiff seems to lay great stress on the fact that the court refused to charge the twenty-second proposition requested by it. In answer to this claim it is only necessary to say that, from the examination of the record, it will be found that the court charged the proposition, except as to two or three lines, which should not have been charged. At the conclusion of the charge the court verbally charged the jury as follows: "That there is really but one question in this case, and that is, who first made a valid location on this ground? That is really the whole question. Now, to determine that point, you must go into all the evidence you have heard. Reconcile it, if you can, and ascertain, if you can, who, in your judgment, made a valid location upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and, whatever may be the facts in this case, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location of the ground in dispute, then the defendant is entitled to a verdict at your hands. I state this to you so as to simplify the case and bring it down to the direct point in issue." Under the pleadings and the evidence this charge was perfectly proper, and the jury could not have been mistaken as to what was the real issue in the case. The evidence was conflicting, but fully justified the verdict of the jury.

The contention of the plaintiff that because the location notice, as recorded by the defendants, described the defendants' claim as adjoining the Stem-Winder, the defendants are estopped from claiming that their location is prior in point of time to plaintiff's, under the evidence and the explanation which was given of that statement, is utterly without merit. We think that there is no error in the record which would justify this court in reversing the judgment. The judgment is therefore affirmed with costs.

*Bowman v. Ayers.*BOWMAN *et al.* v. AYERS.

(March 11, 1889.)

CONTRACTS—RESCISSION—PART PERFORMANCE.

Four persons owned in common a water-ditch, and while in the joint possession and use of the water three of said tenants in common entered into an agreement in writing with A., agreeing that if A. would do certain work in enlarging and improving the ditch he should have an interest therein, and right to use water therefrom. A. entered upon the performance of his contract, and did work upon the ditch to the value of \$50, and began to use water from the ditch, and was proceeding to complete his contract, when he was stopped by the owners, including the persons with whom he had contracted, and who declared the contract rescinded, whereby A. was prevented by them from the completion of his work. No reason was assigned for the attempt to rescind, and no offer to pay for the work done. A. insisted upon his contract, and right to use the water under it, and continued to use water from the ditch. Thereupon the owners, including the contracting persons, brought a joint action in trespass against A. for wrongful use of the water from the time he entered. *Held* (1) that the defendant's acts did not constitute trespass, and that the plaintiffs cannot recover; (2) that a party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure; (3) that where there has been part performance a party cannot rescind and still retain the benefits received under the agreement.

(Syllabus by the Court.)

Appeal from district court, Ada county.

Action by William Bowman and others against J. F. Ayers to recover damages for defendant's alleged wrongful act in cutting and otherwise injuring plaintiffs' ditch, and diverting the waters therefrom, and for an injunction to restrain further diversion. From a judgment for plaintiffs, defendant appeals. Reversed.

The other facts fully appear in the following statement by BERRY, J.:

This is an appeal from a judgment rendered in the district court, Ada county. The action is for damages, in trespass, and also praying equitable relief. The complaint avers, in substance, "that in 1883 the plaintiffs were the owners and in possession of a certain ditch, necessary for irrigating the lands of plaintiffs; and that the defendant wrongfully entered upon and cut and tapped said ditch, also drew water from said ditch, to the plaintiffs' damages \$500." It also avers that in 1883, 1884, and 1885 the defendant

wrongfully placed dams in said ditch, and cut down its banks, to the further damage of the plaintiffs \$200. It further avers that the defendant is continuing such trespasses, and threatens and intends to continue them; that the defendant is insolvent, and the plaintiffs remediless, unless the defendant be enjoined; and prays judgment for the sum of \$500 damages sustained; also that an injunction issue against the defendant. The answer puts in issue each allegation of the complaint and avers ownership, in common with the plaintiffs, to the extent of one-sixth of the whole ditch; that he also owns lands (describing them) to which one-sixth of the waters of the ditch are necessary; that prior to 1887, the ditch being in part on and through the defendant's lands, the plaintiffs wrongfully entered upon his said lands, and enlarged the ditch, and did damage, etc.; and demands judgment, etc. The cause was tried before the court with a jury, and a general verdict was rendered in the following words: "We, the jury in the above-entitled action, find for the plaintiffs, and assess the damages at the sum of nothing." The jury also, under instructions of the court, made special findings; the seventh, eighth, and ninth being as follows: "Question submitted to jury, by the court: (7) In the matter of the contract made between the defendant and the plaintiffs in the spring of 1883, by which the defendant was to enlarge and improve the ditch for an interest therein, did the defendant perform all the conditions of the agreement on his part? *Answer.* He did not. Q. (8) What was the cost to the plaintiffs of the construction of the ditch under controversy? *A.* \$500. Q. (9) What was the value to plaintiffs of the work done, or caused to be done, by the defendant on the ditch under the contract made in the spring of 1883? *A.* \$50." The special findings of the jury, except the fifth, are on the alleged trespass of the defendant, and are, in substance, included in the general verdict. The fifth special finding is that the enlargement of the ditch on defendant's land by the plaintiffs was not without defendant's consent. On this verdict judgment was entered for the plaintiffs decreeing the said ditch to be the property of the plaintiffs; that the defendant

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be barred of all interest therein; and for \$271 costs of this action.

Brumback & Lamb, for appellant.

Though an oral purchase from a cotenant does not convey the legal title, it gives the purchaser an equitable title to the interest of the cotenant, and protects him from being a trespasser. *Hoffman v. Fett*, 39 Cal. 111.

The other cotenants can take no advantage of the statute of frauds so long as the selling cotenant does not. *Galway v. Shields*, 27 Amer. Rep. 351.

When the answer contains a cross complaint, it must be replied to so far as the cross complaint is concerned, or the matters therein alleged will be taken as confessed. *Herold v. Smith*, 34 Cal. 124.

The plaintiffs had no right to rescind the contract after part performance by defendant. 2 Pars. Cont. (7th Ed.) pp. 653, 812.

Judgment outside of the issues is against law. *Lothian v. Wood*, 55 Cal. 164.

A party cannot allege one cause of action and recover on another. *Black v. Merrill*, 65 Cal. 92, 3 Pac. Rep. 113.

The complaint in this case is totally defective for a complaint quieting title, inasmuch as it nowhere alleges that the defendant claimed any right or interest in the ditch, but, upon the other hand, it alleged he had no interest. Rev. St. § 4538.

Huston & Gray, for respondents.

It is entirely within the discretion of the court to grant or refuse a jury trial in an equity case. *Societe Francaise v. Selheimer*, 57 Cal. 623; Code Civil Proc. § 4365; *Koppikus v. State Capital Com.*, 16 Cal. 249; *Brewster v. Bours*, 8 Cal. 501; *Weber v. Marshall*, 19 Cal. 447; *Houser v. Austin*, ante, 188, 10 Pac. Rep. 37.

In equity cases, where special issues are submitted to a jury, their verdict is merely advisory to the court. *Warring v. Freear*, 64 Cal. 54; *Freeman v. Stephenson*, 63 Cal. 499; *Stockman v. Irrigating Co.*, 64 Cal. 57; *Bates v. Gage*, 49 Cal. 126.

Mere lapse of time does not constitute an abandonment, but it may be given in evidence, for the purpose of ascertaining the intention of the parties. *Moon v. Rollins*, 36 Cal. 333; *Seymour v. Wood*, 53 Cal. 303; *Davis v. Gale*, 32 Cal. 26.

Sale for a nominal price may be received

in evidence, as tending to show abandonment. *Davis v. Gale*, 32 Cal. 26; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901.

Failure to use the water is competent evidence of abandonment. *Davis v. Gale*, 32 Cal. 34.

A deed subsequent to abandonment is void. *Bird v. Lisbros*, 9 Cal. 1; *Preston v. Keys*, 23 Cal. 195.

A cross complaint must state all the facts which would be required in an original complaint to entitle the party to affirmative relief, and it cannot be helped out by the averment of any other pleading in the action. *Collins v. Bartlett*, 44 Cal. 381; *Doyle v. Franklin*, 40 Cal. 110; *Blum v. Robertson*, 24 Cal. 141; *Jones v. Jones*, 38 Cal. 585.

Findings of a jury in issues submitted to them in an equity case, if not objected to by motion for a new trial, cannot be questioned in the supreme court. *Duff v. Fisher*, 15 Cal. 375; *James v. Williams*, 31 Cal. 211; *Reed v. Bernal*, 40 Cal. 628.

A pleading improperly designated as a "cross complaint" will not be treated as such, so as to necessitate an answer thereto. *Harrison v. McCormick*, 69 Cal. 617, 11 Pac. 456; *Thompson v. Thompson*, 52 Cal. 154; *Jones v. Jones*, 38 Cal. 585.

BERRY, J., (*after stating the facts.*) There are numerous assignments of error in this case, but we shall not find it necessary to consider them all. Evidence was given upon the trial tending to show an agreement in 1883, and before the acts complained of, between the plaintiffs, or some of them, and the defendant, for a purchase by the defendant of the right to take water from this ditch; the plaintiffs claiming to be tenants in common of the right to the water flowing in the ditch. The counsel for the defendant requested the court in its charge to the jury to instruct them that "if you find from the evidence that the plaintiffs, or a portion of them, proposed in writing that the defendant should be entitled to water if he should do certain work on the ditch, and defendant accepted such proposition, and proceeded to do such work, and offered to complete the same, but was prevented by the plaintiffs, the defendant is entitled to the rights the plaintiffs proposed to give him."

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They cannot rescind the contract if the defendant had accepted, and partly performed, and offered to perform the rest, but was prevented by plaintiffs." The court refused to so instruct, but modified the request, and gave the modified charge as follows: "If you find from the evidence that the plaintiffs, or a portion of them, proposed in writing that the defendant should be entitled to water if he should do certain work on the ditch, and defendant accepted such proposition, and proceeded to do such work, and performed all the conditions of the contract on his part, then he was entitled to his proportion of the water." This charge was objectionable for ambiguity, and as it really made the jury the judges of the legal obligations of the defendant. But, given as it was, in contradistinction to a request clearly defining the rights of the defendant, and the obligations of the plaintiffs, it could be understood by the jury only as charging that acts of the plaintiffs could not excuse the defendant from the full completion of all the work to be done. The evidence tended to show his acceptance of the plaintiffs' terms, and a part performance. Indeed, the court submits the question to the jury as to the value of the defendant's work on this agreement; and the jury found upon it as follows: "*Question for special finding.* What was the value to the plaintiffs of the work done, or caused to be done, on the ditch by the defendant under the contract made in the spring of 1883? *Answer.* \$50." But the respondent seeks to avoid the consequences of this error of the court in refusing to charge as requested, and in giving the modified charge, by claiming that, even if the charge was wrong, and the finding of the jury was wrong in consequence of it, still it does not prejudice the defendant, for the reason that the verdict of the jury was only advisory, and not conclusive upon the court; that the court still had the evidence before it, and could make its own findings on this point; and that the court did in fact act on this view of its duties, and in the fifteenth finding of fact found as follows: "That the defendant did, in the spring of 1883, enter into a contract with the plaintiffs Bowman, Butler, and McDowell, to enlarge the ditch described in the plaintiffs' complaint, and have

an interest therein; that the defendant failed to perform the conditions of said agreement, and plaintiffs terminated said agreement." This the court had no right, as an original finding, to do. The question submitted to the jury was one of fact, in a common action at law, for damages arising from trespass. In the seventh amendment to the constitution of the United States it is provided that "in suits at common law no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law." We are aware of no rule of law authorizing such re-examination, except through the regular proceeding of appeal. That the court followed the jury makes no difference with its right to make an original finding on this point. Its duty, if it did anything as to stating this as a fact found, was to follow the verdict; and the only allowable presumption is that it did so. And it is equally presumable that the jury found that the acts of the defendant were unlawful, from the erroneous charge given them. The charge as given could have been followed by no other results, providing any part of the work the defendant was to do had not been done; and this, although the cause of that failure was the unlawful acts of the plaintiffs themselves. His readiness and willingness to perform, if indeed such was the fact, (and the evidence on that point raises a strong presumption on his part of such readiness and willingness,) was not allowed to go to the jury, or to have any consideration by them. It may be further said that no notice was taken by either the court or the jury of the work done under this contract, further than to assess its value. But that work had been done by the defendant on that contract, and it appears that the plaintiffs, without repaying it or offering to do so, "rescinded the contract." A party to a valid contract, where there is no fraud or other special reason, (and none is here shown,) cannot rescind at pleasure, and especially where, as in this case, there has been a part performance, and still retain the benefits received under it. 2 Pars. Cont. 679, 680; 1 Whart. Cont. § 285, and cases cited in notes. The judgment should be reversed. Judgment reversed. All concur.

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MINTY v. UNION PAC. RY. CO.

(March 11, 1889.)

MASTER AND SERVANT—ASSUMPTION OF RISK.

1. The traveling auditor of a railroad company, whose duties are to travel on the company's cars from station to station on its roads and audit accounts, is a servant of the company and assumes the ordinary risks incident to the employment.

SAME—INJURIES—PRESUMPTIONS.

2. Where such servant is injured in an accident resulting in the derailment of the car on which he is riding, it will be presumed, until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for the business, and had no notice of any defect or other cause of the accident.

SAME—KNOWLEDGE OF DEFECTS—EVIDENCE.

3. Before the servant can recover he must show that the injury did not arise from a defect obvious to himself, or which, by the exercise of ordinary care, he might have known.

SAME—HAZARD INCIDENT TO EMPLOYMENT—EVIDENCE.

4. He must show it was not from hazard incident to the business.

SAME—INSTRUCTIONS.

5. Where the judge charged the jury "that, if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is in itself presumptive evidence of negligence on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever," *held* that, as between master and servant, such presumption of negligence does not so arise, and the charge was erroneous.

SAME—INSTRUCTIONS.

6. The court also charged, while the "burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of defendant, and that the cause of that injury was probably the negligence of the defendant," (*held* to be error;) "and that whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was; and, if the defendant does not choose to give the explanation, the jury will be authorized to find that the real cause of injury was the negligence of the defendant in the particular case specified in the complaint, (*held*, that this was also error.)

(*Syllabus by the Court.*)

Appeal from district court, Oneida county.

Action by R. H. G. Minty against the Union Pacific Railway Company for personal injuries. From a judgment for plaintiff, and from an order overruling its motion for a new trial, defendant appeals. Reversed.

The facts appear in the following statement by BERRY, J.:

On the 12th day of January, 1884, the plaintiff was in the employ of the defendant as traveling auditor, his duties extending over the entire lines of the company west of Cheyenne, including the entire Utah & Northern road, and continued in such employment until August 17, 1886. On the 7th day of January, 1886, while on duty, and on a train, traveling from station to station on the Utah & Northern road, and in the course of such employment as traveling auditor, the car in which the plaintiff was riding was derailed, and the plaintiff was injured. The case was tried by a jury before Hon. CASE BRODERICK, district judge, at the May term, 1888, in Oneida county. The jury returned a verdict for the plaintiff, and assessed his damages at \$4,000. Judgment was entered and docketed the same day. A bill of exceptions was duly made by the defendant, and a case containing the evidence, bill of exceptions as agreed upon by the respective parties, was settled and allowed, upon which the defendant moved for a new trial, which was refused, and the defendant appeals from both the judgment and the order denying a new trial. In the complaint the cause of action is stated as follows: "That on or about the 1st day of November, 1885, and from that time continuously until on or about the 1st day of April, 1886, the defendant negligently and carelessly permitted the said line of railroad, known as the 'Utah & Northern Railway,' to become ruinous and out of repair, and so negligently and carelessly permitted the rails upon said railway to become worn out and weak and insufficient to support the trains run upon the same, and particularly did negligently and carelessly permit said rails to become so worn out and weak and insufficient on the 7th day of January, 1886, at a point in Montana territory, near Monida station, that the said rails there became broken on the passage over them of the train on which the plaintiff was that day riding, as hereinafter stated; that on the said 7th day of January, 1886, this plaintiff was traveling in the discharge of his duties as traveling auditor upon the regular passenger train of the defendant; that the defendant, while knowing the ruinous condition of its said track, was nevertheless running both passenger and freight trains upon it; that while plaintiff was rightfully riding said train, it came to a point near

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Monida aforesaid, where said rails were worn out, and weak, and insufficient to support the trains, as above stated, when by reason of the said worn out, weak, and insufficient condition of said rails, upon said track so negligently and carelessly permitted to be and remain there, one of said rails became broken, and the car in which plaintiff was riding was thereby and by reason of the aforesaid ruinous condition of the track at that place run off the track," etc., whereby the plaintiff was injured, etc., to his damage, etc.; "that plaintiff was at all times before he received said injuries ignorant of the ruinous condition at said place, and defendant had then, and for a long time immediately prior thereto, notice and full knowledge of said ruinous condition of said railroad; wherefore the plaintiff demands judgment." The answer puts in issue each allegation of the complaint, but avers that plaintiff "was at the time an employé of the defendant, to-wit, its traveling auditor upon the said Utah & Northern Railway and other lines of railway owned or operated by defendant; that it was the duty of the plaintiff to travel from one station to another on the line of said railway, and audit the accounts of the station agents of defendant on said railway; that by his contract of employment * * * plaintiff was to receive a certain price and compensation per month, and was to be transported from place to place on said railway, free of charge, as his duties as such employé required; that in pursuance of said contract the defendant issued to plaintiff an employé's time-pass or free ticket; that said pass had indorsed thereon a condition to the effect that the person accepting the same should assume all the risks of accidents, etc.; that the plaintiff had knowledge of such indorsement, accepted the terms, and was bound by it." Other facts of the case will appear in the opinion of the court.

P. L. Williams and *W. H. Savidge*, for appellant.

The evidence must establish the negligence alleged to be the cause of the injury, or it fails to justify the verdict. *Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. Rep. 508; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Murray v. Railroad Co.*, 3 N. M. 337, 9 Pac. Rep. 369.

The burden of proof of the negligence alleged is upon the plaintiff. *Wood, Mast. & Serv.* § 382; *Shear. & R. Neg.* §§ 222, 223; *Rose v. Railroad Co.*, 58 N. Y. 221, 222; *Wright v. Railroad Co.*, 25 N. Y. 562; *Railroad Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. Rep. 411.

And proof of the accident merely, or the injury received, is not sufficient to establish negligence even *prima facie*. *Wood, Mast. & Serv.* § 419; *Whart. Neg.* § 421; *Nitro-Glycerine Case*, 15 Wall. 524; *Lockwood v. Railway Co.*, 55 Wis. 50, 12 N. W. Rep. 401; *Railroad Co. v. Scott*, 64 Tex. 549.

Evidence relating to accidents and repairs or replacements, occurring and made at points remote from, and long after the happening of, the particular accident causing the injury complained of, is not admissible. *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Reed v. Railroad Co.*, 45 N. Y. 574; *Dougan v. Transportation Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. Rep. 735; *Hipsley v. Railway Co.*, 27 Amer. & E. R. R. Cas. 287; *Railroad Co. v. Fox*, 11 Bush, 495; *Pierce, R. R.* 293.

Smith & Smith and *R. D. Winters*, for respondent.

Derailment of a car makes out a *prima facie* case of negligence. *Railway Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836; *Railroad Co. v. Rainbolt*, 99 Ind. 551; *Hipsley v. Railway Co.*, 27 Amer. & Eng. R. Cas. 287, and note.

The allegation of the derailment of the cars, and the consequent injury to plaintiff, were all he needed to prove. *Railway Co. v. Jones*, 108 Ind. 551, 9 N. E. Rep. 476; *Shear. & R. Neg.* §§ 280, 280a; *Edgerton v. Railway Co.*, 39 N. Y. 227; *Fairchild v. Stage Co.*, 13 Cal. 605; *Thomp. Carr.* 181, 355; *Fitch v. Railway Co.*, 45 Mo. 322.

BERRY, J., (*after stating the facts.*) The specific wrong by the defendant of which the plaintiff complains, after a general statement relating to the track, is that "in particular [the defendant] did negligently and carelessly permit said rails to become so worn out and weak and insufficient, on the 7th day of January, 1886, at a point in Montana territory, near Monida station,

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that the rails there became broken, on the passage over them of the train in which the plaintiff was that day riding;" that on that day "the defendant, well knowing the condition of its said track," ran its cars upon it, and, at a "point near Monida aforesaid," where the rails were worn out, and too weak to support the train, and by reason of such weak and worn-out condition of said rails "there" or at that point the car in which the plaintiff was riding "was thereby and by reason of the said ruinous condition of the track at that place run off the track," and the plaintiff was injured. No defect in the cars or other machinery is alleged, nor is there any misconduct on the part of the persons in charge of the train either alleged or shown; but the sole grievance is that the track at that point was ruinous and weak, and the defendant, knowing it, still ran its trains; that this weakness of the track threw off the car, and caused the injury. There is no direct evidence that a rail was broken. No one seems to have seen a broken rail. Nor is there any evidence of special defect in the track at that point. A careful review of the evidence would indicate that the track, where the accident occurred, was as good, if not better, than at other parts of the road; but the issue is tendered and joined as to a defect in the track, and that such defect was the cause of the accident. To sustain the position of the plaintiff as to the weak and ruinous condition of the track at this time and place, the following questions were asked by the plaintiff of Timothy Farrel, the conductor of the wrecked train, and evidence given under objection, duly made by the defendant, as to each question and answer. "Question. What caused this wreck? Answer. I don't hardly know what caused the wreck. I suppose it was a broken rail. Q. Was the track laid with new iron or steel shortly after the accident? A. Not for some time. I believe it was some time late in the following fall. Q. What, if any, was the difference in the new rails, that were laid then,—what is the difference in the size of the new rails and the old ones? A. There is considerable difference in the size and heft both. Q. Which is the heaviest? A. The last iron laid was considerably heavier than the iron it replaced. Q. Can you give the

comparative difference? Is one twice as heavy as the other? A. I don't think it is twice as large. Q. Have you observed any broken rails along there since the new track was laid? A. No, sir; not to my personal knowledge. Q. Was not one of the causes of the track being rough (without reference to any particular place) because the ends of the rails were battered down? A. I expect it was. Q. Have you had your train wrecked at any other time since this accident,—the accident in which the plaintiff was injured? A. Yes, sir. Q. How many times? A. Twice that I remember. Q. On the same road? A. Yes, sir. Q. How near to this place did they happen? A. One was about fifty miles, and the other about eight miles, from it. Q. How long after this wreck? A. One was about six months, and the other about a year; one happened before, and the other after, this wreck. Q. Was the last one before or after this iron was laid? A. It was after." The defendant moved to strike out the answers of the witness as to the two wrecks before and after the accident in question as immaterial and irrelevant, which motion was refused, and the defendant duly excepted. We think the testimony was improper, and should have been rejected. These two wrecks were too remote, both in time and place, from the wreck in question; and besides, it was not shown from what cause they occurred. They have no proximate relation to the condition of the track at the time and place of accident. No fact was stated by this witness as a ground for his opinion that it was a broken rail that caused the wreck, and we have no intimation as to the grounds of his belief. That there was a broken rail, and that the wreck was caused by it, were facts to be found by the jury; and the opinion of a witness, not based on competent facts, should not have been given to them. Aside from this "supposition" of the witness Farrel, who was himself injured at the accident, too much to take notice, there is no evidence that a rail was broken at all. Nor was the fact that in the fall of the same year, but more than eight months after the accident, the whole road was reironed, and heavier rails placed upon it, competent evidence of the cause of this accident. What the motive was is not shown by the act it-

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self, or otherwise. There are many reasons, each of which is equally presumable, which may have induced this reironing; each of which reasons may have been wholly disconnected with any weak or ruinous condition of the track at the time and place of accident. Even granting that the road as a whole, eight or more months after the 7th day of January, 1886, required strengthening in view of the uses it was to be put to, still those defects may have been at great distances from the place of the accident, or from causes not at all existing at that place. Any possible relation of this evidence is too remote in character, time, and place, from the acts in question. *Morse v. Railroad Co.*, 16 N. W. Rep. 358. This evidence may not have influenced the jury, but we cannot see that it did not.

A more serious error was in giving the first charge to the jury at the request of the plaintiff, that "if the car was overturned by reason of any defect in said car, or of the track on which it was running, * * * this is in itself presumptive evidence of negligence on the part of the defendant; and the burden is on the defendant to show that there has been no negligence whatever, and that the overturning has resulted from a cause which reasonable care and foresight could not prevent."

1. It was not any defect in the car that was in issue. Suppose the car had been derailed by a broken axle, that would raise no presumption that the track was ruinous and weak, or that the defendant had knowledge of its condition.

2. Nor was it "any defect" which the track might have which the jury were to consider, but only the defects charged. It was in evidence that the weather was very cold at that time and place,—the thermometer was 28 degrees below zero; also that broken rails are more frequent when the weather is cold. But no issue has been made upon a defect so caused; nor of the defendant's knowledge or want of knowledge of such defect. Yet the charge is that such or any other defect in the track is presumptive evidence of negligence of the defendant in what constituted "the real cause of the accident," whatever it was, and lays on it the burden of showing that there was no negligence whatever. That is

very unreasonable. It is as though the jury were told the same thing in case an enemy had drawn the spikes, thereby causing the car to be derailed. It is impossible to see how such a fact, even if the jury thought the defendant careless in such a case, could be presumptive evidence of the defendant's negligence in letting its track become weak and ruinous.

The second charge was also equally erroneous. The court charged "that the burden of proof is upon the plaintiff to show the negligence of the defendant, but it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of defendant; and that the cause of that injury was probably the negligence of the defendant; and that whether it is so or not is in the knowledge of defendant, for then the defendant must show what the real cause of the injury was; and if the defendant does not choose to give the explanation, the jury would be authorized to find that the real cause of the injury was the negligence of the defendant in the particular case specified in the complaint." This is wrong for many reasons. It tells the jury that whatever may have been the cause of the accident, whether as alleged in the complaint, or from any other cause, however remote, if the defendant was "probably" negligent in it, then the jury, without any further proof, may find against the defendant on the facts in issue. To show that the plaintiff was injured by a broken axle; that such axle, on inspection, appeared much worn, and that the defendant probably knew it; or that the engineer was probably intoxicated, and so caused the accident,—certainly could raise no presumption as to the condition of the track, nor of the company's knowledge of that condition. The company may be equally ignorant with the plaintiff as to what the jury may think is "probably" the "real cause" of an accident, or of what is in fact "the real cause." But this instruction is to the effect that, whether the company has or has not any knowledge, if still it is probably negligent in something else, which might have been the cause of the accident, it must nevertheless show what the real cause was, or the case as charged will stand confessed. No rule of law, we think, will sus-

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tain that position. Wood, Mast. & Serv. § 419; Whart. Neg. § 421; Railroad Co. v. Scott, 64 Tex. 549; note to Railroad Co. v. Brice, 1 S. W. Rep. 483, 28 Amer. & Eng. R. Cas. 551; Ely v. Railway Co., 77 Mo. 34.

A point is made by the defendant that the plaintiff at the time of the accident was riding on a pass, which had conditions that in case of injury to the holder would protect the defendant from liability. The effect of such a provision upon a pass is not, under the evidence, a question in this case. The pass was apparently adopted by both parties as a convenient way to carry out a contract of employment. The terms of that pass were no part of that agreement. Its object was only to enable the plaintiff, by its means, to pass over the road. The agreement was that the plaintiff should serve the defendant as its traveling auditor; go from station to station on this and other lines of road, upon the cars of defendant, without charge to the plaintiff; for which he was to have an agreed compensation. With or without the pass he was to do, and would have done, so far as appears, precisely what he was doing at the time of the accident. He was a servant of the company, on duty in the defendant's business, and riding upon or under his contract of employment, but of which contract neither the pass nor its conditions were a part. The relations between the parties were those of master and servant, and the only rule of the liability of the defendant to the plaintiff is the rule of the liability of the employer to the employé. That rule is "that when a servant enters into the employ of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment; and he cannot recover for injuries resulting from such ordinary risks." Wood, Mast. & Serv. § 326. Noyes v. Smith, 28 Vt. 59. The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part; and he is met with two presumptions, both of which he must overcome, in order to entitle him to a recovery: *First*. That the master discharged his duty to him by providing suitable instrumentalities for the business; and this involves some-

thing more than proof of the mere fact that the injury resulted from a defect in those appliances. The burden is imposed on him of showing that the master had notice of the defect, or that, in the exercise of ordinary care, which he is bound to observe, he would have known it. *Second*. When this is established, he is met by another presumption, the force of which he must overcome, and that is that he assumes all the ordinary hazards of the business. To overcome this presumption he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from hazard incident to the business, or from causes known by him to exist, or which he might have known by the exercise of ordinary care. Failing to overcome these presumptions, he cannot recover. Wood, Mast. & Serv. § 382, and cases cited. The jury in this case should have been so instructed, instead of being permitted to act upon the instruction given to them by the court. There was no evidence in the case to overcome either of these presumptions; and for this, as well as for the other reasons above stated, the judgment must be reversed. Judgment reversed, and a new trial ordered.

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(March 11, 1889.)

TERRITORIAL COURTS — TIME AND PLACE FOR HOLDING—POWERS OF JUDGES.

1. The judges of the district court have the power, when assembled at the capital, to fix the time and places for holding court in their respective districts.

SAME—CAUSES ARISING UNDER UNITED STATES LAWS.

2. They also have the power to fix the time and places for holding terms of court for the trial of causes where the United States is a party, or where such causes arise under the constitution and laws of the United States.

JURY — ISSUANCE OF VENIRE — UNITED STATES MARSHAL.

3. In such cases it is proper to issue the *venire* to the marshal of the United States, directing him to summon jurors from the body of the district at large.

BIGAMY—INDICTMENT—SUFFICIENCY.

4. In an indictment under section 3 of the act of congress approved March 22, 1882, c. 47, entitled "An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy and for other purposes." the use of the word "co-

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habit" is sufficient, and it is not necessary to set out at large in the indictment the meaning or definition of the word itself.

SAME—ARGUMENTS OF COUNSEL—HARMLESS ERROR.

5. In the trial of a cause arising under said section the prosecuting attorney referred to the fact that the defendant had failed to testify as a witness in his own behalf when he had the right so to do. This is *held* error, but is cured by the court subsequently, at the request of the defendant, charging the jury, in substance, that the fact that the defendant did not testify in his own behalf should not in any manner be considered by the jury as a circumstance against him.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

Samuel Kuntze was convicted of bigamy, and appeals. Affirmed.

Smith & Smith, for appellant.

There is no such crime known to the laws of the United States as "unlawful cohabitation," nor is there such a crime as "cohabitation."

The time of holding the district courts, as well as the place, is fixed by the judges of the supreme court; but they must be held in the "several counties or subdivisions" of the district. Rev. St. U. S. § 1914.

To convict under the indictment, it was incumbent on the government to prove two principal facts: (1) That the defendant lived (cohabited) with the two women named in the indictment; (2) that a marriage, real or ostensible, with each of these women, had preceded this cohabitation. Rev. St. U. S. § 1865.

James H. Hawley, U. S. Dist. Atty.

The word "cohabit," when used in a criminal statute, means "together as man and wife." Rev. St. Idaho, § 7684; Webst. Dict. 284; *Cannon v. U. S.*, 116 U. S. 74, 6 Sup. Ct. Rep. 278.

While this court has the power to set terms of court in each of the counties of the territory, it would still have the right to determine in which of said counties United States business should be transacted. Rev. St. U. S. § 1910; Id. § 1874.

LOGAN, J. The defendant was indicted by the grand jury at Blackfoot, Idaho territory, in October, 1887, for a violation of section 3 of the act of congress approved March

22, 1882, c. 47, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes." The section reads as follows: "Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." The defendant was tried and convicted at the June term, 1888, of the district court of Bingham county, for a violation of the preceding section, and sentenced to suffer the extreme penalty of the law, and from that judgment he has appealed to this court.

The indictment referred to reads as follows: "Samuel Kuntze is accused by the grand jury of the United States within and for the Third judicial district of Idaho territory, duly summoned and impaneled upon their oaths, by this indictment, of the crime of unlawful cohabitation, committed as follows, to-wit: The said Samuel Kuntze, at Bear Lake county, within said Third judicial district of Idaho territory, on the first day of December, A. D. 1884, and thereafter, on divers other days, and continuously from the said first day of December, A. D. 1884, up to and including the day of finding this indictment, did unlawfully cohabit with more than one woman, to-wit, with Mrs. Samuel Kuntze and one Caroline Wuthrick, against the peace and dignity of the United States, and contrary to the form, force, and effect of the United States statute in such case made and provided." To this indictment the defendant demurred upon the ground that the same did not state facts sufficient to constitute an offense, in this: That it charges a mere conclusion of law; that it did not state whether he cohabited with the two women named as his wives or otherwise; and that the court, being a district court for Bingham county, had no jurisdiction of the offense attempted to be charged, it being alleged to have been committed in Bear Lake county. The demurrer was overruled by the court be-

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low, which decision is assigned as error by the defendant.

The first objection goes to the meaning of the word "cohabit," used in section 3 of the act, and also in the indictment. This word has several meanings, as defined by Webster and Worcester, and among its definitions we find that it is defined, "To dwell or live together as husband and wife;" and this unquestionably is the sense in which it is used both in the statute and in the indictment. The context in which it is found, and the manifest evils which gave rise to the statute in regard to cohabitation, require that the word should have the meaning assigned to it. *Cannon v. U. S.*, 116 U. S. 55, 6 Sup. Ct. Rep. 278. Taking the meaning of the word as defined, and the manner in which it is used in the indictment, we think it is sufficient to charge the defendant with the crime he is alleged to have committed. Certainly, the defendant was fully aware of the nature of the offense with which he was charged; and, taking into consideration sections 7684 and 7686 of the Revised Statutes of Idaho, we think the indictment is sufficient.

The second objection is practically disposed of by this court when it has disposed of the first objection. At any rate, it becomes more a question of evidence than of law, if the meaning of the word "cohabit" is to be in the sense used. The opinion of the supreme court is very full upon this subject, as will appear on page 71¹ of *Cannon v. U. S.* Although it is true that this case cannot be considered as authority, yet the opinion of the court upon the questions raised is of as much value as if the case was of the most binding authority.

The third objection goes to the jurisdiction of the court, and the construction of the jury by which the defendant was convicted. No question is raised as to the manner of drawing the grand jury, for the reason that the manner of their drawing does not appear to the court. The question is raised, however, as to the power of the court to summon such grand jury from the district at large, and the right of the United States marshal to execute the process. The same questions are raised in regard to the trial jury, and we will

consider and dispose of both the questions at the same time.

The only question involved is the power of the court to hold sessions of court for the trial of causes arising under the constitution and laws of the United States in one designated place in the judicial district. The organic act, § 1914, provides that the time of holding the district courts, as well as the places, shall be fixed by the judges of the supreme court when assembled at their respective seats of government. Section 1874 of the organic act provides that the judges of the supreme court in each territory of the United States are hereby authorized to hold court within their respective districts in the counties wherein, by the laws of said territory, courts have been or may be established, for the purpose of hearing or determining all matters and causes except those in which the United States is a party. The act of March 2, 1867, passed with especial reference to Idaho territory, provides that the judges of the supreme court of said territory, or a majority of them, shall, when assembled at the seat of government of said territory, define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and shall also fix the times and places for holding court in the several counties or subdivisions in each of such judicial districts, and alter the times and places of holding the courts as to them shall seem proper and convenient. It would certainly seem fair to conclude from these acts that the judges, as provided by law, may so arrange the time and place for holding court for the trial of causes in which the United States is a party at such place or places in the district as they may think proper and convenient. The place for holding court in the Third district was fixed at Blackfoot, Bingham county. We think the court had this power. *Huston v. Heed*, 1 Idaho, 402.

The selection of jurors by the marshal from the body of the district under open *venire* directed to him was made the subject of challenge by the defendant, which challenge was overruled by the court. We are referred to the case of *Clinton v. Englebrecht*, 13 Wall. 434, as decisive of this point in favor of the defendant. This case is not at all in point.

¹116 U. S., 6 Sup. Ct. Rep. 286.

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It was a civil case, arising under the laws of Utah, and did not fall within the jurisdiction of a district court fixed for the trial of such issues. The law of the territory of Utah had provided a mode of selecting and returning jurors, which was openly disregarded by the district court, and for this error the judgment was reversed. The case at bar is founded upon the statute of the United States, and appertains to the federal jurisdiction of the court, and differs materially from that decided by the supreme court in the above case. No provision has been made by the legislature of this territory for selecting or summoning jurors for the trial of cases arising under the laws and constitution of the United States, or in which the United States is a party, and it would seem that in the absence of any territorial law the court had the common-law power to proceed in the manner in which it did, and this position is supported by undoubted authority. *Beery v. U. S.*, 2 Colo. 186; *Huston v. Heed*, 1 Idaho, 404; *U. S. v. Beebe*, 2 Dak. 292, 11 N. W. Rep. 505; *McCann v. U. S.*, 2 Wyo. 275; *Bennet v. U. S.*, 2 Wash. T. 179, 3 Pac. Rep. 272. The marshal being the executive officer of the court when sitting for the trial of causes in which the United States is a party, and performing essentially the duties of a sheriff at common law, it is no objection that the selection of the jurors was intrusted to him; for, by the common law, he was clothed with authority to that end. *Beery v. U. S.*, supra. We think, therefore, that no error was committed by the court below in its disposition of the demurrer and challenges to the grand and trial juries.

The defendant requested the court to instruct the jury that in this case the evidence did not warrant a verdict of guilty, and that it was their duty to return a verdict of not guilty. The court was right in declining to give this instruction. There was some evidence in the case tending to prove the guilt of the defendant, and sufficient to authorize the court in submitting the case to the jury, and, the jury having found a verdict upon the evidence, we are not inclined to interfere with their verdict.

The refusal of the court to give the first instruction requested by the defendant was not error. The court charged the jury that,

when a person is charged with an offense, his flight or hiding will not of itself warrant a conviction, but it may be proven as a circumstance to be considered with the other evidence in the case. This, we think, was sufficient and justified by the evidence, and consequently it became unnecessary thereafter to charge as requested by the defendant upon the same point. *People v. Forsythe*, 65 Cal. 101, 3 Pac. Rep. 402; *People v. McDowell*, 64 Cal. 467, 3 Pac. Rep. 124.

It was manifestly improper on the part of the district attorney to have referred to the fact in any way in his address to the jury that the defendant had failed to testify in his own behalf. He should not have called the attention of the jury to that fact. But as it appears subsequently that the defendant requested the court to instruct the jury that the failure of the defendant to testify as a witness in his own behalf should not be taken into consideration by the jury in arriving at their conclusion in this case, and is not to be considered as a circumstance against him, and it appearing that the court did so instruct the jury, all of which took place subsequent to the remarks made by the district attorney, we fail to see in what manner the defendant was injured by such remarks. The error on the part of the district attorney was cured by the act of the defendant, and of the court in the charge above referred to. We do not deem it necessary to notice particularly any other exception taken by the defendant in this case. It is sufficient to say that we find no error in the record calling for a reversal of the judgment. The judgment is therefore affirmed.

WEIR, C. J., and BERRY, J., concurring.

UNITED STATES v. COZZENS.

(March 11, 1889.)

Appeal from district court, Bingham county.

One Cozzens was convicted of bigamy, and appeals. Affirmed.

Smith & Smith, for appellant. *J. H. Hawley*, U. S. Dist. Atty.

LOGAN, J. Under a stipulation now on file with the clerk of this court, and upon the opinion of this court in the case of *U. S. v. Kuntze*, ante, 446, 21 Pac. Rep. 407, (decided at this term,) the judgment in this action is affirmed.

Drake v. Union Pac. Ry. Co.

DRAKE v. UNION PAC. RY. CO.

(March 11, 1889.)

MASTER AND SERVANT—ASSUMPTION OF RISKS.

Where a fireman upon a locomotive engine, in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service he is engaged in, or having the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employer is guilty of no laches or misconduct unknown to the servant, or which with ordinary care he might have known, he cannot recover for such injury.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county.

Action by Allen T. Drake, administrator, against the Union Pacific Railway Company, to recover damages for the alleged negligent killing of plaintiff's intestate, an employe of defendant. From a judgment for plaintiff, and from an order overruling its motion for a new trial, defendant appeals. Reversed.

P. L. Williams and *W. H. Savidge*, for appellant.

An instruction is vicious which ignores a qualification which the evidence tends to prove. *Railway Co. v. Rector*, 9 Amer. & Eng. R. Cas. 265, 269.

A railway company is not held to be an insurer of the safety of its employes, even as to the agencies within its control; *a fortiori* it ought not to be held to this rule as to agencies without its control. *Railway Co. v. Fowler*, 8 Amer. & Eng. R. Cas. 504, 509; *Pierce*, R. R. 379, cases cited; *Gibson v. Railway Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Wood, Mast. & Serv.* § 382; *Railway Co. v. Bresmer*, 4 Amer. & Eng. R. Cas. 647, 650.

Smith & Smith and *R. D. Winters*, for respondent.

Under the evidence, as introduced, it was the duty of the court to submit the question of defendant's negligence to the jury. *Jones v. Railway Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Hough v. Railway Co.*, 100 U. S. 224; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884.

The defendant was bound to keep its track in safe condition, and to use all reasonable means to keep obstructions off the track, and

to discover any that may by chance get thereon, and remove them. *Wilson v. Railway Co.*, 15 Amer. & Eng. R. Cas. 192; *Railway Co. v. Welch*, 52 Ill. 183; *Railway Co. v. Gregory*, 58 Ill. 272; *Railway Co. v. Russell*, 91 Ill. 298; *Fifield v. Railway Co.*, 42 N. H. 225; *Dorsey v. Construction Co.*, 42 Wis. 583.

This action was maintainable, and was properly brought in Idaho for a liability arising under the statute of Wyoming. *Dennick v. Railroad Co.*, 103 U. S. 11.

BERRY, J. This is an appeal from the district court of the Third judicial district, Bear Lake county, tried by a jury at the July term, 1888, Hon. CASE BRODERICK, district judge, presiding. The action is brought by the plaintiff as administrator of one Fred. S. Drake, deceased, who was killed in an accident on the Oregon Short-Line Railway, one of the lines of the defendant, at a point near Ham's Fork, in Wyoming territory, January 28, 1887. The complaint alleges that the deceased was employed by the defendant at the time as a fireman on one of its locomotive engines; that at the place of the accident "the track of the said road was out of repair, and unfitted for the passage of trains, by reason of ice and snow, which the defendant had negligently permitted to remain on the track;" that the defendant, with knowledge, etc., willfully and carelessly ran its train and engine over said track, whereby the deceased, without fault on his part, was killed; that the deceased was ignorant of the condition of said track, or that it was out of repair, or unfit for use. The plaintiff demands judgment as administrator, and pleads the statute of Wyoming territory, where the accident occurred, as allowing recovery by an administrator. The answer of the defendant puts in issue each allegation of the complaint. On the trial, when the evidence on the part of the plaintiff was closed, and the plaintiff had rested his case, the defendant moved for a judgment of nonsuit, under section 4354, St. Idaho, subd. 5, on the ground that the plaintiff had failed to prove a sufficient case for the jury. The motion was denied, and the defendant excepted.

Certain requests were made by the defendant to the court to charge the jury, (which

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requests will hereafter be referred to more at length,) each of which was refused by the court, and to which refusal the defendant duly excepted. The court delivered its charge to the jury, which was also excepted to by the defendant, as will more fully appear, and the jury found a verdict for the plaintiff in the sum of \$3,000. A bill of exceptions and a case were duly settled and allowed, and upon which a motion was made for a new trial, which motion was denied, and judgment on said verdict was entered for plaintiff; and the defendant appeals from such order of refusal and from the judgment to this court.

The first point of the appellant is that the court erred in refusing judgment of nonsuit. That motion was based upon the want of evidence, and the ground is taken that the evidence did not show such a state of facts that the jury could find the defendant liable. It is stipulated that the case before us contains all the evidence. A review of this point involves an examination of the facts of the case. There is little or no conflict between the witnesses on any material point. Stated as strongly for the plaintiff as the evidence will warrant, they are about as follows: The deceased is alleged in the complaint to have been at the time of the accident in the employ of the defendant as fireman on one of its locomotive engines; and the evidence shows that this employment was on and over this division of the road, on its regular trains, and that he had been so employed for some years; that he ran between Montpelier, in Idaho, and Granger or Green River, in Wyoming territory, with his head-quarters at Montpelier, and on each trip passed over the place of the accident; that the train on which he was regularly employed and running was stopped, either the day of the accident or the preceding day, while going east, in consequence of the snow on the track, and difficulty of running, in consequence of the drifted condition of the roads, at a station called Fossil, about 10 miles west of the place of the accident; that other trains, from both directions, had stopped there, and the running of regular trains had been practically suspended, since early in the morning of the accident; that at 12:15 P. M. of that day a special train was made up of passenger cars, to be drawn by two engines, the train so made up being

what is known as a "double-header," to be sent from Fossil east over this line, both to forward the train, and also thereby open and clear the track of the drifted snow; that the second engine was the one on which the deceased was accustomed to run, but on which, on that occasion, another engineer than the usual one was placed; it was a special provision, for a special duty, made necessary by the drifted snow; that no snow-plow was sent ahead of this train, but that this "double-header," as admitted on the argument, and in the respondent's brief, was sent out to "buck the snow." It is also shown that the officers of the company, and the trainmen at Fossil, had knowledge of the storm of wind and snow that had commenced about three days previous to the 28th of January. From the circumstances, in the absence of proof, they are presumed to have known it; and of the presence of drifts upon the line; and of the difficulty of running in consequence; and of the delayed and deranged conditions of the trains; but not that this place of the accident was in any way specially dangerous, above other places in its vicinity; and it was not shown that the track at this point was in any way defective; and also it was shown that the accident was on account of the engines running into a drift at that point, at a speed of about 25 miles an hour. It was shown that the weather was unusually cold,—some degrees below zero,—and had been cold for a day or two previous to the wreck; that the presence of a drift at the place of the accident was on account of the wind blowing from an unusual quarter; that the altitude was about 7,000 feet; the country extremely hilly and rough; that service in "bucking snow-drifts," whether by snow-plow or otherwise, is considered by railroad men as extrahazardous. There was other evidence, but not to materially affect either of these facts. Had this action been for injury to a passenger, instead of to an employé, much of this evidence would have had no bearing, except upon the question of knowledge on the part of the defendant; but being by the representative of an employé, and under the circumstances shown, it involves, or tends to show, the knowledge, or means of knowledge, of the deceased, of the causes of the accident, and the quality and degree of risks which the deceased voluntarily

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assumed, and for which the defendant might not be liable.

It is not claimed that there was any promise to indemnify the deceased, or to do anything to insure safety; nor that the deceased made any request or protest; or that the company had any knowledge, which the deceased did not have, or might not have had, if he had desired. Under such evidence, it is difficult to see how the company could have been found liable in damages for the death of the deceased. It is by no means clear that the motion for nonsuit should not have been granted. We think it should have been allowed. But, if this were not so, the law as to the risk assumed by the employé should have been given to the jury, and the distinction in the obligation of the defendant, in cases of a mere passenger and of an employé, engaged in this service, under the circumstances of this case, and as to his knowledge, or want of knowledge, of the facts constituting this danger, and as to his assent, or his want of assent, to the assumption of the danger, should have been stated.

The judge charged, at the plaintiff's request: "(1) That if the jury find from the evidence that the said railway track was obstructed with ice and snow; that this caused the wreck of the train on which Fred. S. Drake was riding; that in such wreck he was killed without fault on his part; that the defendant's road-master or superintendent, or both of them, had notice of said obstructions in time to remove the same, or in time to have prevented the said train from running into or upon such obstructions, by the use of ordinary diligence, under all of the circumstances of the case,—then your verdict should be for the plaintiff. (2) In this case it is admitted that Fred. S. Drake lost his life at the time and place alleged in the complaint; and the first question for your consideration is whether there was negligence on the part of the defendant company. The defendant was bound to use ordinary care in keeping its track in a safe condition. If it failed after notice to do it, in this instance, then it is liable; but if, under all the attendant circumstances, you are not satisfied from the evidence—that is, by a preponderance thereof—that the company was negligent, then it is not liable in this action,

and you are the exclusive judges of the evidence and facts." These charges are erroneous, both in what they contain, and in what they do not contain. The case was not the case of a passenger riding upon a train, and the jury should not have been induced to so consider it. The court adopted a wrong theory of the nature of the rights and obligations of the parties, respectively, and both charges are consistent with such wrong theory. How well soever it may have suited the case of an injury to a mere passenger, it was misleading when applied to this case; and, as we have before said, the learned judge should have given the law as to the liability of the defendant to its employé, under the circumstances of the case on trial. This the charge does not do, but, so far as it assumes to give a rule, it is erroneous.

The defendant further requested the court to charge "that if, in this case, the jury find from the evidence that, at and near the point of the wreck resulting in the death of Fred. S. Drake, and at the date of its occurrence, there had been recent storms and snow-falls in various places on the track of said railway, thereby increasing the risks and dangers to trainmen and others in going over said portion of said road, and the deceased had knowledge or the means of being informed of said conditions, by the exercise of ordinary diligence, and notwithstanding he continued in said employment until he received the said injury resulting in his death, in consequence of the said dangers, then the plaintiff cannot recover in this action." This request was refused, but, in our opinion, should have been given especially, as qualifying what was actually given, and its refusal was error. The rule as to risks assumed by an employé, and the liabilities of the employer, as to injury to the servant while on duty in such employment, is, in effect, stated in *Pierce on Railroads*, 379, that a servant who, before the injury, had knowledge of the special risks and dangers of the service, or who, having reasonable opportunities to inform himself, ought to have known the facts constituting such risks and dangers, by remaining in the company's service is presumed to have assumed the risk of such voluntary exposure of himself; and he cannot recover for an injury result-

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ing therefrom; and his knowledge has the same effect, whether the employer was informed or was in fact ignorant of such danger; and the rule applies with special force when the danger is obvious to the senses, as in this case, and where the servant was voluntarily assuming the task of removing the very obstructions complained of. 2 Thomp. Neg. p. 1008, § 15; Railway Co. v. Fowler, 8 Amer. & Eng. R. Cas. 504; Gibson v. Railroad Co., 63 N. Y. 449; De Forest v. Jewett, 88 N. Y. 264; Wood, Mast. & Serv. § 379. The judgment and order overruling motion for a new trial should be reversed, and a new trial granted. Judgment set aside, and new trial granted, costs to abide the event.

UNITED STATES *ex rel.* McDONALD, District Attorney, *v.* SHOUP *et al.*

(March 11, 1889.)

PARTIES—ACTION FOR BENEFIT OF COUNTY—CORPORATE NAME.

1. Since the 1st of June, 1887,—the date when the Revised Statutes of Idaho went into effect,—an action for the benefit of a county, and where the demand sued upon is the property of the county, must be in the corporate name of the county.

BAIL BOND—ACTION ON—REFORMATION.

2. A bond payable to the "people of the United States" will not sustain a judgment in favor of the "people of the United States of the territory of Idaho." Before such judgment can be allowed the instrument must be reformed.

PLEADING—NECESSITY OF VERIFICATION.

3. A complaint by a public officer, in his official capacity, need not be verified, but the answer to it must be verified, unless it also be by a public officer in his official capacity. But if the complaint be not in fact verified, a general, and not specific, verified answer, may put in issue the main allegations of the complaint, under section 4183 of the Revised Statutes.

(*Syllabus by the Court.*)

Appeal from district court, Lemhi county.

Action by the people of the United States in the territory of Idaho, by their relator, John McDonald, district attorney in and for Lemhi county, suing for the use and benefit of said Lemhi county, against George L. Shoup and others, sureties upon a bail bond. From a judgment for plaintiffs, defendants appeal. Reversed.

The other facts fully appear in the following statement by BERRY, J.:

This is an appeal from the judgment of the

district court in and for Lemhi county, rendered April 26, 1888, in favor of the plaintiffs, and against the defendants severally, in the sum of \$500 each. The action was commenced July 14, 1887. The defendants on the 28th day of December, 1887, appeared by their attorney, C. A. Wood, Esq., and filed a demurrer to the amended complaint, which amended complaint had been filed on the 19th day of that month. The complaint set up a bond executed by the defendants, November 26, 1886, in the penal sum of \$2,500, which the defendants promised to pay in sums of \$500 each, conditioned for the appearance of one Thomas McKinney, to answer to a criminal charge, in whatsoever court, etc., and to hold himself amenable to the orders, etc. The proceedings in which the bond is taken were regular, and authorized the taking of such bond as plaintiffs say this was intended to be. The bond was in form as described by section 499 of the Criminal Code of Idaho territory, (Rev. Laws, 8th Sess.,) except that it was, by its terms, payable to "the people of the United States," instead of to "the people of the United States of the territory of Idaho." The complaint, which was not verified, admits this deficiency, but alleges that the defect was caused by mistake of all parties to it; and that the prosecutor and all the defendants intended it to be in statutory form; and prays that (1) the bond be reformed by adding to it, after the words "United States," the words "of the territory of Idaho," as the obligees of said bond; (2) that the plaintiffs have judgment upon the bond. To this complaint the defendants demurred, and state, as grounds of demurrer: (1) That the plaintiffs have not the legal capacity to sue; (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and the defendants excepted; whereupon the defendants answered as follows: The defendants, in answer to the complaint of the plaintiffs herein, "deny each and every allegation therein contained," which answer was duly verified. On the 26th day of April, 1888, the plaintiffs, by their counsel, said district attorney, moved for judgment on the pleadings, on the ground that the answer was only general, and not a specific denial of the

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allegations of the complaint. The motion was sustained, and judgment was entered against the defendants in the sums of \$500 each; to all of which the defendants excepted.

Charles A. Wood, for appellants.

If a condition prescribed by statute is omitted, the bond is void, although the surety is benefited. *Alexander v. Bates*, 33 Ga. 125; *State v. McCown*, 24 W. Va. 625.

If the recognizance is not authorized by law, or if the court had no authority to take it, it is void. *Keppler v. State*, 14 Tex. App. 173; *Phelps v. Parks*, 4 Vt. 488; *Nicholson v. State*, 2 Ga. 363.

If the answer was sham or frivolous, or improper for any other reason, it should have been stricken out; but so long as the answer remained on the records, denying any of the material allegations of the complaint, the court had no authority to order judgment on the pleadings. *Reich v. Mining Co.*, 3 Utah, 254, 2 Pac. Rep. 703; *Prost v. More*, 40 Cal. 347; *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. Rep. 942.

R. Z. Johnson, Atty. Gen., and *Henry Z. Johnson*, (*James H. Hawley*, of counsel,) for respondents.

As the complaint shows that the defendants secured the discharge of their principal by the execution of the bond in question, neither said principal nor the defendants were prejudiced by the clerical error in the bond. *People v. Myers*, 1 Idaho, 357; *Huffman v. Koppelkom*, 8 Neb. 344, 1 N. W. Rep. 243; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. Rep. 577; *State v. Soudriette*, 105 Ind. 306, 4 N. E. Rep. 860; *Gorman v. State*, 38 Tex. 112; *Murfree*, Off. Bonds, § 62.

The sureties cannot set up as a defense the fact that the amounts in which they justified were insufficient under the statute. The justification is no part of their contract. *People v. Carpenter*, 7 Cal. 402; *People v. Shirley*, 18 Cal. 121; *People v. Penniman*, 37 Cal. 271; *Murdock v. Brooks*, 38 Cal. 603; *Brandt*, Sur. §§ 439, 440.

Although the complaint was not verified, the territory being plaintiff, the statute required the defendants to verify their answer. Rev. St. § 4199.

A general denial in a verified answer is

sham and frivolous, and may be stricken out or disregarded. *People v. Hagar*, 52 Cal. 171, 175, 182; *Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. Rep. 388.

Whenever the answer fails to deny any of the material allegations of the complaint in such form as to put the same in issue, the plaintiff is entitled to judgment upon the pleadings. *Doll v. Good*, 38 Cal. 287; *Fitzgibbon v. Calvert*, 39 Cal. 261; *Felch v. Beaudry*, 40 Cal. 443.

BERRY, J., (*after stating the facts.*) The first question is whether the action is brought in the name of the proper plaintiff. It is conceded that the county of Lemhi, Idaho Ter., is the party in interest, and for whose benefit the action is brought. Whatever was the practice as it stood prior to the 1st day of June, 1887, the statutes on which that practice rested were either repealed, or superseded, by the Revised Statutes, which went into effect June 1, 1887. By section 4090 all actions must be brought in the name of the party in interest. By section 1732 all acts respecting the property and rights of the counties shall be in the names of the respective counties. And by section 1733 counties may sue and be sued. It seems, therefore, that the county is not only authorized to sue in its own name, but is required to do so; and that this action should have been brought in the name of Lemhi county. But it is objected further that the bond does not run to the county of Lemhi, or even to the people of the territory of Idaho, but to the people of the "United States," and that such a bond was unauthorized by the laws; that as to the meaning of the parties to this bond the court cannot from the words alone take judicial knowledge that the bond was intended to run otherwise than it was in fact drawn. The bond, if a judgment was to be rendered upon it in favor of the people of the territory of Idaho, or for the benefit of Lemhi county, should have been reformed. It was not reformed; and, as it stood when judgment was rendered, would not sustain a judgment in favor of the people of the United States in the territory of Idaho. A bond in this form was unknown to the laws; and only on reformation could it have any validity whatever.

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But it is claimed that it is alleged in the complaint that it was the intention of all parties to it to make it payable as provided by section 498 of the Laws of the Eighth Session, and that such fact is admitted. Even if such were the case, (which the defendants do not admit,) the bond should have been reformed as prayed in the complaint, before a judgment should have been rendered. In some way it should appear in the action of the court that the promise was for the benefit of the party demanding judgment upon such promise. There should have been a formal reformation of the bond, even if, as the respondent contends, the answer was not sufficiently specific. But was not the answer sufficient to put in issue each material fact of the complaint? Whatever may be thought of the intention of the parties, we must still look to what they did, and for this, first, to the pleadings. The allegations of the complaint are that by mutual mistake there was a defect in stating in the bond the name of the obligee; and which allegation, if adjudged to be true, might cure that alleged defect in the judgment. The answer, as to every material allegation in the complaint, (Rev. St. Idaho, §§ 4183, 4184,) is good, as a general denial. But it is not a specific denial of each allegation controverted; hence, if the complaint is verified, the answer is open to the objection of insufficiency. The learned judge in the court below seems to have taken the view that the complaint was verified, and that the answer should be wholly disregarded. While it is not specifically stated for what cause he ignores the answer, we may suppose it was for want of compliance with the statute, (section 4183,) in not being specific in denial of each material allegation of the complaint controverted. If such holding is correct, it must be for the reason that in this case a general answer is denied to the defendants. Section 4199, Rev. St., provides that when an action is brought in the name of an officer of the territory, and for the public, the complaint need not be verified; but the defendant, unless he also be an officer, or answering in his official capacity, must verify his answer. The statute goes no further on that point than merely to excuse such officer from verifying his pleading, and of requiring unofficial parties to

verify. The statute does not "verify the complaint," as the respondent claims. The officer is excused from verification for reasons growing out of the fact that his relations to the subject-matter are official, and not personal. If he desires, he may verify; and then his pleading will be a verified pleading, and will entitle him to whatever advantage may result from that fact. But if he do not verify, his pleading, for all purposes, except as to the single matter of verification alone, differs in nothing from an ordinary unverified pleading. In this case the defendants were entitled to interpose either a general or specific denial of the material allegations of the complaint, controverted by the defendant. Rev. St. § 4183, subd. 1. The answer was good, and the action of the court below was therefore error. From the view taken of the points here noted, it is apparent that the judgment cannot be sustained. Judgment reversed.

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(March 11, 1889.)

HOMESTEAD—EXEMPTION FROM EXECUTION.

1. A judgment lien acquired before the filing of a declaration of homestead by respondent and wife subjects such property to sale under execution. Such lien cannot be divested by any subsequent act of the owners.

JUDGMENT—LIEN—SATISFACTION.

2. A judgment lien is a vested right of property, and cannot be satisfied except by payment or release.

(*Syllabus by the Court.*)

Appeal from district court, Oneida county.

Ejectment by Joseph Smith against Edmund T. Richards and wife. From a judgment for defendants, plaintiff appeals. Reversed.

Smith & Smith, for appellant.

The lien of a judgment gives to the judgment creditor a vested right of property in the land to which it attaches. *Gunn v. Barry*, 15 Wall. 622; *Edwards v. Kearzey*, 96 U. S. 595.

Neither occupancy, where that alone is necessary, nor recording a declaration of homestead, where that is required, will in any way affect or modify a judgment lien. *Thomp. Homest. & Ex.* §§ 317, 318; *Kelly v. Dill*, 23 Minn. 435; *Bullene v. Hiatt*, 12

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Kan. 98; Robinson v. Wilson, 15 Kan. 595; Bartholomew v. Hook, 23 Cal. 278; Rix v. McHenry, 7 Cal. 89; Elston v. Robinson, 21 Iowa, 532.

A subsequent setting off of a homestead does not detach a judgment lien that had already attached. *Freem. Ex'ns*, pp. 390, 391, § 249; Rankin v. Scott, 12 Wheat. 177; Goodwin v. Investment Co., 110 U. S. 1, 3 Sup. Ct. Rep. 473; McComb v. Thompson, 42 Ohio St. 139.

D. W. Standrod and *J. T. Morgan*, for respondents.

Under the laws of this territory a judgment does not become a lien upon the homestead premises. It can become a lien only upon real property of the judgment debtor which is not exempt from execution. *Code Civil Proc.* 1881, § 425; Bowman v. Norton, 16 Cal. 219, 220; McDonald v. Badger, 23 Cal. 400; Williams v. Young, 17 Cal. 403; Ackley v. Chamberlain, 16 Cal. 181.

After the selection of the homestead is made, and filed for record, no levy upon or sale of the homestead property can be legally made, except for purchase price, mechanic's lien, etc. *Hawthorne v. Smith*, 3 Nev. 182, 185; *Estate of Walley*, 11 Nev. 264; *Lachman v. Walker*, 15 Nev. 425; *Stone v. Darnell*, 20 Tex. 14; *Macmannus v. Campbell*, 37 Tex. 267; *Smyth, Homest.* §§ 176, 180; *Green v. Marks*, 25 Ill. 224; *Hume v. Gossett*, 43 Ill. 299; *Bonnell v. Smith*, 53 Ill. 377.

If the judgment in this case became a lien for any purpose, such lien is postponed to the homestead right. *Hoyt v. Howe*, 3 Wis. 752; Bowman v. Norton, 16 Cal. 219; *Freem. Ex'ns*, § 249.

LOGAN, J. This is an action brought by the plaintiff against the defendants in ejectment. The action arose in Oneida county, and the same was tried upon an agreed state of facts. It appears from the findings of the court that on the 17th day of July, 1883, the plaintiff recovered a judgment against the defendant E. T. Richards, in the probate court of Oneida county; that on the same day an abstract thereof, made in conformity with the requirements of section 608 of the then Code of Civil Procedure of

Idaho, was filed and docketed in the office of the clerk of the district court of the Third judicial district of Idaho, in and for Oneida county; that on the same day a writ of execution was duly issued to the sheriff of Oneida county upon the judgment so docketed, and that under and by virtue of this writ the sheriff levied upon the real estate described in the complaint; that said real estate was then the property of the defendant E. T. Richards; that by virtue of such execution the sheriff of the county advertised the said property, as required by law, for sale, and that, on the 10th day of September, 1883, the same was sold, and the plaintiff, being the highest bidder, became the purchaser of the said property; that on the 1st day of April, 1884, the defendant E. T. Richards not having redeemed the said premises, the sheriff executed to plaintiff a deed of conveyance of said land and premises; and that by virtue of this deed the plaintiff seeks to eject the defendants. The defendants, however, claim that on the 3d day of September, 1883,—just seven days before the sale of the premises by the sheriff,—Ann Richards, who was then the lawful wife of the defendant E. T. Richards, by herself, filed, and caused to be recorded in the office of county recorder of said Oneida county her declaration of homestead, in the form and in all respects as required by law, upon the premises described in the complaint; that the defendant E. T. Richards, with his wife and family, had resided upon the premises continuously for seven years last past from the date of the execution and recording of the declaration of homestead; and that they now have no other homestead or place of residence whatever. Under this state of facts the court found as conclusion of law that the defendants are entitled to the possession of all the land and premises described in the complaint herein as against the plaintiff and all persons claiming, or to claim, the same under him, and that the plaintiff had no right, title, or interest in or to the said land, or any part thereof. It is claimed that this conclusion of law, as founded upon the facts, is error; and a reversal of the judgment is sought upon that ground.

The question presented for our considera-

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tion is, can the defendant, or his wife, under the circumstances, by filing a declaration of homestead subsequent to the attaching of a judgment lien, divest that lien, and prevent the property being made subject to it? It is with some difficulty that we have been able to arrive at a satisfactory conclusion in this case. Such doubts have arisen mainly from a consideration of the decisions of the courts of Nevada and California. These cases appear to hold that the homestead itself is exempt from forced sale under execution, and that a subsequent filing of a declaration of homestead under the statute defeats the operation and effect of the lien. Although we are of the opinion that these cases do not go fully to that extent, yet, even if they do, we are not prepared to uphold the doctrine laid down therein. Freeman, in his work on Executions, §§ 249, 249*d*, 249*e*, says, referring to the cases which we have mentioned: "These provisions clearly make it the duty of the officer to levy the writ on all property not then exempt from execution, and afterwards, in the event of plaintiff's recovering judgment, to sell all the property attached, if necessary to produce a satisfaction of such judgment. We think, therefore, that, construing all the statutes together, it clearly appears that these decisions are wrong, and that, when an attachment is properly levied on lands not then exempt from attachment and execution, a lien is created which no subsequently arising exemption can supplant; and in so thinking we are sustained by a decided preponderance of the adjudications upon this subject." Thompson on Homesteads & Exemptions, § 317, says: "If a simple contract debt, created at a time when the creditor has not had the notice required by law,—whether given by visible occupancy or a declaration of record,—that the debtor has withdrawn a certain portion of his land from exemption by making it his homestead, will bind such homestead, *a fortiori* a valid lien placed upon land before it acquires the character of homestead will not be subsequently impaired by the debtor occupying such land as his homestead, or, in those states where such a proceeding is required, by filing the statutory declaration of homestead. If the legislature of a state cannot

divest such a lien, it is pretty clear that a private individual can do no act which would have this effect. Plain as this conclusion would seem to be, the question has been thrust in the face of the courts again and again." Smyth on Homesteads & Exemptions, § 35, says "that, if the premises became a homestead after a lien has attached, this does not discharge or affect the lien;" and "a lien claimant, having a lien older than the homestead right, may enforce his lien without any reference to such homestead right." Platt on Property Rights of Married Women, § 71, says: "All liens acquired before the homestead has been established must be raised, or it will be subject to forced sale for their satisfaction." And again, in the same section, he says: "Consequently an appropriation of land as a homestead subsequent to the levy of an attachment or the attaching of a judgment lien cannot protect it from forced sale under the lien thus acquired." To the same effect: Kelly v. Dill, 23 Minn. 435; Bullene v. Hiatt, 12 Kan. 82; Robinson v. Wilson, 15 Kan. 448; Bartholomew v. Hook, 23 Cal. 278; Rix v. McHenry, 7 Cal. 89; Elston v. Robinson, 21 Iowa, 532.

We are cited by respondents to Hawthorne v. Smith, 3 Nev. 164; Estate of Walley, 11 Nev. 260; and Lachman v. Walker, 15 Nev. 422. In the first case the question was not a judgment lien, but an attachment lien, and the court there refused to express an opinion upon what would be the effect of a judgment lien entered before the filing and recording of a declaration of homestead. In the second case the court merely held that the widow of David Walley, deceased, was entitled to have her homestead set apart for her by the probate judge, and that, when so set apart, it was not subject to the debts of the said David Walley; but no opinion is expressed as to what would be the effect of a judgment lien. In 15 Nev. 424, which is the latest case called to our attention, the court say: "We intimate no opinion of what would have been the effect of a homestead declaration filed by plaintiff's grantors subsequent to the docketing of Rinaldo's judgment, but before sale of the property under execution issued upon that judgment, and prior to the conveyance by McCarran and

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wife to plaintiffs. In this case no declaration has ever been filed, and we have not the slightest doubt that the property is not exempt. The statute only exempts a homestead which has been selected according to its provisions. 'The homestead * * * to be selected * * * shall not be subject to forced sale. * * * Said selection shall be made by either husband or wife, or both of them, * * * declaring their intention in writing to claim the same as a homestead.' The law does not compel any person to have his property become a statutory homestead against his will, but it requires him to do certain things in order to enjoy its benefits." Under the act of 1881 homesteads are not exempt from sale under execution, and thus leaves the law as it was under the act approved January 13, 1875. Section 1 of that act is substantially the same as the Nevada statute; and the only construction which we can place upon it is as contended for by the appellant. The homestead is to be selected by the husband and wife, or either of them, or other head of a family, and when that is done it is exempt from forced sale under execution so far only as to subsequent liens. The property in this case, at the time of the filing and docketing of the judgment herein mentioned, was the property of E. T. Richards, the defendant, and was subject to levy and sale under that judgment. No subsequent act of the defendant, or of any one acting for him, could release that lien except by payment. A person against whom the law has created the lien is unable by any act of his, short of discharging it, to impair or affect it; and certainly, in a case of this kind, what he could not do by himself he could not do by his wife. *Tinney v. Wolston*, 41 Ill. 215. The effect, under the statute, of permitting the wife to file a declaration of homestead, and thus defeating the lien, would be indirectly doing for himself what he could not do, because the statute provides that from and after the filing for record of said declaration the husband and wife shall be deemed, and hold said homestead as, joint tenants. The judgment in this case should be reversed, and the case remanded to the court below, with instructions to enter judgment according to this opinion. Judgment reversed, with costs.

BURKHART, Speaker of the House, *v.* REED, Chief Clerk of the House, *et al.*

(March 11, 1889.)

MANDAMUS TO TERRITORIAL OFFICERS — PRODUCTION AND CORRECTION OF LEGISLATIVE JOURNALS.

Rev. St. Idaho, § 124, provides that the clerk, at the close of each session of the legislature, must arrange all bills and papers, and deliver them to the secretary of the territory, who must certify to their reception. Section 190 charges the secretary of the territory with the custody of journals of the legislature. Section 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the legislature. *Held*, that *mandamus* would not lie, on the application of the speaker of the house of representatives, to compel the secretary of the territory to produce a document delivered to him by the clerk of the house, and purporting to be the journal thereof, signed by the speaker *pro tem.*, in order that petitioner might make corrections therein, and to receive the corrected journal as the journal of the house. BERRY, J., dissenting.

Application for *mandamus* by H. Z. Burkhardt, speaker of the house of representatives, to compel Charles H. Reed, chief clerk of the house, and Edward J. Curtis, secretary of the territory, to produce and correct the house journal. Denied.

Arthur Brown, *Lyttleton Price*, *Texas Angel*, and *S. B. Kingsbury*, for petitioner. *R. Z. Johnson* and *Albert Hagan*, for respondent Reed. *Jas. H. Hawley* and *John S. Gray*, for respondent Curtis.

WEIR, C. J. This is an application by the plaintiff for a writ of mandate to be directed to the defendants above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which is as follows: "The above-named plaintiff, H. Z. Burkhardt, shows that he was the duly-elected speaker, and is now the actual and acting speaker, of the house of representatives of Idaho; that defendant Charles H. Reed is chief clerk of the house of representatives, and Edward J. Curtis is the secretary of the territory of Idaho; and for cause of action for *mandamus* alleges that the said defendant Chas. H. Reed has in his possession, as such chief clerk, the minutes of the proceedings of said house of representatives for the last day of the fifteenth session; that the same has not yet been signed by plaintiff, H. Z. Burkhardt, the speaker, and said defendant Reed refuses to present the same to said speaker for his signature, but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings; that in

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truth, on the sixtieth day of the said session, February 7, 1889, just before 12 o'clock P. M., the said speaker inquired if there was any further business; that the clerk replied there was none; said speaker then requested the journal to be read, which was done by the clerk; that thereupon the proceedings, as recorded in said journal, were approved by the house of representatives, and by said speaker declared to be approved; that thereupon, the hour of 12 o'clock midnight having arrived and passed, the speaker did, after said hour, declare and announce that the time having arrived when, by act of congress, the session of the legislature must close, therefore he, as speaker, thereby then and there declared said session closed and adjourned without day; that no objection was made by the house, or any member thereof, to the said adjournment, or to the authority of said speaker to declare the same adjourned, but all acquiesced therein; that after the speaker and a part of the members had retired from the room a portion of the members pretended to elect a speaker *pro tem.*, to-wit, one George P. Wheeler, and assumed and attempted to proceed with pretended legislation; that a large number of assumed and pretended bills were assumed to be passed by the said remaining members, and pretended to become the acts of the legislature; that all pretended proceedings on said last day after the speaker retired were after 12 o'clock midnight, and after said house had been adjourned; that in preparing the journal of said proceedings said clerk omitted to state, and did not state, that the minutes were read and approved by the house; that the speaker declared the house adjourned; that the house was adjourned by the acquiescence and assent of all the members, and that the speaker *pro tem.* was elected after the said adjournment, and the subsequent pretended legislation had and done after such adjournment; that said chief clerk, Chas. H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings, has procured the signature of said Wheeler as speaker *pro tem.*, and delivered the same to Edward J. Curtis, secretary of the territory, but the minutes of proceedings as prepared by said Reed omit the matter as hereinbefore alleged to be omitted, and is a false statement or record of the said proceedings; that the said secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record, and jour-

nal of the house of representatives, and is recording the same as such journal, and threatens to certify them to congress as the journal of said house of representatives; that he knew that said proceedings of the last day were not signed by the speaker; that plaintiff, by his attorney Lyttleton Price, has filed, to-wit, on the 9th of February, 1889, and before the same were recorded with said secretary, Edward J. Curtis, a demand in writing that he do not record said proceedings, and a protest against the same on the ground that they were not the correct record of the proceedings of the house of representatives; that the plaintiff did, on the 8th day of February, 1889, demand of the defendant Chas. H. Reed that he present said minutes of proceedings to the plaintiff for signature; that he failed and refused, and still fails and refuses, to so produce the same; that the rules and practice of said house of representatives require that the said defendant Reed present all the minutes of proceedings thereof to the plaintiff, as such speaker, for his signature. Wherefore, plaintiff prays that said Edward J. Curtis may produce in court the original minutes, record, or proceedings delivered by said Reed to said Curtis, and that said defendant Chas. H. Reed be required to prepare said journal according to the facts as hereinbefore set forth, and state that said minutes were read and approved; that after the hour of 12, midnight, of February 7, 1889, the speaker declared said house adjourned *sine die*; that the house did not object to such adjournment, but acquiesced therein, and in all of the other proceedings hereinbefore stated; and that such journal be handed to the speaker to sign, and thereafter, when so amended and completed, to be delivered to said secretary of the territory as the minutes of the proceedings of said last day, or that said defendants show cause forthwith why said defendants should not do so."

Upon this petition the court granted an alternative writ of mandate, which was made returnable on the 14th day of February, 1889, to which the defendant Curtis demurred, and assigned for grounds of demurrer the following: "(1) That this court has no jurisdiction of the person of the defendant. (2) That this court has no jurisdiction of the subject-matter of this action. (3) That the plaintiff has not legal capacity to sue, in this: *First*, that the plaintiff was not at the time of the commencement of this action, and is not now, the speaker of the house of representatives of Idaho terri-

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tory; *second*, that the plaintiff has no beneficial interest in the result of this action; *third*, that if the plaintiff is now, or was at the time of the commencement of this action, speaker of the house of representatives of Idaho territory, this action should and must have been brought upon the relation of the proper prosecuting officer; *fourth*, that there is a misjoinder of parties defendant herein; that this defendant, as secretary of Idaho territory, is joined as co-defendant with Chas. H. Reed, clerk of the house of representatives of Idaho territory; that there is no community of interests or duties between said defendants, and no act, the performance of which this writ was issued to enforce, could be jointly performed by them, and the writ herein requires different and separate acts from each of said defendants; *fifth*, that several causes of action have been improperly joined herein in this: that the defendant Chas. H. Reed is required to do and perform certain acts, and this defendant required other and different acts, which acts have no relation to each other; *sixth*, that it does not state facts sufficient to constitute a cause of action; *seventh*, that the same is ambiguous and uncertain in this: it does not appear what is required of this defendant; it does not clearly appear who is to make the alterations in the records and journals; it does not appear who has the possession of the journals and records of the house of representatives, or who did have the possession at the time of the commencement of this action."

The jurisdiction of this court to issue the writ is derived from section 3816 of the Revised Statutes, which is as follows: "Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction."

We do not deem it necessary to notice the various grounds of demurrer as hereinbefore set forth, but will confine our attention to the sixth ground: "That it does not state facts sufficient to constitute a cause of action." The disposition of the case upon this ground disposes of it according to our view, and renders it unnecessary for us to consider any further point. The petition for complaint alleges that the plaintiff was the duly-elected speaker, and is now the actual and acting speaker, of the house of representatives of Idaho; that the defendant Charles H. Reed is chief clerk of the house of representatives, and Edward J. Curtis is the secretary of the territory of Idaho; that Charles H. Reed has in his possession,

as such chief clerk, the minutes of the proceedings of the said house of representatives for the last day of the fifteenth session; that he refuses to present the same to the plaintiff for his signature, and has prepared a record of said minutes, omitting a part of the said proceedings. The petition then proceeds to set forth certain facts which it alleges took place in the house of representatives, but that the defendant Reed has omitted such proceedings from the minutes; and proceeds to allege that the said chief clerk has made up a journal of said last day's proceedings, has procured the signature of one Wheeler, as speaker *pro tem.*, and has delivered the same to Edward J. Curtis, secretary of the territory; that the minutes of proceedings, as prepared by said Reed, omit the matters alleged in the said petition to have been omitted, and is a false statement or record of the proceedings; that the secretary, Edward J. Curtis, wrongfully holds out the minutes so signed by Wheeler and the chief clerk as the true journal of the house of representatives, and is recording the same as such journal, and threatens to certify them to congress as the journal of the house of representatives, although he knows that the said proceedings were not signed by the plaintiff. While it is true that a general demurrer admits the truth of facts as stated in the pleadings, yet it is equally true that facts not well pleaded, and mere conclusions of law, are not admitted by a demurrer. There is no pretense that the averments in this paragraph are mere conclusions of law, or that the facts are not well stated. The contention is that the facts stated, if established, would be immaterial and irrelevant, and would constitute no valid ground upon which this court could act. In plain language, the facts, if admitted true, would not constitute a cause of action. Bliss, Code Pl. § 418. Moreover, "a public statute, of which we are bound, *ex officio*, to take notice, as well as to the time it went into effect, as to its provisions, this allegation is not admitted, or to be taken to be true by the demurrer. The existence or the time of the taking effect of a public act cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves." Attorney General v. Foote, 11 Wis. 16.

It seems to be well settled that the courts will take judicial notice of the journal of a legislative body to determine whether an act of the legislature is constitutionally

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passed, and for the purpose of ascertaining what was done by the legislature. A journal, according to the petition, has been filed with the secretary of the territory, and is therefore a public record, and such a record as this court is bound to take judicial notice of. There is, then, no need of stating what appears upon the journals of the legislature or what does not appear. Such matters are judicially noticed without averment. No issue of fact can be taken upon what a court is required, as a court, to know. These averments in the pleading, even if true, contain no issuable fact, and in such a case a demurrer is the proper remedy. The petition concedes that a journal has been filed by the clerk, upon the adjournment of the legislature, with the secretary of the territory, but alleges that the journal was not properly made up by him. Section 124 of the Revised Statutes of Idaho provides that "the clerks, at the close of each session of the legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses, to the secretary of the territory, who must certify to the reception of the same."

We have said that the petition concedes that a journal has been delivered to the secretary of the territory, and that the secretary of the territory treats such journal as the journal of the legislature. By section 190 of the Revised Statutes the secretary of the territory is charged with the custody of such journals. Section 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the legislative assembly. We are now invited to direct the secretary to produce before this court the journal which was delivered to him by the clerk of the house of representatives, in order that the plaintiff, a member of the legislature, may be allowed to make certain corrections therein, and that, after such corrections are made, the secretary receive the corrected journal as the journal of the legislature, delivered to him by the clerk thereof. The production of the journal would be a mere idle proceeding, unless for the purpose of allowing the court to pass upon the question of fact as to whether this book is or is not the journal of the legislature. The journal itself is a public record, and open for public inspection, and any citizen of the territory is entitled to inspect the same; so that its production can only be asked for in order to allow certain corrections to be made. Hence, if

this court comes to the conclusion that it cannot allow such corrections to be made, then the production of the journal merely for inspection is wholly unnecessary.

There is no dispute that the law places no obligation upon Curtis, as secretary, other than that he must receive the journal from the clerks of the legislature and record the same. From the language of section 124 of the Revised Statutes it is clearly the duty of the clerk to make up such records as he deems proper to be delivered to the secretary, and deliver the same. This he has done, and that is the only duty imposed upon him by statute. The law presumes he has done this correctly, and, if not, he is amenable to the Criminal Code of this territory. The question whether the papers so delivered by the clerk to the secretary are correct or not is one which this court cannot entertain. The papers so delivered either are or are not the journal of the legislature. If they are, then this proceeding necessarily fails. If they are not, then it is not the province of this court, nor within the power of this court, to question them, or to make a journal for the legislature. That power is vested in the legislature alone, and is not a power conferred upon the courts.

It is contended with great zeal by the learned counsel for the relator that the journal so delivered is not the journal of the legislature; hence the relator has a right to correct it, so that in his judgment it may become the journal of the legislature, and, as so corrected, that the same be filed with the secretary. This position is wholly untenable. Certainly this court would not correct so important a document as the journal of a legislature, or what purports to be the journal of a legislature, upon the unsupported statement and recollection of one person only, without hearing evidence which might be offered by the defendant. That would necessarily involve the trial of an issue of fact,—namely, is the journal so filed correct or incorrect,—the trial of which issue might lead to the most absurd consequences which we do not deem necessary to state. If the plaintiff desires the production of this public record as a mere matter of curiosity, then, of course, the court would refuse to grant the writ. His only object in demanding its production, therefore, can be but for one purpose only, and that is, that the court may correct it according to certain evidence which may be introduced. The principle of law is settled beyond controversy that a court will not go behind the

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journal of a legislature to ascertain what was done by that body. The journal itself is conclusive, and, if the journal is incorrect or improperly made up, it is for the legislature itself to correct it, and not for the court. The journal, as filed, purports to be the journal of the legislature. It is signed by George P. Wheeler, speaker *pro tem.* of the house, and would, therefore, seem to be correct on its face. The presumption always is that when an act of the legislature is signed and enrolled that it has gone through all the necessary formalities. A few of the states hold that the enrolled statute is conclusive evidence of its due passage and validity. A great majority of the states, however, hold that this makes out a *prima facie* case only, and that such case may be overthrown by the journals, and that the judges, for the purpose of satisfying themselves, may take judicial notice of the journal, and, if that appear to be regular, that is final and conclusive upon the courts. Cooley, Const. Lim. (5th Ed.) 163, note 2. Sherman v. Story, 30 Cal. 253, 276; Territory v. Clayton, 18 Pac. Rep. 628, 629; State v. Smith, 7 N. E. Rep. 449; Koehler v. Hill, 14 N. W. Rep. 738.

We have been unable to find a single case which maintains the contrary of this doctrine. Counsel, with great zeal, have searched for such authority, but have been unable to cite us to a single one. We have endeavored to find some authority for the position taken by counsel for the plaintiff, but have been unable to find any. The authorities cited by counsel in which superior courts have compelled inferior courts to correct their records are not at all in point, and are entirely different in principle. The superior courts have authority over inferior courts, and it is their duty to compel them to keep proper records. On the contrary, courts have no authority over the deliberations of a legislative body, and therefore cannot compel them to keep any record, or interfere with any record that they have kept. The case of Territory v. Clayton, *supra*, is in point here, and seems to have been well decided both upon authority and principle. In that case the court refused to go as far as we are disposed to go. There the court refused to look beyond the record contained in the office of the secretary of the territory, and refused to go to the journals of the legislature for information, and expressly held that it would not receive verbal testimony to support or contradict the record in the office of the secretary of the territory.

It is unnecessary for us to go into the reasons which have induced the various courts to unanimously proclaim the doctrine which we may have set forth. It would be a mere waste of time, because most of the authorities which we have cited contain the reasons of the courts for their action.

It is contended that there is some difference between a direct attack upon the action of a legislature and a collateral attack. It is sufficient to say that in every case which has been presented to our attention the attack upon the acts of the legislature has been collateral. We concede that this is the first case, so far as we are able to ascertain, in which the court has been invited by *mandamus* to inquire into the acts of a legislative body by verbal testimony, and to permit its record to be corrected, or, if there be no record, to make one; and we can safely say that this case is sanctioned by no precedent and sustained by no authority. "The supposed case of less than a majority of this court causing a judgment to be entered of record is not apropos, for, if it were done, the only remedy would be in this court, for the reason there is no other tribunal or department of the government that could afford one; and, by parity of reasoning, the only correction that can be made in a legislative journal is by the body that caused it to be made. The suggestion that fraud or bad motives in those who caused it to be made might defeat the remedy, would apply to the one case as well as to the other; but confidence must be reposed somewhere, and why not in a legislative body as to the keeping of its journals, as well as in this court as to the keeping of its records? Besides, the people is the final tribunal before whom, as a rule, such delinquencies must be settled, (Cooley, Const. Lim. 168,) and, in the case of legislators, the return to the people being at comparatively short intervals of time, it is difficult to see how such abuses, if they exist, can be of very long standing, and in such cases it is 'better to bear the ills we have than flee to others we know not of.'" State v. Smith, 7 N. E. Rep. 449.

Some question has been raised by counsel for the plaintiff that this body was not the legislature. As the petition itself alleges that the plaintiff was the speaker of the house, that the defendant Reed was chief clerk of the house, and that these journals, with certain exceptions, are the journals of the house, and that, as such journals, they have been delivered by the clerk to the secretary of the territory, and received by him and recorded as such, we cannot consider

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that point. For the reasons that we have stated the demurrer must be sustained, and the application for a writ denied, with costs.

LOGAN, J., concurs.

BERRY, J., (*dissenting.*) In this case I am constrained to dissent from the opinion of my associates, sustaining the demurrer in this proceeding, and I deem it necessary and proper that the grounds of such dissent be stated. The object of the proceeding is to secure the issuance of a writ of *mandamus* against certain public officers. I shall at first confine my attention to this case, and afterwards refer to the similar case of *Clough v. Curtis*, post, 488.¹ It is a familiar principle in law and practice that the allegations of a pleading demurred to shall, for the purposes of that proceeding, be taken as true. The allegations of this complaint are, therefore, to be taken as admitted. I copy the body of the complaint in this case, together with the demurrer, and make them a part of this dissenting opinion. The following is the complaint: "The above-named plaintiff, H. Z. Burkhardt, shows that he was the duly-elected speaker, and is now the actual and acting speaker, of the house of representatives of Idaho; that defendant Chas. H. Reed is chief clerk of the house of representatives, and Edward J. Curtis is the secretary of the territory of Idaho, and for cause of action for *mandamus* alleges that the said Chas. H. Reed has in his possession, as such chief clerk, the minutes of proceedings of said house of representatives for the last day of the fifteenth session; that the same have not been signed by plaintiff, H. Z. Burkhardt, the speaker, and the defendant Reed refuses to present the same to said speaker for his signature; but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings; that in truth, on the sixtieth day of said session, February 7, 1889, just before 12 o'clock P. M., the said speaker inquired if there was any further business; that the clerk replied that there was none; said speaker then requested the journal to be read, which was done by the clerk; that thereupon the proceedings, as recorded in said journal, were approved by the house of representatives, and by said speaker declared to be approved; that thereupon, the hour of 12 o'clock, midnight, having arrived

and passed, the speaker did, after said hour, declare and announce that the time having arrived when, by act of congress, the session of the legislature must close, therefore he, as speaker, thereby then and there declared said session closed and adjourned without day; that no objection was made by the house, or any member thereof, to the said adjournment, or to the authority of the said speaker to declare the same adjourned, but all acquiesced therein; that after the speaker and part of the members had retired from the room, a portion of the members pretended to elect a speaker *pro tem.*, to-wit, one George P. Wheeler, and assumed and pretended to proceed with the pretended legislation; that a large number of assumed and pretended bills were assumed to be passed by the said remaining members, and pretended to become the acts of the legislature; that all pretended proceedings on said last day, after the speaker retired, were after 12 o'clock, midnight, and after said house had been adjourned; that in preparing the journal of said proceedings said clerk omitted to state, and did not state, that the minutes were read and approved by the house; that the speaker declared the house adjourned; that the house was adjourned by the acquiescence and assent of all the members; and that the speaker *pro tem.* was elected after the said adjournment, and the subsequent pretended legislation had and done was after such adjournment; that said chief clerk, Chas. H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings, has secured the signature of said Wheeler as speaker *pro tem.*, and delivered the same to Edward J. Curtis, secretary of the territory; but the minutes of proceedings, as prepared by said Reed, omit the matter as hereinbefore alleged to be omitted, and are a false statement or record of said proceedings; that the said secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record, and journal of the house of representatives, and is recording the same as such journal, and threatens to certify them to congress as the journal of said house of representatives; that he knew that said proceedings of the last day were not signed by the speaker; that plaintiff, by his attorney Lyttleton Price, has filed, to-wit, on the 9th day of February, 1889, and before the same were recorded with said secretary, Edward J. Curtis, a demand in writing that he do not record said proceedings, and a protest

¹22 Pac. Rep. 8.

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against the same, on the ground that they were not the correct record of the proceedings of the house of representatives; that the plaintiff did, on the 8th day of February, 1889, demand of the defendant Chas. H. Reed that he present said minutes of proceedings to the plaintiff for signature; that he failed and refused, and still fails and refuses, to so produce the same; that the rules and practice of said house of representatives require that the said defendant Reed present all the minutes of proceedings thereof to the plaintiff, as such speaker, for his signature. Wherefore, plaintiff prays that said Edward J. Curtis may produce in court the original minutes, record, or proceedings delivered by said Reed to said Curtis, and that said defendant Chas. H. Reed be required to prepare said journal according to the facts as hereinbefore set forth, and state that said minutes were read and approved; that, after the hour of 12 o'clock, midnight, of February 7, 1889, the speaker declared said house adjourned *sine die*; that the house did not object to said adjournment, but acquiesced therein, and in all of the other proceedings hereinbefore stated; and that such journal be handed to the speaker to sign, and thereafter, when so amended and completed, to be delivered to said secretary of the territory as the minutes of the proceedings of said last day, or that said defendant show cause forthwith why said defendants should not do so." This complaint was verified.

DEMURRER.

"Now comes the defendant Chas. H. Reed and demurs to the alternative writ of mandate herein filed, on the grounds that it appears on the face thereof (1) that this honorable court has no jurisdiction of the subject of this proceeding; (2) that the court has no jurisdiction of the person of the defendant in this proceeding; (3) that said H. Z. Burkhart has not legal capacity to sue in this proceeding; (4) that there is a misjoinder of parties defendant in that said alternative writ joins this defendant and Edward J. Curtis, the secretary of the territory and an officer of the United States, as defendants; (5) that several causes of action have been improperly united, in that relief is demanded against this defendant on the ground that this defendant has in his possession certain proceedings of the house of representatives of the territory, and another alleged and distinct cause of action is stated against Edward J. Curtis, the secretary of the territory, on the ground that said Edward J. Curtis, as such secre-

tary, has possession of said proceedings; (6) that the same does not state facts sufficient to constitute a cause of action, or to entitle said plaintiff to relief by writ of *mandamus* against this defendant; (7) that the same is ambiguous, unintelligible, and uncertain in this: that it is first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein, as a ground of relief against the said defendant Edward J. Curtis, secretary of the territory; that this defendant has filed said minutes with said secretary, as this defendant is required by law to do; and that said secretary retains and preserves the same, as he is required by law to do."

Not having had an opportunity until the present moment to see or know the tenor or effects of the points made in the opinion of my associates upon the bench, beyond the bare fact that the demurrer was to be sustained, the scope of my observations may be, perhaps beyond the required limits, made necessary by the opinion dissented from. But I will follow in some degree the order of the argument of the leading counsel in support of the demurrer.

1. There is, I think, no room for a serious question that this court has full and complete power to issue the writ as prayed; also, that it has jurisdiction of the subject-matter of the complaint. The power to issue writs of *mandamus* must be vested somewhere, and the legislature, in plain and unequivocal terms, has conferred it upon this court. It seems to me too plain to admit of any doubt. Section 1866, Rev. St. U. S., says: "The jurisdiction, both appellate and original, of the courts provided for in sections 1907 and 1908 shall be as limited by law;" and in section 1907, "the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana, and Wyoming shall be vested in a supreme court, district courts, and probate courts, and in justices of the peace." Rev. St. Idaho, §§ 3815, 3816, tit. 2, entitled "Of the Supreme Court," are as follows, viz.: "The jurisdiction of this court is of two kinds: *First*, original; and, *second*, appellate." Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction. Section 3817 defines its appellate jurisdiction.

2. So of the jurisdiction of the court over the persons of both defendants. It makes no difference that one of them, the secre-

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tary of the territory, is appointed by the president of the United States. He is not, therefore, the executive branch of the United States government, nor even of the territory of Idaho. Congress has declared, in the organic act of the territory, that the executive power of the territorial government is vested in the governor alone. The secretary is no more above the laws than the marshal, the United States district attorney, or the deputies of either of these officers, or the most humble person in the land. *Kendall v. U. S.*, 12 Pet. 608, and *U. S. v. Schurz*, 102 U. S. 372. The authorities are numerous and clear that even cabinet officers are equally subject to the mandate of courts with any other person; but it is not necessary to cite those authorities. The one principally relied on by the defendants is that of *Marbury v. Madison*, 1 Cranch, 137. But that case was decided on other grounds than the official character of the party defendant. Congress supplied the defect found in the law in that case by conferring the needed power to issue the writ on the courts of the District of Columbia. Since then cabinet officers have constantly been held subject to the jurisdiction of courts with no more power than has this court. If the court can issue a writ at all, —of which there is no doubt,— no case can reasonably be supposed, unless it be the case of *Clough v. Curtis*, post, 488,² now pending in this court, involving a part of this controversy, calling for the exercise of this power more emphatically than do the admitted facts in the case at bar. If cabinet officers are thus within the jurisdiction of the court, there is certainly no ground for an inferior officer of a territory to claim greater immunity, simply because he is appointed by the president. They, also, are appointed by the president, and stand nearer to him than any officer of the territory. The counsel for the secretary practically admits this by saying that a state court cannot issue a writ of *mandamus* to an officer commissioned by the United States, except as they are authorized by the United States. I think the counsel is mistaken in this, and that he will find that, while the rule as to state courts is not universal, it applies only where the officer's duties are purely federal, as in the case of a United States land-officer; but not in such a case as this, where the officer is not in the service of the United States, but only an inferior officer of the territory acting in and

for the territory. But, even if it were otherwise, this court has federal jurisdiction as well as territorial. I suppose that fact will not be disputed. I can see nothing valid in the objection that a territorial officer is not amenable to the laws because he is commissioned by the president of the United States.

3. The plaintiff has an unquestionable power to sue. He was, and still is, the speaker of the house, and as such, had, and still has, the exclusive right to the performance of the duties set forth in the complaint. The public requires it of him, even if no executive or administrative officer can be found willing to assist him to his own and the public right. If that right is invaded, as by the defendants' demurrer it is admitted to be in this case, he may invoke the aid of this tribunal to enable him to perform his sworn duties to the public. Any member of that legislative body may interpose to preserve the lawful records of its proceedings, and prevent the dearest rights of the community, the very foundation of its laws,—the evidence upon which the interests of thousands depend,—from being, in a wholesale manner, falsified and debauched. It was shown on the argument that in a matter vital to the public any citizen may institute proceedings by *mandamus*. *High, Extr. Rem.* §§ 431-433; *Railroad Co. v. Hall*, 91 U. S. 354; *Hall v. Railroad Co.*, 3 Dill. 521. In *Railroad Co. v. Hall* the supreme court of the United States held that *mandamus* was correctly brought by a citizen of Council Bluffs to compel the Union Pacific Railway Company to fulfill its contract with the United States to build a bridge across the Missouri river. This case meets the objection raised by the demurrer on this point, without at all referring to the official character and rights of this plaintiff. The contract with the United States on the part of the Union Pacific Railway Company was one to enforce which the attorney general would have been a proper officer to sue out the writ, and might have done it; but, as he did not do it, the court held that any other citizen might do so.

4. It is also contended that there is a misjoinder of defendants. No, there is no misjoinder if the facts are as stated in the complaint, and the demurrer admits them. What papers the secretary has are admitted to be unsigned, mutilated, and fraudulent papers, and are not "archives of the legislature," which alone the secretary has a right to receive, any more than would be

²22 Pac. Rep. 8.

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the records of a base-ball club, or any other unlegislative association or gathering. Of this he was, and is, duly apprised. If what is admitted to be true are real facts, the secretary is aiding and abetting the clerk in his attempt to foist upon the territory as records what are not records, to be used, if at all, as conclusive evidence to establish as facts what are not facts, and that legislative acts were done which it is admitted were never done by a legislature. The joining by these two officers in the perpetration of a grave wrong, one doing one part and the other completing it, makes them both *particeps*, and subject to the same process, if necessary, for its correction and prevention. In this case it is necessary. The secretary must produce the fraudulent papers, abstain from treating them as genuine, or, as he threatens to do, from recording them and sending them to congress, and the several officers of the United States government, as genuine, or in any way to act upon them, until the clerk shall write them truthfully, and they shall have the necessary official sanction of the chief officer of the house, whose proceedings they profess to record, and until they thereby become real records and archives of the legislature. There is no misjoinder.

5. Proceeding in the order of the attorney for the secretary, we may here inquire whether the session of the legislature did, in fact, expire with the 7th day of February, 1889. The inquiry is not necessary, perhaps, for the fact is admitted. But let us look into the facts and the law. It met on the 10th day of December, 1888. That was its first legislative day, and so appears on its journals. The session began with the beginning of that day. The claim that it did not begin till noon of that day, and hence that the first day should end at noon of the next day, and so for each day through its session, to the 61st day, simply because the territorial legislature had enacted that the legislature should meet at noon of the day appointed for the meeting, cannot for a moment be maintained. If such a thing could be, there would be no meridian to the legislative day. It met at 12 o'clock "M.;" that day's noon would be midnight. The law takes no notice of fractions of a day. Congress has said how long the session should continue, and it was not competent for the territorial legislature to prolong the time. This act of congress is in the following words, and has all the force of a constitutional provision:

Rev. St. U. S. § 1852, says: "The sessions of the legislative assemblies of the several territories shall be limited to sixty days' duration." The act of the legislature fixing the hour recognizes the second Monday of December as the first day of the session. The section (Rev. St. Idaho) is as follows: Section 122. "At the hour of 12 o'clock M., on the day appointed for the meeting of any regular session of the legislature, the presiding officer, or, in his absence, the chief clerk of each house of the last session, must call the same to order, and preside until a presiding officer is chosen, or, in case of the absence of both of said officers, the senior member present must perform said duties. All members-elect present, having certificates of election from the clerk of the board of county commissioners of their respective counties, and no other person, has the right to participate in the organization of the respective houses. Neither house must organize or transact business, but must adjourn from day to day until a majority of all the members authorized by law to be elected are present." It does not pretend to extend the time fixed by congress, but merely fixes the hour of meeting, and declares it shall meet at noon of that day. There is nothing whatever in the statute, or either of them, or in the construction given them by either branch of the legislature in the numbering the days of the session, to justify this extraordinary claim. Both bodies counted in their journals the 10th day of December as one day of the session, and numbered from it. Even the bodies which met, as is alleged, on the 8th day of February, admit the hollowness of this pretense, by claiming its acts to have been done on the 7th of February instead of on the day on which it is admitted they were in fact done. They themselves seek to take shelter under a false date. Were there anything in this claim, no reason is apparent why acts done before noon of the 8th should be antedated a day to bring them within the law.

6. It was clearly the duty of the presiding officers of both houses to obey the law; and, when the constitutional time had expired, to declare the session ended. Such action is abundantly sustained by both authority and precedent. In this case the acts of both presiding officers were acceded to by both houses. What occurred in the house also occurred in the council. When the minutes of the last day had been read, and formally approved in the house by the members in session, and the clerk had pub-

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licly announced that there was no more business before the house, and the speaker, at 1 o'clock in the forenoon of the 8th of February, declared to the listening house that the hour fixed by congress for adjournment had arrived and passed, and that, in view of such fact, he, as presiding officer, declared that session ended, and there was no objection or appeal from this decision, that session was ended. Three things concur to give force and effect to the solemnity of his act: *First*, the expiration of the time fixed by congress; *second*, the official action of the presiding officer; and, *third*, the assent and concurrence of the entire body. Whether, under such conditions, the house broke up, as is conceded it did, or all members remained in their places, is of no moment. The regular session was ended; and if, before the meeting of the next legislature, that body could reconvene, it must be in extra session, called pursuant to law. After that moment, whatever was done by certain members was not done by a legislative body, and all its acts pretending to be legislative acts are, in fact, absolutely null and void.

7. It follows from the facts that this so-called legislature was not a legislature, and those so-called records are not, in any sense, legislative records; that the arguments and authorities upon the power of the court to correct or supervise acts done by a real legislature, or the effect, for any purpose, of real legislative records, or whether such real records can or cannot be impeached collaterally, and any and all questions, and, I think, either in the majority of opinions of this court, or otherwise, based on a presumption founded on real records, are wholly irrelevant, and do not bear on this case. These questions comprise most of the arguments of these demurrants, and have no bearing on the case before this court. They are collateral merely. Those papers are not called in question collaterally, but directly, by proceedings provided by law to determine whether they are, in fact, records of a legislative body or not; and, if not records, then to have them, or such of them as are not records, so declared, and to have the spurious portions expunged, and the true records substituted. This is a plain and simple duty of the court, for which it was created and armed with plenary power.

8. These considerations apply as well to the case of *Clough v. Curtis*, supra, as to this case. The facts in the two cases are, in the main, the same, only that like

proceedings took place in the council as in the house, and except that in that case a fact is also alleged and admitted by the demurrer: that the true record was mutilated; that three leaves of the genuine records, which had actually been written up and approved before adjournment, were removed from the records, and their places supplied with matter falsely purporting to be a record of proceedings by the legislature before it had expired. The high-handed character of those acts should be investigated, and should not be hidden. If those grave charges be not in fact true, let them be denied, and let both sides be admitted to their proof. The demurrer in both cases should be overruled.

CLOUGH, President of the Council, v. CURTIS, Secretary of the Territory.

(March 11, 1889.)

MANDAMUS—TO SECRETARY OF TERRITORY—CORRECTION OF RECORDS.

Rev. St. Idaho, § 124, provides that the secretary of the territory must certify to the reception of all bills and papers belonging to both houses of the legislature delivered to him by the respective clerks. Section 1844 of the organic act provides that he "shall record and preserve all the laws and proceedings of the legislative assembly." *Held*, that *mandamus* would not lie, on the application of the president of the council of a session of the legislature, to compel the secretary of the territory to record a report of such president as part of the proceedings of the session, or to expunge from the records of such proceedings part of a former report made by the clerk. BERRY, J., dissenting.

Application of J. P. Clough, president of the council, for a writ of mandate to compel Edward J. Curtis, secretary of the territory, to correct the record of the council. Denied.

Arthur Brown, Lyttleton Price, Texas Angel, and S. B. Kingsbury, for the petitioner. Jas. H. Hawley and John S. Gray, for respondent.

WEIR, C. J. This is an application by the plaintiff for a writ of mandate to be directed to the defendant above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which reads as follows: "Your applicant respectfully shows to your honorable court that he is the president of the council of the fifteenth session of the legislature of Idaho territory. That he was duly elected, qualified, and acted as, and is the acting,

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president of that body. That the defendant, Edward J. Curtis, is the secretary of the territory of Idaho. That on the 60th day of the said session of the legislature, February 7, 1889, the following proceedings were had in the council: That the said council continued in session during the whole of the said sixtieth day till 12 o'clock, midnight, of that day, and thereafter till about one o'clock of the next succeeding morning. That at that time a communication was received by the said council from the chief clerk of the house of representatives of the said fifteenth session, announcing that the said house of representatives had then and there elected one George P. Wheeler a speaker *pro tem.* of the said house of representatives. That this communication was received long after the sixtieth day had expired, to-wit, about one o'clock of the 8th day of February, 1889. That your applicant, the president of the council, then and there declined to receive the said message as a message from the house, for the reason that the said house of representatives had no authority to elect a speaker after the 60 days prescribed by the limitation of the act of congress had expired. That thereupon this applicant, as president of said council, did then and there announce to the council and declare 'that because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said legislature was permitted to transact business, therefore the said council was adjourned without day,' and your applicant alleges that the said fifteenth session of the council of the legislature of Idaho territory was then and there adjourned and terminated. That your applicant then inquired of the chief clerk, Edward L. Curtis, if the said adjournment was recorded in the minutes of the proceedings of the said session, and received the reply from him that it was. Your applicant further shows that the said council then dispersed, and he himself, and other members of the council, left the room, and your applicant is informed, and alleges on information and belief, that, after the said president of the council and other members of the council had left the room, other members assumed and pretended to reorganize the said council, and assumed and pretended to elect one S. F. Taylor president *pro tem.* of said council, and to elect other officers of the council, and assumed and pretended to transact legislative business thereafter, and assumed and pretended to pass enactments which

the said persons pretending to be a legislature did then and there assert and claim were acts of the legislature of the fifteenth session of Idaho territory. That as your applicant is informed, and on his information and belief charges, there are some 17 of said pretended acts of the legislature thus assumed and pretended to be passed by the said persons after the time had expired for holding said session of the legislature. Your applicant further alleges that, in making up and preparing a record of the said 60th day of the said session of the legislature, the clerk did not show thereafter the same to this applicant, and your applicant has never seen, till after the said chief clerk had filed with the secretary of the territory, the defendant herein, certain papers which he claimed and pretended were the proceedings of the said sixtieth day of the said session of the council, but which, in truth and in fact, were a false and fictitious account of the proceedings of that day, signed by S. F. Taylor, and not signed by J. P. Clough, president of the council, as required by the rules and practice of the council. That your applicant has now seen the said pretended proceedings in the office of the secretary of the territory, and finds that a part of the said pretended minutes or records has been cut out. That there are 3 stubs of leaves which have been part of the former proceedings of the records or minutes of the said fifteenth session. That that part of the minutes which recites that the said president of the council had declared the said session adjourned, and his reasons therefor, has been cut out, and was omitted from the minutes as filed with said secretary of the territory. That this applicant, the president of the said council, did, on the 14th day of February, 1889, call the attention of the said secretary of the territory to the said cut leaves, and stated to him the proceedings which should have appeared therein, and handed to him a report of the proceedings as they actually occurred, and demanded that the same should be incorporated with the proceedings of the said legislature, and be recorded as a part of the proceedings of the council of said legislature. That the said Edward J. Curtis, secretary of the territory of Idaho, did then and there decline to record the said adjournment and proceedings, and each and every part thereof, as part of the proceedings of the said legislature. And your applicant did then and there also demand that the said report, as furnished by this applicant, should be certified to congress as a part and a portion

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of the proceedings of the legislature of Idaho for the fifteenth session. That the said Edward J. Curtis did then and there refuse to report the said adjournment as a part of the said proceedings, or any part of the report, as furnished by this applicant; and your applicant, after having stated and certified to said Edward J. Curtis, secretary of the territory of Idaho, that all of the alleged proceedings wherein it was pretended and claimed that said S. F. Taylor was president *pro tem.* were had after the hour of 12 o'clock, and after the adjournment of the said council by the president thereof, demanded that the said subsequent pretended proceedings and pretended legislation should not be recorded as a part of the proceedings of the legislature, and, if already recorded, that the same be expunged from the record of the proceedings of the fifteenth session of the said legislature,—all of which the said secretary of the territory declined to do, and still does decline to treat the said pretended proceedings and acts signed by the said S. F. Taylor as president *pro tem.* as null and void, and threatens to report the said proceedings of the council of the said legislature, and threatens to certify the same to congress as a part of the said proceedings: Wherefore, your applicant prays that a writ of *mandamus* may issue from this honorable court, commanding the said Edward J. Curtis, secretary of Idaho territory, to record the said report of your petitioner as a part of the proceedings of the said fifteenth session of the council of the territory of Idaho, and commanding him to expunge from the records and minutes of the sixtieth day of said session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to strike from the files and records of the laws of Idaho those pretended acts of the legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council, and signed by him as such, and for such other relief as may be proper under the circumstances."

Upon this petition the court granted an alternative writ of mandate, returnable on the 14th day of February, 1889, to which the defendant demurred, and assigned for cause the following grounds: "(1) That the court has no jurisdiction of the person of the defendant or the subject of this proceeding. (2) That the plaintiff has no legal capacity to sue, in this: that the said writ does not show that he has any beneficial interest therein; that if he be the of-

ficer alleged in said writ at the time of the commencement of this action the proceedings should have been brought upon the relation of the proper prosecuting officer. (3) That it does not state facts sufficient to constitute a cause of action or proceeding of this kind. (4) That the same is ambiguous and uncertain in this: that the same does not clearly state what act or acts the defendant is required to perform, what matters are sought to be inserted in said journals and minutes, and what to be stricken out."

This proceeding is based on sections 3815 and 3816 of the Revised Statutes of this territory. Section 3815 declares that the jurisdiction of this court is of two kinds, original and appellate. Section 3816 provides that "its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction."

We do not deem it necessary to notice the various grounds set out in this demurrer, but will confine our attention to the third cause assigned, which is as follows: "That it does not state facts sufficient to constitute a cause of action or proceeding of this kind." The decision of the court upon this ground disposes of the case according to our view, and renders unnecessary a discussion of the other grounds. The consideration and decision of the question raised by this ground of demurrer necessarily involves an inquiry into the powers and duties of the defendant secretary, conferred upon him by law. Section 124 of the Revised Statutes of Idaho prescribes the duties of the chief clerk of the legislative council, and the duties of the defendant, as secretary of the territory, in reference to the journals and rolls of that body, in these words: "The clerks, at the close of each session of the legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses, to the secretary of the territory, who must certify to the reception of the same." Section 1844 of the organic act imposes further duties upon the secretary of the territory, and prescribes and defines those duties as follows: "The secretary shall record and preserve all the laws and proceedings of the legislative assembly, and all the acts and proceedings of the governor in the executive department. He shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end

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of each session thereof, to the president, and two copies of the laws, within like time, to the president of the senate and to the speaker of the house of representatives, for the use of congress. He shall transmit one copy of the executive proceedings and official correspondence semi-annually, on the first day of January and July in each year, to the president. He shall prepare the acts passed by the legislative assembly for publication, and furnish a copy thereof to the public printer of the territory, within ten days after the passage of each act." And afterwards, by act of congress of June 20, 1874, further duties were imposed upon him, which are as follows: "And hereafter it shall be the duty of the secretary of each territory to furnish estimates in detail for the lawful expenses thereof, to be presented to the secretary of the treasury on or before the first day of October of every year." The duties of the defendant secretary are very clearly defined by these statutes. They constitute the chart of his authority. He is bound to perform the duties thus imposed upon him, but nothing more. He must receive from the clerks of both branches of the legislature, at the close of each session, all bills and papers belonging to the archives of the respective houses, together with all the books of both houses, and must also certify to the reception of the same. He is not required, nor, in fact, permitted, to receive and record any such documents from any other source. Clearly, it was not his duty to receive from the plaintiff his alleged report of the proceedings, as he claimed them to be, or to incorporate the same in the proceedings of the said legislature, or to record the same as a part of the proceedings, or to certify the same to congress. It is equally clear that it was not the duty of the secretary, upon the plaintiff's demand, to expunge from the journal and minutes of the sixtieth day of said session the proceedings assumed to be had before S. F. Taylor as president of the council, or to strike from the files and records the alleged pretended acts of the legislature, which were passed while the said S. F. Taylor was acting as president *pro tem.* of the council. Not only was he not authorized to do what was demanded of him, but, if he had done so, it would have been a clear breach of his official duty. The law authorized him to receive such reports from one source only, and he could not receive them from any other. The president of the council had no more right to make this demand upon the secretary than

would any other member of the legislature; and certainly, upon the unsupported word of one member of the legislature only, the secretary would not be authorized to change, modify, or expunge from the journal, which he had received from the proper source, anything therein contained. Neither had he the right to assume judicial functions, and decide upon evidence what should constitute the proceedings of the legislature.

It is not within the scope of *mandamus* to confer power upon those to whom it is directed. It only enforces the exercise of powers already existing, when its exercise is a duty. *U. S. v. County of Clark*, 95 U. S. 769. The court there say: "A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty." In the case of *Supervisors v. U. S.*, 18 Wall. 77, Mr. Justice STRONG, in delivering the opinion of the court, says: "It is very plain that a *mandamus* will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of *mandamus* is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked." And again, in the case of *U. S. v. County of Macon*, 99 U. S. 591, the court say: "We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation." We might cite a multitude of authorities which sustain this doctrine, but the principle is so well established that we deem it unnecessary. Certainly, considering this as the well-established law, we cannot create in the secretary of the territory a power to determine from evidence what are the correct minutes of the legislature. No such power is conferred upon him by statute, nor is there any such duty imposed upon him. As we have already stated, he is required to receive such journals as are handed to him by the clerks, and, after receiving them, to perform certain duties in regard thereto such as we have stated. There his power and his duty ends. To dispose of this case it is only necessary to refer to the prayer of the petition, which

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"prays that a writ of *mandamus* may issue from this honorable court, commanding the said Edward J. Curtis, secretary of Idaho territory, to record the said report of your petitioner as a part of the proceedings of the said fifteenth session of the council of the territory of Idaho, and commanding him to expunge from the records and minutes of the sixtieth day of said session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to strike from the files and record of the laws of Idaho those pretended acts of the legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council, and signed by him as such, and for such other relief as may be proper under the circumstances."

For these reasons, and also for those stated in the case of *Burkhart v. Reed*, ante, 470, 22 Pac. Rep. 1, (decided at this term of the court,) the demurrer is sustained, and the application for a writ of peremptory *mandamus* is denied, with costs.

BERRY, J., dissents.

SMITH *v.* ANDERSON *et al.*

(March 11, 1889.)

FACTORS AND BROKERS—RIGHT TO COMMISSION.

Plaintiff was employed by the defendants to find a purchaser for a certain piece of property, at a named sum. The plaintiff had some conversations with one P. with regard to the purchase of the property, and introduced him to the defendants. Plaintiff also advertised the property for sale. The defendants afterwards notified plaintiff that he was not to act for them any longer in procuring a purchaser for the property, as they did not desire to sell it; but about a month after such notice they sold the property to P. for a less sum than that named in their agreement with plaintiff. *Held*, in an action by plaintiff for his commission, that the refusal of a nonsuit was proper.

Appeal from district court, Bingham county.

Action by T. J. Smith against John C. Anderson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. T. Morgan, for appellants.

The plaintiff has no cause of action unless the evidence shows that he brought to defendant a purchaser able and willing to pay for the ranch the stipulated price. *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. Rep. 784; *Cassady v. Seeley*, 69 Iowa, 509, 29 N. W. Rep. 432; *Bradford v. Menard*, 35 Minn. 197,

28 N. W. Rep. 248; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. Rep. 790; *McClave v. Paine*, 49 N. Y. 562; *Wylie v. Bank*, 61 N. Y. 415; *Brown v. Pforr*, 38 Cal. 552, 553; *McGavock v. Woodlief*, 20 How. 221; *Dolan v. Scanlan*, 57 Cal. 261.

Smith & Smith, for respondent.

No objection to the instructions can be considered, as no objection to them was made on the trial, and no objections reserved. *Black v. City of Lewiston*, ante, 254, 13 Pac. Rep. 80; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. Rep. 960; *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119.

LOGAN, J. The plaintiff in this action alleges that in the month of August, 1886, the plaintiff, being engaged in the business of buying and selling real estate upon commission, was employed by the defendants to find for them a purchaser for a certain ranch, known as the "Booth Ranch," then the property of the defendants; that in case the plaintiff found a purchaser the defendants agreed to pay the plaintiff 10 per cent. upon the price for which said ranch should be sold; that plaintiff did find a purchaser for the ranch, and brought him to the defendants; and that thereafter the defendants sold the said ranch to such purchaser for the sum of \$6,000. The complaint contains a second cause of action, substantially the same as the first, except that the plaintiff claimed the right to recover upon a *quantum meruit*. The answer is substantially a general denial. Upon the issues raised the cause duly came to trial, and the jury rendered a verdict for the plaintiff, and assessed his damages in the sum of \$600. The evidence given at the trial was very brief, and upon the part of the plaintiff it was to the effect that he was employed by the defendants in the month of August, 1886, to find a purchaser for the Booth ranch, at the sum of not less than \$8,000; that during the month of November, 1886, he had a conversation with one E. A. Potter in regard to the purchase of said ranch, and that thereupon he took said Potter to the defendants, and introduced him to them; that he had been for some time negotiating the trade with said Potter while the ranch was owned by and in the possession of

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Booth; that Potter subsequently came to the plaintiff, and told him that he could buy the property from the Andersons, the then owners of the property, and employers of the plaintiff, for a less sum than he was offered the property by the plaintiff. It further appears that the plaintiff advertised the property for sale in certain newspapers, at his own expense, and that in January, 1887, he presented the advertisement to the defendants, and called their attention to it; that afterwards, some time in May, 1887, defendants sold the ranch to said Potter for \$6,000, and received the money; that prior thereto, in the month of March, 1887, said defendants notified the plaintiff that he was not to act any further as agent to procure a purchaser for said ranch, and discharged said plaintiff from said employment, and said they did not desire to sell the ranch; that the plaintiff never did anything with reference to the sale after March, 1887, nor before, except as before testified; and that 10 per cent. on the purchase price was a reasonable fee for procuring the sale; and that he had been engaged in the real-estate business for three years. The plaintiff then rested. Thereupon the defendants moved the court for a nonsuit, which motion was denied. No exception was taken to the charge of the court to the jury, and no requests were made by the defendants upon the court. The whole question, therefore, rests upon the very simple proposition as to whether the court was right in refusing to grant a nonsuit.

In considering the evidence upon a motion of this character we are bound to assume that the same was true, and to consider what natural inference the jury might arrive at from a consideration of the testimony. The plaintiff was employed by the defendants to do a particular thing, namely, to procure a purchaser for the ranch, at the sum of \$8,000, for which services he was to receive 10 per cent. upon the purchase money paid. It appears that in the month of March, 1887, the defendants revoked, or attempted to revoke, the agency of the plaintiff, and in their notice of revocation they used the following language: That the plaintiff was not to act any further as agent to procure a purchaser for said ranch, and discharged the plaintiff from their employment, and stated further

that they did not desire to sell the ranch. Yet, in the face of this statement, and about a month thereafter, they consummated a sale with the very person with whom the plaintiff had negotiated, and to whom he had introduced the defendants as a purchaser. It is also fair to presume that some negotiations had preceded the actual consummation of the sale, so that it could not have been very far from the time of the revocation by the defendants of the plaintiff's agency that the negotiations were taken up by the defendants in person. Considering these facts, and considering the fact that the defendants stated in their letter of revocation that they did not desire to sell the ranch, yet, in the very teeth of that statement, proceeding to sell, and to the very person to whom the plaintiff had introduced them, it was a fair inference from the testimony that the object of the letter of revocation was an attempt to deprive the plaintiff of his commission. *Lloyd v. Matthews*, 51 N. Y. 124; *Martin v. Silliman*, 53 N. Y. 615; *Sussdorff v. Schmidt*, 55 N. Y. 319. The evidence, although not very full, was sufficient to justify the court in refusing the motion for a nonsuit. These defendants should not be permitted by their own act to deprive the plaintiff of his lawful commissions, and, the case having been submitted to the jury upon the whole evidence, and the jury having found a verdict for the plaintiff, we do not deem it proper, under the circumstances, to interfere with that verdict. The judgment is therefore affirmed.

WEIR, C. J., and BERRY, J., concurring.

PEOPLE *ex rel.* GORMAN *v.* HAVIRD.

(March 11, 1889.)

QUO WARRANTO—TITLE TO OFFICE—JURY TRIAL.

1. An action under Act Jan. 30, 1885, to try title to an office to which there are several claimants, is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones, and the trial of such issues by a jury is a constitutional right of the parties.

CONSTITUTIONAL LAW—JURY TRIAL—ACTION TO TRY TITLE TO OFFICE.

2. That part of section 536 (said act) providing that actions of this nature "shall be tried by the judge of the district court at chambers, and without the intervention of a jury," is *held* unconstitutional and void.

(Syllabus by the Court.)

People v. Havird.

Appeal from district court, Boise county.

Proceedings in the nature of *quo warranto* by the people, by their relator, John Gorman, against Cary C. Havird, to try the title of defendant to the office of sheriff of Boise county. There was judgment for defendant. From an order overruling a motion for a new trial, plaintiff appeals. Reversed.

George Ainslie, for appellant. Huston & Gray, for respondent.

BERRY, J. This action is under an act of the territorial legislature of Idaho, passed January 30, 1885, being sections 534-542, inclusive, of the Code of Civil Procedure, and its purpose is to try the title of the respondent to the office of sheriff of Boise county. It has the usual provisions for obtaining jurisdiction of the parties, the formation of issues by pleading, the trial of the issues, and the rendition of judgment, with the further privilege of appeal to this court. The proceeding is called by the act an "action," and it is so treated by both parties, and it must be so considered for the purposes of this appeal. Its purpose, however, is to attain the end reached by a writ of *quo warranto* at common law, or a writ of right for the king, against him who improperly claimed or usurped an office. Such a writ is not suited to our form of government, and in America it has fallen into disuse, and statutory proceedings in the nature of a writ of *quo warranto* have, in most of the states, if not all, taken its place. Those statutes vary in the extent of the remedy which they furnish; some, as in Alabama, (St. Ala. Feb. 3, 1840, § 4,) make of the court a mere inquisition to ascertain the regularity of the election. These have been held not to confer judicial power upon the court, as in a suit at common law; hence, that exercise of the right to hear and decide is rather in the character of supervisor of elections, and does not require the intervention of a jury. In other states this statutory proceeding has approximated more nearly in its scope to the writ of *quo warranto*; still retaining the criminal form of that writ, but using it as a civil remedy only. In our own territory our legislature has gone much further, and includes within its act the full scope of an information in the nature of a writ of *quo warranto*, including its criminal features and power to punish. Such information in the nature of a writ

of *quo warranto* was properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize the office for the crown. Paine, Elect. 710. This law not only provides for supervision of elections, and the correction of errors, but it goes further, and places in the court unmistakable judicial powers. Section 541 provides "that when a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding, any office, franchise, or privilege, judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court or the judge may also, in its or his discretion, impose upon the defendant a fine not exceeding two thousand dollars." Here are questions not merely as to regularity of an election, but also as to personal guilt or innocence, followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of willful intrusion into a public office, to which one has not been elected, is declared to be a misdemeanor. Rev. St. Idaho, § 6388.

The section of the act in question, under which the district judge, at chambers, assumed jurisdiction, and tried this case, is section 536, Act 1885, providing, among other things: "And such action shall be heard and determined by the judge of the district court at chambers, and without the intervention of a jury, after due service of the summons, and the expiration of time allowed by law for answering the complaint in a civil action; but no judgment shall be rendered in such action by default." This is an essential provision of the act, and without which the other provisions are inoperative. If this is unconstitutional, as the respondent claims, the remedy under the act fails. This objection was taken by the respondent before the answer was filed. His exceptions to the ruling were then and there settled by the judge, and are incorporated as a part of the statement of the case on appeal. The respondent still stands upon such objection and exceptions in this court. It is true that the court, upon the hearing, found for the defendant, and that the defendant does not appeal. Yet it is not easy to see, if the objection was valid when it was taken, how his failure to ap-

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peal from a finding in his favor, where he has all along, and on the appeal, insisted on his objection, should be construed as a waiver of his exception. If, indeed, in any case, it might be so waived, it cannot be so in this case; for the objection goes to the jurisdiction of the court, to the validity of the statute, and not merely to an irregularity. That is not subject to such waiver. If that part of the act is void, the objection may be made at any time, even on appeal. The grounds on which it is urged that this provision is unconstitutional are (1) that it denies the right of trial by jury; (2) that it creates a tribunal unknown and unauthorized by the laws. Section 1868 of the Revised Statutes of the United States, as amended April 7, 1874, prescribing and limiting the powers of territorial legislatures, provides that "no party shall be deprived of the right of trial by jury in cases cognizable by the common law." Again, (Const. U. S. art. 3, § 2,) "the trial of all crimes, except in cases of impeachment, shall be by jury." Again, (Id. art. 5, Amendments,) "no person shall be deprived of life, liberty, or property without due process of law." And again, (Id. Amend. 7,) "in suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." There seems to have been a disposition in some states, under their own constitutions, to evade these provisions, whether of the United States or state constitutions, or such of them as clearly affect this case. Some courts have gone so far as to deny squarely that proceedings of this nature are of legal, instead of equitable, cognizance. A Missouri case (*State v. Lupton*, 64 Mo. 415) so holds. But this case is met by the New York court of appeals in *People v. Railroad Co.*, 57 N. Y. 161, in which case the court holds that an action in the nature of a *quo warranto*, brought by the attorney general, in the name of the people of the state, to try the title to a corporate office, to which there are several claimants, is one of legal and not equitable cognizance; that the issues therein are strictly legal ones; and that the trial of such by a jury is the constitutional right of the parties. The constitutional guaranty of the right of trial by jury in that state goes no further than the provisions of the federal constitution and the act of congress cited, § 1868, as amended, and made especially to apply to our territorial legislature. Nor can the territorial legislature pass any

law in contravention of the constitution or the laws of the United States. Rev. St. U. S. § 1851. In other cases, as in the state of Illinois, the statute itself only confers a supervisory power over the regularity of the election, and does not at all apply to much of the ground covered by the statute of Idaho. A Louisiana court, in *Joseph v. Bidwell*, 28 La. Ann. 382, holds that the federal constitution in that respect can have no application to the state courts. Perhaps, as Louisiana is a sovereign state, that claim may be sustained. Other cases cited by the appellant hold the same. But we are not called upon to discuss that question. Idaho is not a state, but is a territory of the United States, and in all things subject to the constitution of the United States and the laws of congress. Section 1868 of the United States Revised Statutes, as amended, seems to meet this case, and is conclusive. Even were this otherwise, and the question arose under the common law, which is adopted in this territory, (Rev. St. § 18,) the weight of authority is in favor of the construction given by the New York court of appeals in the case in that state above cited, but arising under the state constitution. See, also, *Reynolds v. State*, 61 Ind. 392; *People v. Van Slyck*, 4 Cow. 297; *People v. Ferguson*, 8 Cow. 103. But it is contended by the appellant that, if the issues here are triable by jury, and the objection was or is properly taken, and for that reason the judgment should be reversed, still a new trial should be granted. The answer to this may be that the proceedings in the court below were under the act in question, and, if wrong, it is because that part of the act on which they are based is invalid, and no valid judgment could be had; that, while the action in its present form cannot proceed, amendment changing its nature and purpose is not authorized by law. We are not called on to decide that point. There is no intimation of a purpose to amend or change the proceeding in any way, even if allowable. The term of office of the defendant expired in January, 1889, and we see no purpose which could now be reached by any proceeding of this nature. All that part of section 536 of the act entitled "An act to amend chapter 35 of the Code of Civil Procedure, being sections 534 to 542 inclusive," approved January 30, 1885, beginning at the words "and such action," in the fourth line thereof, to and including the words "in a civil action," in the eighth line there-

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of, must be declared unconstitutional and void, and the judgment herein must be reversed.

LOCKHART *et al.* v. ROLLINS.

(March 11, 1889.)

BILL OF EXCEPTIONS—SETTLEMENT—EXTENSION OF TIME.

1. When exceptions to evidence are taken during the trial, but such exceptions are not settled until two months after the trial, and more than a month after filing decision, the appellant then having prepared a case, embodying a bill of exceptions, in which bill the exceptions taken during the trial are included, and the case containing such bill is allowed, and settled without objection in the presence of the attorneys for the respective parties, *held*, that such exceptions are not waived. *Held, also*, that by the failure to object at the settlement the party is deemed to have "agreed" to the extension of time, under section 4426 of the Statutes of Idaho.

MINES AND MINING — TRANSFERS — EVIDENCE — MINERS' CUSTOMS.

2. Evidence of local customs of miners, as to the manner of transfers of interest in mining claims previous to July 26, 1866, is admissible.

SAME—VERBAL TRANSFER—VALIDITY.

3. Verbal transfers, if followed by change of possession, are valid as transferring claimant's interest.

SAME—LABOR ON CLAIM—WORK OF WATCHMAN.

4. Where mining works are idle, time and labor of a watchman and custodian expended on the property in taking care of it is labor done on the claim.

SAME—RELOCATION—ABANDONMENT.

5. A party cannot make a valid relocation of lands legally possessed by another until the owner's rights have been abandoned, forfeited, or otherwise ended.

FACTORS AND BROKERS — SALE OF MINE — FIDUCIARY RELATION.

6. The undertaking by one on the ground to procure a purchaser for a mining claim, the owners being non-residents of the territory, and having no other agent in the territory to look after the claim, constitutes a fiduciary relation of such person in relation to such property.

MINES AND MINING — RELOCATION BY AGENT — RIGHTS OF PRINCIPAL.

7. A person sustaining such fiduciary relation in respect to a mining claim cannot defeat the rights of his principal by relocating it for himself.

SAME.

8. If he do so relocate it, and benefit accrues from such act, the benefit accrues to the owner, and not to the relocater.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county.

Action by Charles Lockhart and another

against True W. Rollins, Jr., to recover the possession of a certain mining claim. There was judgment for plaintiffs. From an order overruling a motion for a new trial, defendant appeals. Affirmed.

The other facts fully appear in the following statement by BERRY, J.:

This action is for the recovery of possession of a certain mining claim situate on Bear creek, Alturas county, Idaho, known as the "Ada Elmore Lode and Mining Claim." The complaint alleges that the plaintiffs have a "legal right to occupy and possess" the claim by virtue of compliance with all the requirements of law and rules of miners, and of actual prior occupancy of it as a mining claim; also that the defendant, on the 4th day of January, 1886, while in the employ of the plaintiffs as their agent, and as such agent in the actual occupancy of said property, made a relocation of the property adverse to the rights of the plaintiffs, intending the same to be for his benefit; that the defendant ever since such act wrongfully withheld possession from the plaintiffs, to their damage, etc.; and prays judgment for the possession of the premises, with damages for detention; and closes with a general prayer for relief. The answer is a general denial, but avers, among other things, that "the said alleged original locations on said Ada Elmore lode" consisted of several mining claims located thereon, by the discoverers thereof, in 1863, extending 1,200 feet in length, along said lode, and no more, "with a width of 100 feet; that prior to the 19th day of June, 1878, said Pittsburgh and Idaho Gold Mining Company had or claimed an interest in, or right of possession of, 700 feet undivided of said 1,200 feet of said premises; that on that day the plaintiff Charles Lockhart, as assignee of one Newton, a judgment creditor of said company, and purchaser of said interest of said company, under a sheriff's sale thereof, succeeded, by sheriff's deed, to whatever interest," etc., said company had in said premises; that thereafter, and until the defendant's discharge, in August, 1885, the defendant acted as agent for said Lockhart, in the care and supervision of said mining claim and business, and improvements connected therewith; that in 1883 the plaintiff Lockhart contracted with defendant to pay defendant for his serv-

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ices as such agent \$500 a year, beginning January 1, 1883, in consideration of which the defendant "agreed to take and keep the care and supervision of said property, business, and improvements; prevent wastethereon; preserve the possession thereof; attend to the payment of taxes and hire of laborers to perform the requisite annual labor, to be paid out of funds to be furnished by the said Lockhart." Alleges performance of such duties until his discharge, in August, 1885. Alleges payment of such salary for 1883 and 1884, and claims such salary as unpaid for 1885, up to July 31st of that year; and alleges that the assessment work for 1885 was not done, whereby, and "by force of the law," the claim "became forfeited and relegated to the body of public mineral lands;" and on the 4th day of January, 1886, he "located a claim as the 'Ada Elmore,' including said premises, of 1,200 feet long, and 100 feet wide, enlarging the location to 1,500 feet in length by 600 feet in width; claiming such relocation for his benefit; and closing with prayer for judgment against said plaintiffs for the right of possession of his said Ada Elmore lode, and for costs, and that the judgment "be certified to the register of the land-office," etc. The case was tried by the court without a jury, at the October term, 1887. Findings were filed December 10, 1887, and judgment for plaintiffs on such findings of fact and law was entered on that day. The findings and judgment affirm the right of the plaintiffs to all the lands described in the defendant's location of January 4, 1886. This part of the judgment is based mainly on the following findings of fact and conclusions of law: "The court finds as a fact that on the 4th day of January, 1886, a fiduciary relation existed between the plaintiffs and defendant, by reason of the employment of the defendant to procure for the plaintiffs a purchaser for the property included in the defendant's location of January 4, 1886, for a percentage of the proceeds of such sale as his commission," and as conclusion of law that the defendant, sustaining such fiduciary relation in respect to this property, acquired no rights by his relocation,—the lands so affected by this finding extending beyond the original claim in length 250 feet, and on each side 250 feet, the point of location at which defendant

placed his notice being at the point of plaintiffs' shaft in the Ada Elmore lode claim. As to whether this finding of fact is sustained by the evidence, it was further found that, during the year 1885, the annual labor required by law (Rev. St. U. S. § 2324) was performed by plaintiffs on said Ada Elmore lode claim by caring for and maintaining the buildings and improvements thereon; and hence that the claim was not on the 4th day of January, 1886, subject to relocation. We shall consider these findings hereafter.

J. B. Rosborough, for appellant.

It was error to admit oral testimony to show the location of a mining claim and transfers of interest therein, contrary to the statute of frauds. *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. Rep. 280.

The admission of sheriff's deed, without showing a valid judgment as a predicate, was error. *Freem. Judgm. § 350; People v. Doe*, 31 Cal. 220, 221; *Lanning v. London*, 4 Wash. C. C. 513.

In proceedings to determine adverse claims to locations of mineral lands, it is incumbent upon the plaintiff to show a location which entitles him to possession against the United States, as well as against the other claimant. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110.

A valid location of a claim is not made by taking possession alone; and merely working mineral land gives no right of possession against a locator who complies with the regulations prescribed by law. *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. Rep. 197.

The right of possession is acquired only by such compliance. *Belk v. Meagher*, 104 U. S. 279; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. Rep. 280.

Expenses of money and time in traveling about matters connected with a mining claim are in no sense labor performed on the claim. *Du Pratt v. James*, 65 Cal. 555, 4 Pac. Rep. 562; *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. Rep. 643.

A relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done. *Belk v. Meagher*, 104 U. S. 284; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. Rep. 93.

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Lyttleton Price and Richard Z. Johnson, for respondents.

Mining locations and transfers of mining property prior to 1866 may be proved by parol. Conveyances of claims prior to 1866 may be made by parol. *Kinney v. Mining Co.*, 4 Sawy. 382; *Mining Co. v. Taylor*, 100 U. S. 37.

Color of title, even under a void and worthless deed, has always been received in evidence that the person in possession claims for himself, and, of course, adversely to all the world. *Pillow v. Roberts*, 13 How. 477; *Kennebec Purchase v. Laboree*, 11 Amer. Dec. 79.

A location may be made by an agent. *Schultz v. Keeler*, ante, 305, 13 Pac. Rep. 481; *Gore v. McBrayer*, 18 Cal. 582-588; *Morton v. Mining Co.*, 26 Cal. 534; *Murley v. Ennis*, 2 Colo. 300; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. Rep. 182.

A trustee or agent cannot deal with the subject of the trust or agency for himself. Equity will declare any act of the agent to be for the benefit of his principal. *Ewell's Evans*, Ag. 255; *Story*, Ag. 210; *Cooley*, Torts, 526; *Gardner v. Ogden*, 22 N. Y. 327; *Ringo v. Binns*, 10 Pet. 269; *Bain v. Brown*, 56 N. Y. 285; *McMahon v. McGraw*, 26 Wis. 614; *Michoud v. Girod*, 4 How. 504; *Edmonstone v. Hartshorn*, 19 N. Y. 9.

BERRY, J., (*after stating the facts.*) A question of practice and of evidence is presented at the beginning of the consideration of this case. It appears that the findings of the court below were filed December 10, 1887, and judgment for the respondents was entered on that day; that a case was soon thereafter prepared, including assignments of error, presented for settlement, and settled and allowed, on the 28th day of January, 1888. The certificate of the judge states that such case, with assignments of error included, were "examined, settled, and allowed in the presence of the attorneys of the respective parties." Both parties participated in the settlement, without objection. The respondents now claim that many of the alleged errors, if errors at all, were committed in the course of the trial, and the exceptions under Rev. St. § 4426, should have been settled at the time the decision was

made, and, not having been settled for nearly two months after the trial, must be deemed as waived. The statute declares that such "exceptions must be taken and settled at the time the decision is made, and no order of the court shall be made for the settlement of such exceptions at any other time, except by the agreement of both parties." The action of the court in actually settling these exceptions on the 28th of January is equivalent to an extension of the time to that day. Both parties were present at such act, and took part in the proceedings, apparently without objection. Such tacit consent is equivalent to an "agreement of both parties." The settlement of the exceptions was therefore regular. The next question raised is as to the admissibility of the evidence of the local customs of miners in transferring interests or rights of possession in mining claims prior to July 26, 1866. The original locators of the Ada Elmore lode mining claim were six in number, and the witness Sawyer was one of them. In showing a transfer of the several interests of some of the several locators to the plaintiffs, the witness Sawyer was asked: "*Question.* What were the customs as to the transfer of mining property in that district from 1863 to 1866, till the passage of the law of congress that year? (*Objection* was made by appellant to the question and to proof of custom as irrelevant; that the evidence of such transfers should be in writing. The objection was overruled, and the witness answered.) *Answer.* I know the custom. It was by bill of sale or word of mouth. Either was good from 1863 to 1866 to a friend. To those unknown it was otherwise. We had no lawyers to write deeds. When a sale was made to a friend, he would just step into possession."

It was not error to allow this evidence. The act of congress of July 26, 1866, clearly indicates that the rights of mining claimants may be subject "to the local customs or rules of miners;" they not being in conflict with the laws of the United States. It even allows those laws, customs, and rules of miners in establishing the right of a claimant to enter and receive a patent to a mining claim. *Tunnel Co. v. Stranahan*, 20 Cal. 199; *Mining Co. v. Taylor*, 100 U. S. 37. The new location of the plaintiffs' claim is admitted

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in the answer; that prior to June 19, 1878, the Pittsburgh & Idaho Mining Company, one of the plaintiffs, had or claimed an interest of 700 feet of the 1,200 feet of the Ada Elmore claim, and that the plaintiff Lockhart became the owner of it through a sheriff's deed, in an action against this company. Conveyances to said company were shown, covering the balance of said claim; also that plaintiffs had been in peaceful and exclusive possession of the claim, with claim of right, working or improving it, for nearly 20 years. There was other evidence tending to show that the plaintiffs were rightfully in possession of this property. On this point their claim of rightful possession was fully established. The finding of the court below on this point must be sustained.

But it is contended that the labor required by law was not performed in 1885, and that for that reason the claim in question was, at the beginning of 1886, open to relocation adversely to plaintiffs. By section 2324 of the United States Revised Statutes the holder of a mining claim, to maintain his right of possession, must see that "one hundred dollars' worth of labor shall be performed on such claim, or in improvements made thereon, during each year." The object of this requirement seems to be that the holder of a mining claim shall give substantial guaranty of his good faith. It cannot be from any desire on the part of the government to obtain the money of the locator. His right of possession does not depend upon any money consideration, but it is a right founded in public policy. It would be clearly against public policy for one to take and hold a mining claim for years, against all others who would be locators, merely that he might speculate upon it, with perhaps no design to develop it. Some guaranty of his good faith is required, as a condition of allowing him such exclusive possession. The labor is not required to be applied in any particular manner, but so that it is unquestionably devoted to such claim. *McGarritty v. Byington*, 12 Cal. 426. It must not be so as to raise a question as to its purpose. The exception made in the statute itself invites this construction. It is conceded that this labor may be in digging, erection of works for mining, in placing machinery, or in build-

ings on the claim, necessary for its working. In the case at bar the labor of the defendant, under hire of the plaintiffs, at the salary of \$500 a year, continuing at that rate to the 31st day of July, 1885, was in its character precisely what it had been for the two preceding years. His time was spent upon the property, in caring for it, and in protecting it from deterioration, loss, or danger. It involved daily visitations in and over it, and into the works; in fact, as the defendant himself testified, "in doing all that could be done with idle property." The exigencies of the mining business frequently require property of this kind to remain idle for a time, but that is not necessarily evidence of intent to abandon it. In this case, at least, the acts of the plaintiffs show that such was not their intention. The improvements to be taken care of and protected were valuable, and consisted of buildings, engine, boiler, and machinery, hoisting works, etc.; and, from the defendant's evidence, presumably costing thousands of dollars. They had been constructed and used in the development of this mine. The plaintiffs, with them, had worked the mine for years, and when they needed repairs had repaired them. The hoisting works had to be rebuilt, while the defendant was in charge of the property, at a cost of \$2,300. All that was done by the defendant for the plaintiffs in 1885 was clearly in pursuance of their former well-established purpose.

The question as to what shall be understood as "labor upon mines," buildings, etc., has been much discussed, in cases of mining claims; more frequently, perhaps, in cases of liens for labor done. The cases have mostly arisen under claims for miners' or mechanics' liens. While the words of the various statutes are not always identical, there is a general uniformity in the words used in these laws with the statute requiring this annual labor upon mining claims. Practically, where the claim is for work done, the statutes require it to be done on the property. The case of *Mining Co. v. Bouscher*, (Colo.) 12 Pac. Rep. 433, decides what shall constitute labor done "in or upon" mining claims, under the lien law of that state. The law (section 1655, Gen. Laws Colo.) reads: "All miners, laborers, and others, who work or labor in or upon

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any mine," etc., "shall have a lien," etc. The court holds that services of a superintendent of mines, in planning or superintending the erection of a mill, and machinery, are work or labor, in or upon the property, within the meaning of the statute. So in Utah (Comp. Laws, § 1221) one who shall do work "upon any mine shall be entitled," etc. In a case founded upon this statute (*Mining Co. v. Cullins*, 104 U. S. 176) the court say: "It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien and that which is merely professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans, and superintends the erection of a building, acquires a lien thereon for work and labor;" and cite *Stryker v. Cassidy*, 76 N. Y. 50; *Insurance Co. v. Rowand*, 26 N. J. Eq. 389; and other cases. In that case the claimant of the lien was an overseer and foreman of a body of miners, and his claim was held good. If it be said that these cases go rather to what shall be deemed work, we answer that is precisely the case at bar. There can be no question that whatever was done was done on the plaintiffs' claim. So in Oregon, under section 1, c. 32, Laws Or., under a like statute, the court in *Falls Co. v. Remick*, 1 Or. 170, give a like construction.

All the authorities cited by the appellant on this point are consistent with the same view. The strongest case cited for the appellant is that of *Du Prat v. James*, 65 Cal. 555, 4 Pac. Rep. 562. A party had leased a mill, located about a quarter of a mile from his claim, but whether for the sole purpose of developing his claim does not appear. He made efforts, at first unsuccessful, to get water from a ditch to operate the mill, and traveled to distant places, to see agents of a ditch company, to get water for, as he claimed, the same purpose, and incurred expenses in time and money in doing so. Having succeeded, however, in getting water, "he did not use it, or attempt to crush rock or ore." None of these acts were done on the claim, nor were they necessarily connected with this mine. Indeed, his failure to use the water after he had obtained it raises a strong pre-

sumption that he did not intend to do so; at least, not to develop this mine. The court, properly as we think, held this expenditure was not on the mine, in the sense intended. The case cited, (4 Pac. Rep. 562,) is the same as that last commented upon. The case of *McGarrity v. Byington*, 12 Cal. 426, by implication, at least, favors the view we take upon this subject. It holds that "work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it;" clearly implying that, when its purpose is self-evident, it is within the statutes by intendment, if not literally. The personal services of this agent were work and labor. They were performed on the property. They were in aid of the development of this claim. They tended as directly as acts can tend to show the good faith of the plaintiffs, and their purpose not to abandon the mine; at least up to the time they had expended in its preservation, (in 1885,) labor to the value of \$333.

But it is contended that the plaintiffs have not yet paid for this labor. That does not affect the fact that the labor was done by their procurement. The defendant did it for hire, and may recover for the services under his contract. We conclude that on the 4th day of January, 1886, the Ada Elmore lode mining claim was not open to relocation adversely to the plaintiffs. See *Morgan v. Tillotson*, 15 Pac. Rep. 88.

But the court below goes further, and holds that the relocation made by the defendant inures to the benefit of the plaintiffs. Under the pleadings such relief can be had. The conclusion is based upon a finding of fact that, at the time of relocation, the defendant sustained a fiduciary relation to the plaintiffs respecting this property. From the evidence it appears that one W. N. Frew, of Pittsburgh, Pa., where the plaintiffs resided, and still reside, for about eight years next prior to the beginning of this action acted as agent of the plaintiffs, and as such had been known to and dealt with by the defendant. It was through Frew that defendant was in plaintiffs' employ about the premises from 1883 to July 31, 1885. There was much and constant correspondence between the defendant

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and Frew; and on the termination of the defendant's services in caring for the property, July 31, 1885, through Frew defendant was tendered the further service of finding a purchaser for the property at such sum as the plaintiffs would be willing to take, he to receive a percentage of the proceeds for his commission on completion of the sale. The defendant undertook to procure such purchaser, but none had been found up to the beginning of 1886. From this the court held the relations of the defendant with the plaintiffs, with reference to this property, were so far of a fiduciary nature that he would not be permitted to relocate the subject of his trust, for his own benefit; that what he did by the way of enlarging the boundaries of the claim was done for the benefit of his principals, subject to their right of election to accept the same. We think the court below was correct in so holding. Numerous authorities are cited by the respondent in support of this decision, but the principle is too well settled to admit of controversy, and we omit citations. The order denying a new trial is sustained, and the judgment is affirmed.

WEIR, C. J., and LOGAN, J., concur.

WASHINGTON & I. R. CO. v. NORTHERN PAC. R. CO.

(March 18, 1889.)

PUBLIC LANDS — GRANTS TO RAILROADS — CONSTRUCTION OF STATUTE.

1. Section 3 of the act of congress of July 2, 1864, provides "that there be, and hereby is, granted to the Northern Pacific Railroad Company [for the purpose of securing the construction of a railroad and telegraph line, etc.] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, * * * free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office," etc. *Held to be a grant in præsentia*, and to vest in the company an equity in the lands, subject to be defeated, however, on non-compliance with the terms of the grant.

SAME.

2. *Held, also*, that lands included in such grant are not within the operation of the act of March 3, 1875, granting the right of way to railroads, etc.

(Syllabus by the Court.)

v.2 IDAHO—17

Appeal from district court, Shoshone county.

Action by the Washington & Idaho Railroad Company against the Northern Pacific Railroad Company. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Woods & Heyburn, for appellant.

John H. Mitchell, Jr., and *Albert Hagan*, for respondent.

The grant contained in the act of July 2, 1864, (13 St. at Large, p. 365,) is a present one, both by its terms and intent, and passes the legal title to the Northern Pacific Railroad to all the odd-numbered sections within the 40-mile limit on each side of its road. *U. S. v. Ordway*, 30 Fed. Rep. 35; *Schulenberg v. Harriman*, 21 Wall. 44; *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733; *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426; *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100.

BERRY, J. This case comes into this court on appeal from a judgment entered in favor of the defendant upon an order sustaining a demurrer to the complaint. Stripped of all minor questions, and which are not essential to the case, the main issue, and that on which all else in the case depends, is as to which party is entitled to the possession of certain parts of sections 25 and 27, in township 49 N., of range 1 E., of Boise meridian, in Shoshone county. The plaintiff claims a right of way for its road through them, under the act of March 3, 1875. It claims to have fulfilled all the conditions of that act, and compliance with all the rules and regulations of the land department of the United States; and that since the 3d day of November, 1886, it was and is entitled to all the benefits of the act of March 3, 1875, whatever those rights may be. The complaint demands judgment, declaring the company's ownership of a right of way for the plaintiff's road on and over these two sections of land, with right of possession, etc. The defendant, on its part, claims both of these sections, under the land grant to the Northern Pacific Railroad Company by act of congress, July 2, 1864. The lands are a part of the public domain, and sub-

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ject to the operation of the act under which the plaintiff claims, unless they are removed from the operation of that act by the grant previously made to the defendant. The act of congress of March 3, 1875, grants to railroad companies complying with its conditions the right of way over the public lands of the United States, except such lands be contained within "any military, Indian, or park reservation, or the lands shall be otherwise specially reserved from sale." The case made by the plaintiff shows its right to a right of way over the lands, providing the defendant has not a prior claim. It is contended by the defendant that the odd sections "within the 40-mile limit" of its grant are not "public lands," within the meaning of the act of March 3, 1875, but that they are private property, granted to the defendant for certain purposes, specified in the granting act, and in which the defendant, prior to the act of 1875, had a vested right. In support of this claim the defendant cites section 3 of the granting act to the defendant, of July 2, 1864, providing "that there be, and hereby is, granted to the Northern Pacific Railroad Company [for certain specific purposes in the act declared] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, * * * free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office," etc.

Whether this act did or did not vest in the defendant a present property in these lands, which would become absolute as of the time its plat of route should be filed, against pre-emption or other claims arising after the date of the act, has been the subject of some discussion in the courts, and the decisions, at first view, are apparently conflicting. We think this supposed conflict is more apparent than real, and arises chiefly from changed circumstances under which the same and similar acts have from time to time been considered. The policy of the United States with reference to the public lands has ever been to retain their primary disposal exclusively to itself. With that exclusive control it will allow no interference, either by state or ter-

ritorial governments, nor by any means which itself does not institute and put in motion; and we are cited to no case, and know of no case, where the government of the United States has ever allowed the public lands to be made subject to taxation and sale for taxes, under state or territorial laws, so long as it for any purpose holds the title. Improvements on public lands may be taxed, and often are taxed, as personal property, and sold for taxes, but the soil, never. The reason is obvious. A departure from this rule will not be presumed for reasons less than a plain declaration by congress of such intent. There is no such intent expressed in this grant, and the intent will not be implied as against the government. *Railroad Co. v. U. S.*, 92 U. S. 733. What the company may do, in pursuance of the expressed object of the grant, in the sale and transfer of equities in lands, whether earned and title perfected, or the equities still inchoate, is quite another thing.

For reasons satisfactory to congress, and under a clear right reserved in the government to do so, and by express provision of the act of July 15, 1870, the title to these lands has been retained in the government; and it will not, except through the authorized acts of the grantee, done in pursuance of the objects of the grant, and on full compliance by it, with its obligations to government, part with the legal title to the property granted. The making of these lands subject to taxation by territories or states was not one of the expressed objects of this grant. Its purpose was not to expose it to confiscation, but to devote it to the building of a railroad and telegraph line from Lake Superior to the Pacific. To do that, means were prescribed by congress by which the company might mortgage its franchises and property, including these lands, to raise money for that purpose; but to allow the lands to be incumbered by taxation would at once raise a barrier to the object for which the grant was made, and tend, at least, to defeat its real purposes. Any presumption that congress intended, by putting these lands in the hands of the company, practically in trust, with a beneficial interest in the trustee, for a specific purpose, to subject them to immediate taxation, as soon as the line of the road should be established, or even as soon as the lands should

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be earned by the completion of the road, or any section of the road, would necessarily lead to the most serious and absurd consequences; and if we were to look no further than the original grant, with its expressed object and intent, with the known uniform policy of the government, in having no partner in the primary disposal of its soil, such a decision as that of *Railroad Co. v. Traill Co.*, 115 U. S. 601, 6 Sup. Ct. Rep. 201, might have been reasonably expected. Such, however, is not the reason given for that decision. That was based on the fact that the government had a lien on all such lands for the cost of surveying, selecting, and conveying the same, which cost the grantees were to pay, and in default of which payment the government might be obliged to retake or re-dispose of the lands. The interest of the road in the lands is not such an interest as to subject the lands to territorial taxation, and so that case decides. But it does not follow from anything in that case that the beneficial interests of the company in the grant are any less, or any different, from that implied in the obvious meaning of the words of the statute, taken with other portions of the granting act, and the act of July 15, 1870, reserving this power in the government. In construing the act, the nature of the trust, the character and relations of the grantor to the property granted, its rights secured by holding the title, its uniform policy and practice in avoiding complications in the primary disposal of its lands, and the detailed statement of the object of the grant itself, must not be overlooked. Subject to these specified conditions, it seems clear that the conclusion arrived at in *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100, must be taken as the true rule, in defining the estate and interest of the defendant in the lands so granted. Other cases define it quite as explicitly. In that case the court holds that the land in controversy, "and other lands in Dakota, through which the Northern Pacific was to be constructed, was within what is known as 'Indian Country' at the time the act of July 2, 1864, was passed. The title of the Indian tribes was not extinguished, but that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States.

The Indians had merely a right of occupancy,—a right to use the lands, subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy, and the railroad company took the property with this incumbrance." There is no question of "incumbrance" here; hence there was nothing to be "removed" before the rights of the company attached. The court declares that the company "took the property." The counsel cites on this point *Schulenberg v. Harriman*, 21 Wall. 44, which case fully sustains this view; also *Railroad Co. v. U. S.*, 92 U. S. 733; *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426,—all of which cases, considered with reference to their particular circumstances, appear consistent with *Railroad Co. v. Traill Co.*, cited above, and no reason appears to question the correctness of their conclusions.

It is not necessary to inquire as to which of the excepted classes of lands, named in the act of 1875, includes the sections in question in this action, or whether they are in either class. The United States had already granted these lands, subject, of course, to the reservations and conditions of the act of July 2, 1864, and to the requirements of the act of July 15, 1870, hereafter mentioned, when the act of March 3, 1875, was passed. It is admitted in the complaint that the sections of land here in question are now "within the forty-mile limit" of the defendant company; and from the complaint, which was demurred to, it is not apparent that they were not within such limit at any time. It is not pleaded that any previous location of the defendant's road had been definitely made, so as to leave these sections out of that limit, on the 3d of November, 1886, at which time full compliance with the act of 1875 was completed by the plaintiff; and the plaintiff became entitled to its right of way over government lands under that act, and we cannot look into the maps submitted, which are not a part of the complaint, nor indeed altogether consistent with each other, for the discovery of a fact of which the face of the complaint does not give notice. Undoubtedly, if such were the fact when the right of the plaintiff attached, and a change in the

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defendant's line was made afterwards, so as to include these sections, and it were so stated, such fact would demand attention. But such is not the condition of this case.

We see nothing in the point taken under the act of congress of July 15, 1870, "that while the cost of surveying, selecting, and conveying the lands granted to a railroad remains unpaid, the legal title of the lands remains in the United States; that the cost of surveying the land is a condition precedent to the right to receive the title from the government;" and that in such case the equities of the defendant are extinguished or impaired, as claimed under the authority of *Railroad Co. v. McShane*, 22 Wall. 444. The act, under reserved power to amend and modify the grant, merely imposes another condition precedent to the government's obligation to patent the lands, to-wit, that certain costs of survey, selection, and conveyance shall be paid. It goes no further, and we think this retention of title in the United States must be considered as a holding of the naked, legal title only, retained, primarily, at least, as security for the cost of surveying, selecting and conveying the lands, but leaving the equities of the company in the lands themselves entirely intact. Such, if we understand them, is the view taken by Judges FIELD and DEADY in *U. S. v. Ordway*, 30 Fed. Rep. 35. It is apparent, therefore, that the defendant had a vested interest and property in this land, prior and superior to any claim of the plaintiff under the act of March 3, 1875. The judgment in this action should be affirmed.

UNITED STATES *v.* LANGFORD.

(March 18, 1889.)

BIGAMY—EVIDENCE—GENERAL REPUTATION.

1. It is not proper for the court to allow evidence of the general repute of the guilt of the defendant in the neighborhood in which he lives in order to establish that guilt. The facts themselves must be shown, and it is for the jury to draw inferences.

SAME—INSTRUCTIONS.

2. Nor is it proper for the court to charge the jury that if the defendant has by his acts induced others to believe, or the public to believe, that the defendant has cohabited with more than one woman, then his acts are unlawful.

JUROR—CHALLENGE—IMPLIED BIAS.

3. The court will not disturb the finding of a trial judge upon the question of implied bias, un-

less it is so clear a case as would warrant a judge in setting aside the verdict of the jury as against the evidence.

BERRY, J., dissenting.

(*Syllabus by the Court.*)

Appeal from Third district court, Bingham county.

John W. Langford was convicted of bigamy, and appeals. Reversed.

Smith & Smith, for appellant.

The court had no jurisdiction to try this cause, as the indictment shows that the offense charged was committed in Bear Lake, instead of Bingham, county, and this court takes notice that Blackfoot is in Bingham county. *Rev. St. U. S. §§ 1910, 1914; Clinton v. Englebrecht*, 13 Wall. 434; *Reynolds v. U. S.*, 98 U. S. 145; *Miles v. U. S.*, 103 U. S. 304.

Consent to a wrong is not given by silence in a criminal case. *People v. Dick*, 37 Cal. 277; *People v. Beeler*, 6 Cal. 247; *People v. Payne*, 8 Cal. 344; *People v. Demint*, Id. 424; *People v. Ah Fong*, 12 Cal. 347; *People v. Woppner*, 14 Cal. 437; *People v. Sanford*, 43 Cal. 29; *People v. Prospero*, 44 Cal. 186.

James H. Hawley, U. S. Dist. Atty.

The presumption in the supreme court is that the proceedings below were correct, except in so far as the records show the contrary. *People v. McAuslan*, 43 Cal. 55.

LOGAN, J. The defendant was indicted by a grand jury of the United States at Blackfoot, Idaho territory, at the June term of court, A. D., 1888, for a violation of section 3 of the act of congress approved March 22, 1882, c. 47, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States in reference to bigamy, and for other purposes." Under this indictment the defendant was tried and convicted on the 12th day of October, 1888, and from that judgment he has appealed to this court. The errors which it is claimed by the defendant were committed by the court below are as follows: (1) Error in overruling defendant's challenge to the jurors Henry Myers and Thomas Holcomb. (2) Error in permitting counsel for the government to ask the following question: "What was the general repute in that community as to the relations exist-

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ing between defendant and Rhoda Dimmick?" (3) Error in the refusal of the court to charge certain requests made by the defendant, and error as to certain portions of the charge which the court actually delivered to the jury.

As to the first assignment of error, the jurors were challenged for implied bias, and, in the absence of the proof or evidence upon which the court below decided the question of implied bias, this court is bound to presume that the decision of the court below was fully sustained by the evidence. The decision of the question of implied bias is one of fact, and will not be disturbed by an appellate court, unless it is so clearly against the evidence as would warrant a judge in setting aside a verdict of the jury as against the evidence. *Reynolds v. U. S.*, 98 U. S. 145. In order to establish an offense under section 3 of the law of congress mentioned above it becomes necessary for the government to show that the defendant actually cohabited with more than one woman. We have already laid down, in the case of *U. S. v. Kuntze*, ante, 446,¹ (decided at this term,) what is meant by the term "cohabit" in this section, and defined it to mean, "To dwell or live together as husband and wife." It therefore becomes necessary for the government, in order to convict the defendant, to show that the defendant cohabited with more than one woman, or did dwell or live together with more than one woman as husband and wife. This was the substantive fact to be proven, and the only manner in which it could be proved would be to establish the acts of the defendant, and from these acts it is for the jury to say whether he has dwelled or lived together with more than one woman as husband and wife. The facts themselves are to be proven, and the inference to be drawn from the facts is a question for the jury. It was therefore manifestly improper for the government to ask the question which was asked and allowed by the court in this case. The question itself, if answered in the affirmative, assumed all the facts which were necessary to be proven in order to establish the guilt of the defendant. The defendant's guilt may be estab-

lished by his own acts, but certainly to assume the guilt without proof of the acts would be manifestly improper. Proof of marriage was not necessary, but proof of cohabitation was; and under no circumstances would this form of question be proper in a case of this kind. Cohabitation might be inferred by the jury from the acts of the defendant, but such acts should not be inferred from general reputation. In this case the evidence which preceded this question, so far as it appears from the bill of exceptions, would not warrant the question, and, in fact, tended to prove nothing. It is claimed that the case of *Cannon v. U. S.*, 116 U. S. 55, 6 Sup. Ct. Rep. 278, is an authority for such a question. We are unable to view the case in that light. It appears there that facts were proven from which the court held the jury might infer guilt, but no such question was asked or commented upon. We are unable to find any authority warranting such evidence. 1 Greenl. Ev. § 107; 2 Greenl. Ev. § 461.

The next assignment of error is the charge of the court to the jury, which was given at the request of the prosecution, as follows: "In determination of this you will consider whether, under the facts as proved, the acts of the defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe, or the public to believe, that the marital relations still continue, then the acts of the defendant are unlawful." To this portion of the charge the defendant excepted. We think this exception is well taken. If the court had charged the jury that if, from all the facts which had been proven in the case, (if there were any,) they came to the conclusion that by such acts the defendant had held out to the public that the marital relation existed between himself and the two women named in the indictment, that then they should find the defendant guilty, the charge might have been proper; but the court did not so charge. Taking into consideration the evidence which had been admitted, and the charge of the court as given, it is clearly misleading; for in it the jury were told, in effect, that, if the defendant had by his acts induced the public to believe him guilty,

¹21 Pac. Rep. 407.

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then they must find him guilty. Nothing was said in regard to the acts which must be the foundation of public opinion; nothing was said as to what public was referred to; but merely that, if the acts have been such as to induce others to believe, or the public to believe, that the marital relations still continued, then the acts of the defendant are unlawful. The charge of the court in this case was not very full, and did not explain to the jury the facts that were necessary to be proven in order to establish this belief in the public; but by the admission of the testimony which we have already referred to it may well be supposed that the jury, without knowledge of any facts, found the defendant guilty merely upon the general proof that his acts had been such as to induce others or the public to believe him guilty. It may well be said that this was a conviction based upon public opinion.

It is again claimed that *Cannon v. U. S.* is an authority for this charge. We think it just the opposite. If a defendant of this kind cannot be convicted without the invention and application of new rules of law, it is better he should be acquitted.

It is unnecessary in this case to consider the question of the jurisdiction of the court. This question has already been considered and disposed of in the case of *U. S. v. Kuntze*, ante, 446, 21 Pac. Rep. 407, (decided at this term of the court;) nor is it necessary to consider any of the other alleged errors in this case. It follows that the judgment must be reversed, and a new trial granted.

WEIR, C. J., concurs.

BERRY, J., (*dissenting.*) This case comes up on a bill of exceptions. The evidence given in the court below is not brought up. Whenever, therefore, the lawfulness of proceeding upon the trial depends on the evidence given at the trial, the presumption is that the requisite evidence was given. The majority of the court think there were two instances of error on the trial: (1) In the charge of the court to the jury; and (2) in allowing evidence of repute in the family and community where the defendant resided, as to the nature of the relations of the defendant with the woman in question, and whether

they were regarded in the family and community as those of husband and wife.

On both of these points I am constrained to dissent.

First, as to error in the charge. The alleged ground of this is as follows: Evidence had been given, and the fact was not denied, that for years previous to the 1st day of June, 1886, (the beginning of the time alleged in the indictment as the beginning of the time covered by the unlawful cohabitation,) the defendant, having a lawful wife still living, had publicly lived and cohabited with another woman, one Rhoda Dimmick, as his wife; that he had at least one child by her. She went by his name, and was in that community known and recognized as the defendant's plural wife. It was stated by defendant in his own behalf, on the trial, that on or shortly prior to the 1st day of June, 1886, it was agreed between said defendant and Rhoda Dimmick that they would thenceforth live separate and apart. It was shown that the defendant still supported said Rhoda and her child as formerly, and that he was seen at her house. After the cause was summed up, the court charged the jury that "if from all the evidence you are satisfied, beyond a reasonable doubt, that the defendant has cohabited with the woman in question at the time or any part of the time mentioned in the indictment, it will be your duty to find the defendant guilty; but if, on the other hand, you shall not believe from the evidence, beyond a reasonable doubt, that the defendant has so cohabited with said Rhoda Dimmick, then you will find a verdict of not guilty. In this case you cannot find the defendant guilty unless you find from the evidence that defendant has lived with his wife and with Rhoda Dimmick, in the habit and repute of marriage, as to both of said women, between the 1st day of June, 1886, and the 8th day of June, 1888; and if you find that prior to June 1, 1886, they separated by agreement, and ceased their relations of husband and wife, and made the termination of those relations notorious and public, and wholly and publicly repudiated those relations, and have not since lived together, or continued such marital relations in public or privately, and that he has only contributed property to her support, but not as to a wife, then this does not

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constitute such a cohabitation as is condemned by law, and it would then be your duty to find him not guilty. This change of relations must be real, and not merely colorable and unreal. It is not the object of the law to punish for acts of justice or benevolence. There is a wide distinction between such acts, and such as the law prohibits. The example before the public and the influence of such acts are widely different. In the determination of this you will consider whether, under the facts as proved, the acts of the defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe, and to induce the public to believe, that the marital relation still continued, then the acts of the defendant are unlawful." A portion of this charge embodies a request of the defendant's counsel. The part embodying the request is from the words, "in this case the jury," to and including the words, "find him not guilty." The court declined to give as requested, except as modified at the places where those words occur, by inserting the words, "and made the termination of those relations notorious and public, and wholly and publicly repudiated those relations;" also, "or continued such marital relations in public or privately;" also, "but not as to a wife."

It will be seen that the counsel for the defendant himself assumed, and the court assumed, as it was in fact proved, that up to about June 1, 1886, the defendant had lived in the repute of matrimony with Rhoda Dimmick; that on the strength of this alleged agreement with Rhoda, testified to by the defendant himself, and which nobody but he appears to have even suspected, he seeks to evade punishment. With the amendments was given a statement of their true intent and meaning. On any fair reading it only amounts to this: that as the public relations of the defendant and Rhoda up to June 1, 1886, had been those of husband and wife, those relations would be presumed so to continue until there was some change visible to others in their relations. How long that presumption would obtain is another question. But if it hold any considerable time after the 1st of June, 1886, it brings the case within

the indictment. Mere illicit intercourse was not in question; but the offense, under the Edmunds law, is the living in the repute of marriage with more than one woman. The court said to the jury, in effect, that the mere secret agreement with the woman in question was not of itself enough, if he still kept up social relations with her; that he must show to the public, to the community in which he lived, and while he still continued to visit the woman, that the marital relations, so long established and recognized in that community, had ceased, and that those relations still continuing had changed in their character; that his acts and conduct must show this. This is the clear spirit and intent of the Edmunds law. But whether the public did actually believe in the reality of the change was not essential; only so his acts were such as tended to repel the presumption arising from their conceded polygamous relations. Such is the view taken by the supreme court of the United States in *Cannon v. U. S.*, 116 U. S. 72, 6 Sup. Ct. Rep. 287. The judges say: "This offense [unlawful cohabitation] is not on the one hand meretricious, unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks * * * to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act passed, and without reference to what may occur in the privacy of those relations. Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table, and the keeping up of the same family unity, is not a lawful substitute for a monogamous family, which alone the statute [the Edmunds act] tolerates." The instructions of the court in the case at bar go no further than this. See, also, *Murphy v. Ramsey*, 114 U. S. 41, 42, 5 Sup. Ct. Rep. 747.

But the court below also allowed two witnesses to answer as to the repute in the family and community where he resided as to

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what those continuing relations were. This was competent as showing the repute in which he lived. It was competent in showing the nature of the acts proven, though not of itself sufficient to convict. Such is the rule of law applied in Utah, where most cohabitation cases have been tried, and also in Idaho. The bill of exceptions does not purport to bring up the evidence, except of the identical witnesses to whom the question of repute was put; and, because each of those witnesses did not from his own knowledge testify to sufficient (as is claimed) facts of social intercourse, the nature of which facts were in question, and however fully such facts may have been proven by other witnesses, the contention is that such evidence of repute was improper. The point made is practically that under no conditions is such evidence admissible.

Again, it must be said the offense charged is not bigamy or polygamy, and a marriage in fact was not in issue. But, the fact of having a legal wife still living being admitted, the only question to which this evidence was directed was as to whether the defendant was also living in repute of marriage with Rhoda Dimmick. For the purpose of qualifying those acts of defendant, and showing the repute in which he was living, such evidence is competent. 1 Greenl. Ev. §§ 101, 103, 107; Pettengill v. McGregor, 12 N. H. 179; Tarpley v. Poage, 2 Tex. 139-149; 1 Bish. Mar. & Div. §§ 438-440. But to enforce this objection the counsel contends that the facts known to each witness must at least be sufficient to call for such qualifying evidence. This distinction between those identical witnesses and other witnesses in the case is not well taken. All the facts proven must be taken together. Scott v. Lloyd, 9 Pet. 460; Reenan v. Hayden, 39 Wis. 558-561. The order denying a new trial should be affirmed.

Order reversed.

WASHINGTON & I. R. CO. v. OSBORNE.

(March 18, 1889.)

CONDEMNATION OF POSSESSORY CLAIM TO LANDS—
CONSTRUCTION OF RAILROAD—COMPENSATION.

1. A tract of unsurveyed land of the United States, of an agricultural character, was located and settled, and buildings were erected on it. Defendant, who was qualified to take proceedings to

obtain title under the pre-emption laws, bought the right of possession and improvements, took possession, made improvements, and continuously resided thereon, located the section, and filed his declaration to hold it under the pre-emption laws, and intended to obtain title thereunder when the land should be surveyed. Provision for the condemnation of possessory claims for rights of way was made by act Cong. March 3, 1875, and Rev. St. Idaho, tit. 7. Held, that defendant's possessory claim could not be taken for a right of way by a railroad company having no right to the land, without compensation.

APPEAL—REVIEW.

2. On appeal from the judgment only, where it does not appear that a motion for new trial was made, or that any statement was filed pursuant to Rev. St. Idaho, § 4443, the judgment roll only can be considered.

Appeal from district court, Shoshone county.

Suit in equity by the Washington & Idaho Railroad Company against S. V. William Osborne to determine the right of possession of certain land. From a decree for defendant, plaintiff appeals. Affirmed.

W. W. Woods and W. B. Heyburn, for appellant.

Occupation and improvement on the public lands, with a view to pre-emption, do not confer a vested right to the land so occupied. Frisbie v. Whitney, 9 Wall. 187; Aurora Hill Consol. Min. Co. v. Eighty-Five Mining Co., 34 Fed. Rep. 520; Bouldin v. Phelps, 30 Fed. Rep. 564; U. S. v. Taylor, 35 Fed. Rep. 486; Union Pac. Ry. Co. v. Douglass Co., 31 Fed. Rep. 540.

Albert Allen, for respondent.

If possessory claims exist at the time a railroad company complies with the act of March 3, 1875, by filing its articles of incorporation and proofs of organization, then a right of way must be purchased pursuant to section 2288, Rev. St., or condemned in pursuance to section 3 of said act of March 3, 1875. Railroad Co. v. Sture, 32 Minn. 95, 20 N. W. Rep. 229; Railroad Co. v. Johnson, 38 Kan. 142, 16 Pac. Rep. 125.

WEIR, C. J. This is an action brought by the plaintiff, in which it appears that the plaintiff, as a duly-organized corporation, has duly filed its certificate of incorporation and due proofs of its organization, under the act of March 3, 1875, and is entitled to a right of way for the purpose of constructing

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its railroad over the public lands of the United States; that the defendant claims that he is the owner of a part of said public land, and that he is entitled to the possession of the same as against the plaintiff; that thereupon, on the 28th day of July, 1888, plaintiff commenced proceedings in condemnation against said defendant to condemn the right of way for its road over and through the land so claimed by the defendant; that upon such proceedings the district court on the 13th day of August, 1888, appointed commissioners to appraise and assess the damages which the said Osborne would suffer by reason of the said condemnation for plaintiff's right of way; that the commissioners took testimony, and reported, after viewing the premises and hearing the testimony, that the total damage sustained by the defendant by reason of the taking of the premises by the plaintiff were \$6,670. The plaintiff declines to make tender of that sum, or any sum, to the defendant, upon the ground that the defendant is not entitled to the possession of the premises as against the plaintiff. Plaintiff offers to pay the money into court, and abide the determination of the question, and thereupon proceeds to ask judgment that it may be decreed to be the owner and entitled to the possession of the land, and also be entitled to enter upon the same for the purpose of constructing its railroad without the payment or tender of the damages so found by the commission; and asks for an injunction restraining and enjoining the defendant from interfering with it in the construction and operation of its road. The defendant, answering, alleged that he was in all respects qualified in law to initiate proceedings to obtain title to 160 acres of agricultural land belonging to the United States; that the land upon which defendant was in possession was located and settled upon in the year 1885 by one Seth McFarren and Samuel Norman, who in that year built a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundary as defined by their corner stakes; that said McFarren and Norman resided constantly upon the said property, living in the dwelling-house aforesaid, and constantly engaged in inclosing and improving the same during the year 1885 and

down to March, 1886, at which date the defendant duly purchased the same from them, paying therefor the sum of \$2,000; whereupon the defendant went into possession of the entire tract of land comprising 160 acres, with the intent in good faith to initiate and perfect the title thereto under the homestead or pre-emption laws of the United States; and that since that time the defendant has resided upon the ranch continuously, constantly improving the same, and completed the inclosure thereof; and that altogether he has expended the sum of \$8,000, exclusive of the sum of \$2,000 heretofore paid therefor, as aforesaid. The defendant further alleged that the proposed right of way of plaintiff goes through the center of defendant's garden, which defendant has thoroughly reduced to cultivation and set out in orchard; and conceded that the land is unsurveyed public land of the United States.

The appeal in this action is from the judgment and decree only. It does not appear that any motion for a new trial has been made, or any statement been filed in pursuance of section 4443 of the Revised Statutes of Idaho. We can, therefore, in disposing of this case, consider only the judgment roll. If that appear to be correct, the judgment must be affirmed. *Gamble v. Dunwell*, 1 Idaho, 268; *People v. O'Conner*, Id. 759; *Purdy v. Steel*, Id. 216; *Caney v. Silverthorne*, 9 Cal. 67. The findings of the court in this case are conclusive of the facts, and the only question that remains is whether the conclusions of law are supported by the findings of fact. The court found as a matter of fact that on the 5th day of July, 1886, the plaintiff became a duly-organized corporation under the laws of Washington Territory, for the purpose of constructing and operating a railroad through a certain part of Shoshone county, and on the 8th day of November, 1886, filed amended articles of incorporation extending the line which the plaintiff proposed to construct. The property in question is covered by the extension. The court further finds that the defendant is a native-born citizen of the United States, has never had the benefit of the pre-emption or homestead laws, and is in all respects qualified in law to initiate proceedings to obtain title to 160 acres of the agricultural land

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belonging to the United States; that the lands in question are part of the unsurveyed public land of the United States, and agricultural in character; that the premises in question were settled upon in the year 1885 by Seth McFarren and Samuel Norman, who proceeded to erect buildings thereon, and located the same, as required by law; that, on the 18th day of March, 1886, in consideration of \$2,000, these parties sold and conveyed to the defendant all the improvements upon the said premises, and the right of possession which the said parties then had; whereupon said Osborne entered into possession, and continued in possession up to the time of the commencement of this action, and has duly located the said section, as required by law, and filed in the office of the county recorder of Shoshone county, Idaho, his declaration to hold said premises under the pre-emption law under the possessory land act of the territory; that during all the time since the 18th day of March, 1886, defendant has resided upon the premises, making the same his home, and has made large and valuable improvements thereon; and that he intends to obtain title to said premises under the pre-emption laws of the United States, as soon as the same shall be surveyed by the government. As conclusion of law from these facts the court found that the defendant is now, and at all times since the 18th day of March, 1886, has been, the owner of, as against all persons except the United States, and in possession of, the land and premises described in the answer; that the title and right of possession of defendant in and to said premises are prior to and paramount to the right of way of the plaintiff over the said premises; and that the plaintiff has no estate or interest in or to the right of way over and across said premises, or any part thereof, as against the defendant; that defendant is entitled to a judgment and decree of this court, and that he have judgment for the costs.

The only question presented in this case is whether the defendant's possessory claim can be taken by the plaintiff without compensation. It appears that the defendant's right was acquired before the organization of the plaintiff, and that the plaintiff had no right whatever. The act of March 3, 1875, provides that the legislature of the proper

territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned. Section 3 of said act. It is under this act that the plaintiff claims its right. The legislature of Idaho has provided a law for the condemnation by railroad companies of the right of way over possessory claims. Title 7, Rev. St. Congress itself by the act seemed to provide for condemnation of possessory claims, and undoubtedly the defendant's claim was a possessory one, and this plaintiff could not enter upon it and take it from the possession of the defendant, unless it had a prior right, without due compensation. The question of a rule of damages in a case of this kind, where the property itself is property of the United States, is another question, but is not presented for our consideration in this case. It appears from an examination of the judgment roll that it is in all respects regular, and that the conclusions of law are sustained by the findings of fact. The judgment is therefore affirmed, with costs.

SCHULTZ et al. v. KEELER et al.

(March 18, 1889.)

MINES AND MINING — LOCATION OF CLAIM BY AGENT—INSTRUCTIONS.

Where the complaint alleges that a mining claim was located on behalf of the owner by a duly authorized agent, and the answer admits that fact, it is error for the court to refuse to give an instruction to the jury to the effect that one might initiate the location of a mining claim through an agent.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Action by C. A. Schultz and others against William Keeler and others to recover the possession of certain placer mining ground. From a judgment for defendants, plaintiffs appeal. Reversed.

For former appeal, see ante, 305, 13 Pac. Rep. 481.

W. B. Heyburn and *W. W. Woods*, for appellants.

The actual possession of another by one who has knowledge of the extent of that possession is such a trespass as will render unlawful any attempt to initiate any such title

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by such trespass adverse to the title of those in possession. *Attwood v. Fricot*, 17 Cal. 43; *English v. Johnson*, Id. 115; *Hess v. Winder*, 30 Cal. 355; *Golden Fleece G. & S. Min. Co. v. Cable Consol. G. & S. Min. Co.*, 12 Nev. 322; *Belk v. Meagher*, 104 U. S. 284.

If three sides of the claim were marked, and the other side was described in the notice as being a river or the base of a mountain, still, without the marking of the boundaries, the claim would even then be defective. *Anderson v. Black*, 70 Cal. 226, 11 Pac. Rep. 701.

Albert Allen and Richard Z. Johnson, for respondents.

If none of the evidence is found in the record, the court will not grant a new trial on the ground that certain instructions to the jury were refused, for the court may have refused to give them because there was an entire lack of evidence on which to base them. *Brown v. Kentfield*, 50 Cal. 129, 132; *Tompkins v. Mahoney*, 32 Cal. 231; *Shepherd v. Jones*, 71 Cal. 224, 16 Pac. Rep. 711.

Actual possession, without more, without location, or even an attempted compliance with the mining laws, may be good against mere intruders, but is not good as against one who has complied with the mining laws. *Garthe v. Hart*, 73 Cal. 543, 15 Pac. Rep. 93.

Plaintiffs or their workmen might have been in actual possession, and still have "made no such location as prevented the lands from being in law vacant," and subject to location under the mining laws. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. *Belk v. Meagher*, 104 U. S. 287.

Prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either federal, district, or local custom, does not give a right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respects complies with the federal and district mining laws and regulations. From the time the second person has perfected his location the prior occupant is a trespasser.

Horswell v. Ruiz, 67 Cal. 111, 112, 7 Pac. Rep. 197; *Du Prat v. James*, 65 Cal. 555-557, 4 Pac. Rep. 562.

LOGAN, J. This action is in the nature of ejectment, brought to recover the possession of certain placer mining ground, situated in Shoshone county. The case was tried before the court with a jury. Verdict and judgment in favor of the defendants. The appeal is from the judgment only, but the judgment roll contains the complaint, answer, and bill of exceptions. The complaint alleges that on the 11th day of June, 1883, the plaintiffs, jointly with one Jesse A. Pritchard, by their attorney, A. J. Pritchard, made a certain mining location in pursuance of the act of congress of May 10, 1872. The answer admits that the pretended ownership of the mining ground described in the plaintiffs' complaint is based upon a pretended location thereof by one A. J. Pritchard, as the agent of the plaintiffs. Although we have no evidence before us, taken at the trial as to this point, yet we have this allegation of the complaint and the admission by the answer. It was therefore proper for the plaintiffs to request the court to charge that a valid location of a mining claim may be made by a duly authorized agent in the name and in the absence of the principal, and that when such location is once proved it as completely segregates the ground so located from the public domain as though located and held by the locator in person. The fact of the location by an agent was in the case as fully as it would have been had there been evidence. It was absolutely necessary for the plaintiffs, in making out their case, to prove this allegation; and they could only prove it in the manner alleged. The answer having admitted the manner of location, evidence of the manner might not be necessary, but it furnishes no excuse for the court to refuse to instruct upon that subject, because the plaintiffs' whole claim, and the validity of their location, depended upon the question whether it could be made by an agent. It is unnecessary for us to go into the question as to whether this request to charge is proper or not. It was the law of this case, for the reason that the same question had been presented in the

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same action on a former appeal, (ante, 305, 13 Pac. Rep. 481,) and the charge was there held to be proper. In that opinion we certainly concur. For the refusal of the court to charge as requested, the judgment is reversed, and a new trial ordered.

WEIR, C. J., and BERRY, J., concur.

LIDENTHAL v. BURKE.

(March 18, 1889.)

GARNISHMENT—JUDGMENT.

When a debt claimed to be due by one person to another is attached, as provided for by section 4309, Rev. St., and such person has been examined under section 4310, Rev. St., and the existence of liability denied, the court or judge has no power to order a judgment against such alleged debtor upon such examination.

(Syllabus by the Court.)

Appeal from district court, Shoshone county.

Action by Henry Lindenthal against Amadis Seymour on a promissory note. John M. Burke was summoned as garnishee. There was judgment for plaintiff against the garnishee, and he appeals. Reversed.

W. B. Heyburn and W. W. Woods, for appellant.

The only jurisdiction the court or judge had was to make an order. Mull v. Jones, 33 Kan. 112, 5 Pac. Rep. 390; Board v. Scoville, 13 Kan. 17.

The order, if made with jurisdiction to make it, would be only an assignment of the claim from the debtor to the creditor. Railroad Co. v. Hopkins, 94 U. S. 12; Bank v. Pugsley, 47 N. Y. 368.

On proceedings supplementary to the execution, if the debt is denied, all the court or judge can do is to authorize by order the judgment creditor to bring his action. Rev. St. § 4510.

The person sought to be charged as a debtor of the defendant in attachment must owe the defendant upon a demand which would be a cause of action in favor of the defendant against the attached debtor, upon which the former could at common law maintain an action of debt or *indebitatus assumpsit*. Hassie v. God Is With Us Congregation, 35 Cal. 378; Nesbitt v. Ware, 30 Ala. 68; Wil-

liams v. Gage, 49 Miss. 777; Caldwell v. Coates, 78 Pa. St. 312; Webster v. Steele, 75 Ill. 544; Hoyt v. Swift, 13 Vt. 129.

It must be a debt not subject to contingencies. Roberts v. Drinkard, 3 Metc. (Ky.) 309; Bishop v. Young, 17 Wis. 46; Maduel v. Mousseaux, 29 La. Ann. 228; Railroad Co. v. McCullough, 12 Grat. 595; Wood v. Buxton, 108 Mass. 102; Cutter v. Perkins, 47 Me. 557.

A. E. Mayhew, for respondent.

The court or judge has jurisdiction to render judgment against the garnishee in cases like the present. Johnson v. Carry, 2 Cal. 33; Brummagim v. Boucher, 6 Cal. 16; Roberts v. Landecker, 9 Cal. 262.

LOGAN, J. It appears that on the 27th day of July, 1887, the plaintiff commenced an action in the district court in and for the First district of Idaho territory, to recover \$800 upon a promissory note against one Amadis Seymour. A writ of attachment was issued in the action, and on the 30th day of July, 1887, Burke, the appellant herein, was attached as a debtor of the defendant. Such proceedings were had in the action that on the 25th day of October, 1887, judgment was rendered against Amadis Seymour, the defendant, for \$884.21, and \$49.55 costs. On the 22d day of November, 1887, the plaintiff filed an affidavit in the action stating that the defendant Burke had been attached as a debtor of the defendant Seymour, whereupon the court made an order requiring the defendant Burke to appear and answer touching any debts due by him to the defendant Seymour. The defendant Burke appeared, and the testimony upon the examination seems to have been somewhat conflicting. Upon the testimony so taken the court below ordered judgment in favor of the plaintiff and against defendant Burke for the sum of \$933.76 and for \$26.15 costs. It is contended here that the court below had no jurisdiction to try the question of indebtedness as between Burke and Seymour in that summary manner, and to render a judgment against Burke as a garnished defendant. Unquestionably the court had the power to direct the defendant Burke to submit to an examination in respect to the indebtedness, but had no power

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or authority conferred upon him by statute in that manner to direct the entry of judgment against the defendant Burke, without allowing to said defendant a hearing upon issues duly raised. *Bank v. Pugsley*, 47 N. Y. 368. Section 4510 of the Revised Statutes provides a clear and distinct manner of proceeding in such cases. The court or judge might authorize the plaintiff, by order, if it seemed to him proper, upon the testimony, to commence an action against the defendant Burke, and in the mean time could have restrained the defendant from transferring or in any manner disposing of the interest of defendant until the action so ordered should be disposed of. The defendant Burke should not have been subjected to any different or harsher remedy than he would have been if he had failed to pay his indebtedness to Seymour. He was entitled to a trial of the issues between himself and Seymour, and the court had no power to deprive him of such trial. The judgment, therefore, in favor of the plaintiff in this action, and against defendant Burke, should be reversed, and the plaintiff left to his proceeding under the statute. Judgment reversed.

WEIR, C. J., and BERRY, J., concur.

TERRITORY v. ANDERSON.

(March 18, 1889.)

PERJURY—INDICTMENT—SUFFICIENCY.

1. An indictment for perjury in taking oath as to facts within defendant's knowledge, which pertained to himself alone and which he was bound to know, charging that defendant "willfully, unlawfully, and feloniously contriving, * * * upon his oath aforesaid falsely, wickedly, and feloniously did say, swear," etc., is not defective for omitting the word "knowingly," in view of Pen. Code Idaho, § 8236, providing that a departure from the form or mode prescribed for pleadings or proceedings, or an error or mistake therein, shall not render it actually invalid unless prejudicial.

REGISTRAR—POWERS—ADMINISTERING ELECTION OATH.

2. Rev. St. Idaho, §§ 504, 505, confer on the registrar the power to administer the "election oath."

Appeal from district court, Bingham county.

A. S. Anderson was convicted of perjury, and appeals. Affirmed.

J. H. Hawley and *J. Ed. Smith*, for appellant.

Richard Z. Johnson and *Henry Z. Johnson*, for the Territory.

Every objection that the defendant can waive is waived by failure to move in arrest of judgment, specially stating and pointing out the basis of the motion. *People v. Dick*, 37 Cal. 277; *Cannon v. U. S.*, 116 U. S. 77, 6 Sup. Ct. Rep. 278.

The oath need not be taken in a judicial proceeding, but may be before any competent tribunal, officer, or person in any case in which it may by law be administered; nor does it matter whether the deposition or affidavit is written and signed before or after the oath is administered. *People v. Kelly*, 59 Cal. 372; *Ex parte Carpenter*, 64 Cal. 267. 30 Pac. Rep. 816.

The registrar was competent to administer the oath. Rev. St. §§ 504, 505.

An averment of "knowingly" is not necessary, except in cases where the assignment of perjury is upon the statement by the accused of his belief, or denial of his belief, of the alleged false matter. *State v. Raymond*, 20 Iowa, 583; 3 Whart. Crim. Law, 2261; 1 Barb. Crim. Law, 200; 2 Chit. Crim. Law, 312; 3 Russ. Crimes, 70.

"Knowingly" is not essential when "falsely," "willfully," and "corruptly" are used. 2 Whart. Prec. p. 8, note, citing *State v. Sleeper*, 37 Vt. 122.

It is sufficient to charge generally that the false oath was material. 3 Whart. Crim. Law, § 2263; 2 Whart. Prec. pp. 7, 8, note.

LOGAN, J. The defendant was indicted, tried, and convicted at the October term, 1888, of the district court of the Third judicial district of Idaho, in and for Bingham county, of the crime of perjury. The crime was alleged to have been committed by reason of the defendant having taken an oath known as the "election oath" before one A. M. Carter, registrar of Rexburg precinct in said county, on September 15, 1888. The defendant contends that the indictment does not charge the commission of any offense by him, for the reason that A. M. Carter was not authorized by statute to administer the oath complained of, and that it is not charged in the indictment that the defendant "know-

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ingly" took such oath. Other points are raised by the defendant in his brief in regard to the charge of the court, and in regard to the refusal of the court to admit certain evidence which was offered by the defendant. These we cannot take notice of. No exception was taken to the charge of the court, and no requests were made to the court by the defendant to charge in his own behalf. The exception taken to the refusal of the court to admit certain testimony was not error. We have no bill of exceptions before us, and no evidence. The testimony was objected to as immaterial, and we have no means of ascertaining whether it was immaterial or not. In regard to the points raised as against the indictment, we think the registrar was competent to administer the oath. While it is true that under the general act, which empowers certain persons to administer an oath, the name of the registrar is omitted, yet, under sections 504 and 505 of the Revised Statutes of Idaho, it is perfectly clear that the legislature intended to, and in fact did, by these sections, confer upon the registrar the power to administer such an oath. In regard to the omission of the word "knowingly" in the indictment, we are perfectly clear that the use of the words "willfully, unlawfully, and feloniously contriving and intending to procure himself to be registered, * * * upon his oath aforesaid falsely, wickedly, and feloniously did say, swear," etc., is sufficient in a case of this kind. The defendant was called upon to take oath as to certain facts which were necessarily within his own knowledge, facts which pertained to himself alone, and which he was bound to know; and we do not see how he could in any manner be injured by the omission of the word. Section 8236 of the Penal Code of Idaho provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." For the defendant to make the claim he does would seem to us to be of no force whatever. The judgment of conviction is therefore affirmed. Judgment affirmed.

WEIR, C. J., and BERRY, J., concur.

CATERIL v. UNION PAC. RY. CO.

(March 18, 1889.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault, or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, does not provide the "due process of law" provided for in the constitution of the United States, and is therefore void.

(Syllabus by the Court.)

Appeal from district court, Oneida county.

Action by S. H. Cateril against the Union Pacific Railway Company to recover damages for certain horses alleged to have been killed by defendant's locomotive. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

P. L. Williams, for appellant.

The different killings constitute different torts, and, while they may be united in the same complaint, they must be set forth, as they are, in fact, distinct causes of action. Rev. St. § 4169; *Buckingham v. Waters*, 14 Cal. 146; *Watson v. Railroad Co.*, 41 Cal. 17.

Rev. St. § 2680, if valid, creates an absolute liability on the part of any railroad company for all domestic animals killed or injured by it in the manner designated, unless the injury occurred through the neglect or fault of the owner. The effect of this statute, if it means what it says, is to take the property of one, while in the exercise of a lawful pursuit, and in a lawful, proper, and careful manner, and transfer it to another. This is not due process of law, is unconstitutional, and void. *Cooley*, Const. Lim. 432 et seq.; *Zeigler v. Railroad Co.*, 58 Ala. 594; *Railroad Co. v. Geiger*, 29 Amer. & Eng. R. Cas. 275; *Railway Co. v. Lackey*, 78 Ill. 55.

Smith & Smith, for respondent.

Every one must so use his property as to cause the least injury possible to every other person's property, and the state may, by appropriate legislation, enforce this duty, even to imposing suitable penalties for its violation. *Broom*, Leg. Max. pp. 275, 276.

Statutes of the kind under consideration are upheld on two grounds. One is that the owner of the animals, not being in fault, ought to be compensated; and the other and

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more weighty one is that it is unsafe to passengers and employes to allow cattle to run upon the track, and be killed by the engines. Hence, to prevent the liability of this killing, a penalty is imposed for every killing. *Cooley, Const. Lim.* 715; *Railroad Co. v. Hughes*, 68 Tex. 290, 4 S. W. Rep. 492; *Railway Co. v. Mower*, 16 Kan. 573; *Hopkins v. Railway Co.*, 18 Kan. 462.

LOGAN, J. This action was brought by the respondent under the statute of this territory to recover damages for certain horses alleged to have been killed by the locomotive and cars of the appellant. The appellant demurred to the complaint, which demurrer was overruled, whereupon the appellant interposed an answer, admitting the incorporation of the defendant, but placing in issue the remaining facts set out in the complaint. Upon the trial of the issues the plaintiff proved the killing of the horses alleged to have been killed, their value, and rested. At the conclusion of the trial the defendant requested the court to charge the jury as follows: "The court charges you that though you may believe that the defendant killed each of the horses sued for by running its engine and cars over against the same, yet, if you further believe by a preponderance of evidence that the defendant, by its agents, in killing any of plaintiff's horses, acted as an ordinarily prudent and reliable person would under similar circumstances, then the plaintiff is not entitled to recover for the horses so killed, and your verdict as to such horses should be for the defendant; that mere proof of killing plaintiff's horses is not sufficient evidence to show that defendant did not act as an ordinarily prudent and reasonable person would act under similar circumstances." The defendant's counsel excepted to the refusal of the court to charge as requested, and this exception raises the only important question of this case, and that is the constitutionality of the statute under which the suit is brought and sought to be maintained; for the refusal to so charge cannot be upheld except upon the statute. The statute (section 2680 of the Revised Statutes of Idaho) provides that "every railroad company operating any line of railroad within this territory, that maims or kills any

horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or cars over or against any such animal, is liable to the owner of such animal for the damages sustained by such owner by reason thereof, unless the injury occurred through the neglect or fault of the owner." The plaintiff's counsel concedes that if this section is unconstitutional, then he is not entitled to recover in this action. It is equally clear that unless this action is based entirely upon the statute, the refusal of the court to charge as requested was error; so that the only question to be determined in this case is one of the constitutionality of the section referred to. This statute makes the defendant liable in cases where the mere killing is proven without proof of any negligence whatever on the part of the railroad company. In fact, the killing being proved or admitted, negligence is presumed. It is conceded that there is no general statute in this territory which requires railroad companies to fence their tracks. The supreme court of the United States, in a recent case, has decided that the law compelling railroads to fence their land is not unconstitutional, holding that it is a police regulation.¹ Bearing this doctrine in mind, we find that the authorities which have maintained that acts of this kind are constitutional are based upon the ground that a failure to fence on the part of the railroad company is a violation of the statute, and that the damage in such cases is caused by the wrongful act of the defendant. Such statutes merely fix a penalty for the violation of a duty imposed by a valid law of the land. As we have stated, there is no general law in this territory which compels railroads to fence their lands, and in order to hold the provisions of this section constitutional we must uphold the right of the legislature to inflict a penalty upon the defendant who is doing a lawful act in a lawful manner. We do not feel that we should uphold such a statute as this. The weight of authority is decidedly against our doing so. *Railroad Co. v. Parks*, 32 Ark. 131; *Zeigler v. Railroad Co.*, 58 Ala. 595; *Railroad Co. v. Lackey*, 78 Ill. 55. The court said in the last case cited: "On what

¹ *Railway Co. v. Beckwith*, 9 Sup. Ct. Rep. 207.

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principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?" An examination of the section will show that no default or negligence of any kind need be established against the railroad company. A penalty—for it is in the nature of a penalty—should not be inflicted upon the defendant by the legislature for doing a lawful act in a lawful manner. In fact it has no power to inflict such penalty. The running of trains by this corporation was lawful, and of great public benefit, and has served more to develop the resources of this western country than any other agency. It is not claimed that the liability attaches for the violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. It is contended that the statute should be construed so that it may establish a rule of *prima facie* evidence of negligence. Such construction of the statute does not seem to us a fair one. The language is plain, and it was clearly the intention of the legislature to make the killing of the animal by the railroad company the only test of its liability. To do this, in our opinion, would be an act of great injustice, and would be a clear violation of the constitution. It is with great reluctance that we pass upon this statute, and we would not do so if it were possible to dispose of this case justly upon any other basis; but the refusal to charge as requested, and the overruling of defendant's demurrer, can be upheld upon no other ground than upon the existence of this statute, for, in the absence of the statute, both rulings are manifestly error. A statute of this character—one precisely similar to the one in question—has lately been passed upon by the supreme court of Montana in the case of *Bielenberg v. Railway Co.*, 20 Pac. Rep. 314. That court has declared such an act unconstitutional. We are inclined to follow the decision of that court. The judgment and order appealed from are therefore reversed, and a new trial granted. Judgment reversed.

WEIR, C. J., and BERRY, J., concur.

WASHINGTON & I. R. Co. v. Cœur d'ALENE RY. & NAV. Co. *et al.*

(March 19, 1889.)

EQUITY—ADEQUATE REMEDY AT LAW.

Where, in an action to enjoin a railroad company from entering upon plaintiff's right of way, and from further constructing its railroad thereon, and from interfering with plaintiff's occupancy thereof, and praying that the title thereto be decreed to be in plaintiff as against defendant, it appears that defendant has completed its road over the property in dispute, and is in the actual use and possession thereof, the court should not pass upon the title, but should leave plaintiff to his remedy at law. BERRY, J., dissenting.

Appeal from district court, Shoshone county.

Action by the Washington & Idaho Railroad Company against the Cœur d'Alene Railway & Navigation Company and another to restrain defendants from entering and constructing a road along plaintiff's right of way. From a decree adjudging defendants to be the owners of said right of way, plaintiff appeals. Modified.

For defendants' appeal from the order refusing a perpetual injunction, see ante, 405, 17 Pac. Rep. 142.

Woods & Heyburn, for appellant.

Under the system of express findings, nothing is implied, but full findings are required upon every material issue without any request therefor, and with no exception on account of defects; and, if any material issue is left unfound, it is ground for a reversal of judgment. *Robinson v. Railroad Co.*, 57 Cal. 417; *Everson v. Mayhew*, Id. 144; *Knight v. Roche*, 56 Cal. 25.

The finding on every material issue is necessary, although no evidence was introduced upon such issue. *Campbell v. Buckman*, 49 Cal. 362; *Speegle v. Leese*, 51 Cal. 415.

There is no presumption of an implied finding under our practice. *Railroad Co. v. Reynolds*, 50 Cal. 90; *Campbell v. Buckman*, 49 Cal. 362; *Dowd v. Clarke*, 51 Cal. 263.

There being findings in the record, there is no presumption of the waiving of findings upon any issue. *People v. Forbes*, 51 Cal. 628; *People v. Fuqua*, 61 Cal. 377; *Van Court v. Winterson*, Id. 615.

The approval by the secretary of the interior of the act of a railroad in locating its

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line may perfect a grant of absolute title, which cannot be questioned or defeated by any person other than the government itself. *Shepley v. Cowan*, 91 U. S. 330; *Johnson v. Towsley*, 13 Wall. 72; *Moffat v. U. S.*, 112 U. S. 32, 5 Sup. Ct. Rep. 10; *U. S. v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836; *Steel v. Refining Co.*, 106 U. S. 450, 1 Sup. Ct. Rep. 389; *Martin v. Mott*, 12 Wheat. 30.

As long as a grant remains uncanceled, it cannot be invaded by a mere trespasser, or one who does not claim to enter by virtue of a better title. *Aurora Hill Consol. Min. Co. v. Mining Co.*, 34 Fed. Rep. 520.

The courts cannot exercise the power of eminent domain either directly or indirectly. The question of the propriety or policy of a condemnation is not a judicial one, but one vested solely in the legislative authority. *Mills, Em. Dom.* § 11; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 34, 35.

The right of way of one railroad cannot be taken by another, except it be in a canyon, and then only on showing of actual necessity in suit instituted especially for that purpose. *Montana Cent. R. Co. v. Helena & R. M. R. Co.*, 6 Mont. 416, 12 Pac. Rep. 916; *Railway Co. v. Alling*, 99 U. S. 463; *Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co.*, 17 Fed. Rep. 867; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368.

When the plats of the plaintiff were approved, the grant attached and was anchored to the definite line indicated upon the plat. *Schulenberg v. Harriman*, 21 Wall. 60; *Ex parte Railway Co.*, 101 U. S. 713; *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 741; *Knevals v. Hyde*, 1 McCrary, 402, 6 Fed. Rep. 651; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336; *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *Railway Co. v. Alling*, 99 U. S. 475.

Albert Allen and William H. Clagett, for respondents.

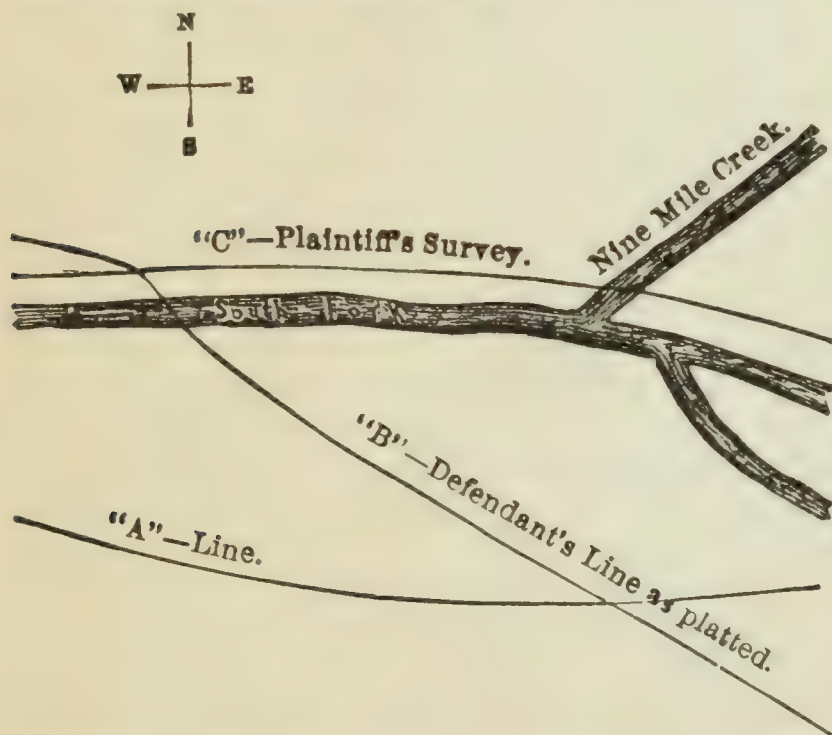
At the time of making the survey over the line in controversy herein the plaintiff had not filed, or attempted to file, in the office of the secretary of the interior, its articles of

incorporation or proofs of its organization, and did not do so for more than a month after the survey. Hence the survey of plaintiff was, at the time it was made, and ever since has been, and is now, absolutely void as against the defendant, which has, subsequent to such survey, surveyed and constructed its road over the same. *Belk v. Meagher*, 104 U. S. 279; *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. Rep. 229.

WEIR, C. J. This is an appeal from a judgment in favor of the plaintiff against the defendants, in which the plaintiff asks a judgment and decree of this court enjoining the defendant, and all persons claiming under it, from in any manner entering upon the right of way of the plaintiff at the town of Wallace, in the county of Shoshone, extending in length a mile and a half, and in width 100 feet on each side of the central line of the railroad of plaintiff, as surveyed and designated on the ground, and from further constructing said railroad on said right of way, and from interfering with the plaintiff in the peaceable and exclusive possession and occupancy of said right of way; and that the title be decreed in the plaintiff as against the defendant. It therefore appears that this action is for a final judgment of injunction in favor of the plaintiff and against the defendant. An answer was interposed by the defendant, and upon issues framed the cause came on for trial. A preliminary injunction was granted in this cause, but was subsequently vacated upon motion. It appears from the findings in this case that, at the time of the trial thereof, the defendant had completed its line of road over the disputed ground, and was in the actual use and occupation of the same. The plaintiff, it would seem, had an adequate remedy at law, if its contention is correct, and the court below was right in refusing a judgment of perpetual injunction, as prayed for; but we think that the court should not, in that case, have passed upon the ownership and title of the premises in question, but should have left the plaintiff to his action at law. The judgment of the court below should be modified as we have stated, and, as modified, the same is affirmed, without costs to either party in this court or in the court below.

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BERRY, J., (*dissenting*.) The plaintiff is a company duly created and organized under the laws of Washington Territory for the purpose of constructing and operating a railway in Idaho territory, including on its line the premises more especially in question in this action. The defendant is also a company duly organized for a like purpose under the laws of the territory of Montana. Both parties began their survey of this section of their respective roads, as appears by the findings of the court, on the same day, (October 22, 1886,) and completed their surveys,—the plaintiff on the 8th day of December, 1886, and the defendant, on the 5th day of November, 1886. The plats of the respective roads were filed in the United States land-office in said district,—the defendant's on the 8th day of November, 1886, and the plaintiffs, December 23, 1886,—and certified and approved by the commissioner of the interior, February 11, 1887. The plats in each case showed the center line of the route claimed by each, at point on the South Fork of the Cœur d'Alene river. The lines of the roads, as marked on the respective maps, diverge from each other as follows:



The plaintiff's line is marked "C," and the defendant's line is marked "B." The premises in controversy are from the point of crossing of these two lines C and B eastward up the stream a distance of about one and a half miles. The valley of the South Fork of the Cœur d'Alene river at this

place is alleged by the defendant in its answer to be about 80 rods wide. The stream appears to run near the northern boundary of the valley. After the respective plats were duly approved and filed, July 11, 1887, the chief engineer of the defendant, George P. Jones, by a written notice, advised the plaintiff that it was the intention of the defendant to construct its said road "on its location as filed." It is also admitted by the defendant, and is part of the bill of exceptions allowed herein, that August 23, 1887, and before the defendant had begun work on the premises in question, the plaintiff delivered to the defendant the following notice: "Engineer's Camp W. & I. R. R. Co. (July 13th,) August 23rd, 1887. To George P. Jones, Engineer in charge, Cœur d'Alene Railway & Navigation Co.—Dear Sir: You, and all parties in your charge, or in the employ of the Cœur d'Alene Railway & Navigation Company, are hereby notified that the Washington and Idaho Railroad Company, a corporation organized under the laws of Washington Territory, and authorized to transact business in Idaho territory, has heretofore duly filed complete maps of its branch line from old Mission to Mullan, Idaho, under the act of congress approved March 3rd, 1875, entitled 'An act granting right of way to railroads through the public lands,' and, having complied with the rules and regulations of the honorable department of the interior, the said maps were duly approved by the said department, and a right of way through the public domain secured by said company. Therefore you, and all servants and employes and privies of the Cœur d'Alene Railway and Navigation Company, are warned to desist from occupying any portion whatever of the said Washington and Idaho Railroad Company's right of way as the same is staked out and surveyed, and as shown by its said maps now on file. THE WASHINGTON AND IDAHO RAILROAD CO., by W. H. BURRYS, Engineer in Charge." That, after the interchange of notices, the defendant entered upon the route on plaintiff's map marked "line C," and was in process of constructing its road along said line C when this action for an injunction was begun.

The main question is as to which of these

companies is the owner of this right of way at the place in dispute. Both companies claim it under the act of congress of March 3, 1875, granting to railroads the right of way through the public lands of the United States. Section 1 provides: "The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, * * * which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road." Section 3 authorizes the territorial legislature to provide for the manner in which private lands, and possessory claims on public lands of the United States, may be condemned, etc. Section 4: "Any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land-office for the district where such land is located a profile of its road; and, upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and thereafter all such lands, over which such right of way shall pass, shall be disposed of subject to such right of way: provided, that, if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

This is not a grant to any particular railroad company, but it is an offer to all companies, otherwise entitled, which shall comply with the conditions of the act. When complied with, it is only operative to the extent of 100 feet on each side of the central line of said road, subject to the conditions that, if after such compliance the road shall not be built within five years, the rights granted shall be forfeited as to such uncompleted parts of said section. The act of location must define the center of the right of way. To every grant of this nature there

must be two parties,—the grantor and the grantee. The United States is the grantor, and the company claiming is the grantee. When the act has passed congress, something else remains to be done. The rights granted must be made definite, through the supervision and approval of the department of the interior. That is the plain intent of the act, though the secretary of the interior may not, by any merely captious refusal to approve a location, defeat the objects of the act. It is for the purpose of having the rights not only of applicants under the act defined, but also that ungranted privileges may be known, both to the United States' authorities and to other claimants, that the rules and regulations of the interior department of November 7, 1879, were adopted.

Rule first, and all of its subdivisions, are merely directory, and as to what evidence the government will require as to the corporate existence of the claimants. Rule 2 prescribes that upon the location of any section of the line of route of its road, not exceeding 20 miles in length, the company must file with the register of the land-district in which said section of the road, or greater portion thereof, is located, a map for the approval of the secretary of the interior, showing the termini of such portion of the road, its length, and its route over the public lands, according to the public surveys. The map must be filed within 12 months after the location of such portion of the road, if located upon surveyed lands, and, if upon unsurveyed lands, within 12 months after the survey thereof. This, too, is directory, and a condition on which the department will act. Rule 3 prescribes what acts are required before it will consider the location as fixed, as between the claimant and the government, and other claimants from the government. Rule 4: "Should the company desire to construct its road over lands prior to their survey, it must file, in manner as heretofore indicated, a map of its surveyed route, without waiting until the lands are surveyed, and, upon approval thereof, may proceed with construction; but, immediately on survey of the lands over which the road passes, the company must also file a map showing the line of route of its road over such lands, in order that the prop-

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er notes and records for the protection of its rights may be made." As this provision was fully and voluntarily acted upon and complied with by both companies in their dealing with the government, by each making a plat showing its line of route, obtaining it to be approved by the secretary of the interior, and filing it in the United States land-office, perhaps nothing more need be here said of the right of the interior department to make this or any of these rules. Yet its validity is drawn in question by the findings of the court below, as being without authority. A grant shall be construed most favorably to the government. In such case the government is deprived of no power by implication. The question of its power to prescribe rules is not so much by what authority does the land department exercise this right, but rather how, if at all, has its exercise been denied. As we have seen, it is proper and necessary that the government shall always be apprised of the limits of an adverse right, or claim of right, and to this end it is proper that its construction of the law, as well as the conditions and limitations of its own acts of consent and approval, should be distinctly known. That, as I understand this rule, is precisely what it does. I do not concur with the court in Oregon in case of *U. S. v. Chaplin*, 31 Fed. Rep. 892, in which rule fourth is held to be without authority and void. It is precisely such apparent abuses of the privileges, under the act of March 3, 1875, as are there alleged, (and by the demurrer admitted,) which made such precautions on the part of the government necessary. Those rules do not pretend to create rights, nor to deny rights granted by congress, but in this instance, at least, by exercise of a reserved and commonly exercised right of judgment, to put upon the completed compact the construction of the government. Such construction is the light by which the acts of the department are to be construed and understood. Reference to this right, in the head of the land department, is clearly implied in the act of congress of March 3, 1875, in requiring acts making certain the claim of companies to be done subject to approval of the secretary of the interior. The rule is in the spirit of the law, and I think the court should not have pro-

nounced it void, as for want of authority in the head of the land department to make it; in other words, I think he had such authority.

Rule 5: "Any variation within the limits of one hundred feet from the center line of the road, as located, will not be construed as a deviation from such line; but where, upon construction, it is found necessary to transgress such limits, in which the company has right of way, the company must at once file an amended map of right of way for approval." It is enough to say that a plat fixing the location of each line was necessary, under the act and rules; that in view of that necessity, and for the express purpose of complying with the act, and also with such rules, a plat was made by each company, presented to the secretary of the interior for his approval, and by him accepted and approved, and filed by the company in the office of the register of the proper United States land-office. These plats were so made, approved, and filed for the express purpose of fixing the respective lines, and such lines were thereby fixed, and made definite and certain. There can, I think, be no question of that. By rule fifth, the government declared that one condition of its approval was that each party should be confined within 100 feet of the center line so drawn. Both parties, and also the government, acted in view of the same statute and rules of the department. The plat of the plaintiff, being subsequent to that of the defendant, was rightfully made to cover the route which the defendant did not follow or touch; and such line, followed and appropriated by the plaintiff, is the identical line here in question. The plaintiff's selection was confirmed to it by the secretary of the interior, and the plaintiff became and was the owner of the right of way marked on the several plats "Line C." But defendant avers that its line as platted and approved was made, by its own mistake, to cover the wrong line, and that it really meant to take the line covered by the plaintiff's route; that it surveyed three lines,—one marked on the plat appended to its answer, and corresponding with the foregoing plat, as "Line A," running south of the line in controversy about 800 feet; one marked on said plats "Line B," and south of the plaintiff's line about

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500 feet; and one marked "C," which was the same as that selected by the plaintiff; and that by mistake of its engineer or maker of the plat line B was chosen instead of line C; and claims the right to correct its location, by changing its route from B to C. There is no allegation or pretense that the plaintiff had anything to do with the defendant's plat, or with its selection or claim of lines, or that the land department ever had any information on the subject. Neither was the United States, or any officer of the United States, a party to this action, except that involved in its approval by the secretary of the interior; nor has there been any attempt to amend the defendant's map of location. "No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them." *Schulenberg v. Hariman*, 21 Wall. 62.

Granting that the defendant did not in fact locate on the line which it meant to locate upon, still, under the laws of congress, the rules of the department, on which all parties acted, the rights so acquired by the plaintiff cannot be thus set aside. Its rights were no longer inchoate, but had become fixed and vested, and could not be divested but by its own act, or by lapse of time. To do so would be merely to take the plaintiff's property without compensation. Were this a canyon or pass, where it were necessary that both roads should run over the same ground, there are provisions under which both roads might be permitted to occupy it. But this is not such a case, nor have those means been attempted. Yet the court below adjudged that line C was the true line of the defendant, and that the right of way over the line in question belonged exclusively to the defendant. This was error. But defendant still insists that, granting the right of way to be in the plaintiff, still the plaintiff was guilty of laches in not apprising the defendant of its claim before the work was done, and that, therefore, the plaintiff is estopped. The court below so holds. We think the court in this was also in error. From the situation of the case an estoppel does not arise. The de-

fendant is presumed to know its own route; having itself surveyed the middle route, made its own plat, and procured that plat to be approved and filed in the United States land-office, as a notice to all others. But had it been made by another, if the defendant did not know what it contained, it might have known it by very slight diligence. Again, the plat was a public record in the land-office, in the vicinity of this work; and it is hardly conceivable that the defendant should not have referred to its own plat in so important a matter as building a railroad. But it appears that before any part of this work on the disputed line was performed, and on the 11th day of July, the defendant's chief engineer served upon the plaintiff a notice that the defendant proposed to proceed with the construction of its road according to its own plat; to which the plaintiff replied, referring to the plaintiff's maps, and warning the defendant "to desist from occupying any part of the plaintiff's line, as the same is staked out and surveyed, and as shown by its maps now on file." This, with the facts above mentioned, was certainly sufficient to call attention to the record of the location, and to repel any presumption of laches on the part of the plaintiff from mere silence or inaction. The plaintiff is not estopped in such case from asserting its claim to its own right of way.

There are other errors assigned, but, from the view I take of the foregoing, it is unnecessary to review them. It is claimed by a majority of the court that this judgment may be modified so as to avoid the error in the rulings, findings, and judgment in the court below; by denying the injunction prayed for; and leaving all questions of the right of the plaintiff to the ownership of the right of way to be determined in an other action. But that cannot be done. This court has jurisdiction of the action for that purpose with the others, and the plaintiff demands an adjudication of its rights in this action. It is not competent for the court to deny such determination, nor was the case tried with such end in view. The judgment in the court below should be reversed and the case remanded.

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WOOLEY v. WATKINS, (BENNETT, Intervenor.)

(July 22, 1889.)

CRIMINAL ORGANIZATIONS—WHAT CONSTITUTE.

1. Orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice the commission of crimes forbidden by law, are criminal organizations.

SAME—LIABILITY OF MEMBERS.

2. To become and continue to be members of such organizations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty, in contemplation of law, as though they actively engaged in promoting their unlawful objects and purposes.

QUALIFICATIONS OF ELECTORS — POWERS OF LEGISLATURE.

3. The organic act confers concurrent power upon the territorial assembly of Idaho to prescribe the qualifications and disabilities of voters of the territory, and to provide a mode by which those qualifications may be ascertained.

SAME—REPEAL OF STATUTE.

4. The act of congress of March 22, 1882, touching the qualifications of electors in the territories, does not repeal sections 1851 and 1860 of the organic act, which gives the territorial legislature power to prescribe the qualifications of voters of the territory.

SAME—CONSTITUTIONAL LAW.

5. The territorial statute of February 3, 1885, which prescribes the qualifications of voters of the territory, and provides that those qualifications may be ascertained by the oath of the electors, is not repugnant to the constitution of the United States.

(Syllabus by the Court.)

Appeal from district court, Bingham county.

Application by H. S. Wooley for a writ of mandate to compel C. N. Watkins, registrar of voters, to register plaintiff as a voter. H. M. Bennett was admitted as a party defendant. From a judgment dismissing the application, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by WEIR, C. J.:

This is an appeal by H. S. Wooley from a judgment rendered against him on the 16th day of October, 1888, in Bingham county, by the district court of the third judicial district of the territory of Idaho, dismissing his complaint and application for a writ of *mandamus* against C. N. Watkins, registrar of voters in Paris precinct, Bear Lake county, to compel him to register his name in the list of voters of that precinct. On the 5th day of October, 1888, the relator filed his petition, wherein he avers "that

he is a male inhabitant and native-born citizen of the United States, over the age of twenty-one years; that he has resided in Bear Lake county, territory of Idaho, for ten years last past, and still resides there; that he is entitled to vote at any election for delegate to congress, and for territorial, county, and precinct officers in said territory; that he is not under guardianship, *non compos mentis*, or insane; that he has not been convicted of treason, felony, or bribery in this territory, nor in any other territory or state in the Union; that he is not a bigamist or polygamist; that he does not teach, advise, counsel, or encourage any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as 'plural' or 'celestial' marriage; that he is not a member of any order, organization, or association which teaches, advises, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of any order, organization, or association, or otherwise; that C. N. Watkins is, and at all times herein mentioned has been, the duly-appointed and acting registrar of Paris precinct, Bear Lake county, Idaho Terr.; that on the 29th day of September, 1888, between the hours of nine o'clock A. M., and five o'clock P. M., (that being the time designated by said registrar for that purpose,) he appeared before the said registrar at the place appointed by him for the registration of voters, and then and there offered to take and subscribe the oath prescribed by law, and known as the 'elector's oath,' answer all questions, give all the information under his control, take all the oaths, and do all other acts and things required of him by law, and then and there demanded of said registrar to register his name as a voter, as required by law; that the said registrar, in violation of his duty, rejected his name, and refused to enter it upon the election register, as required by law; that he has been for more than ten years continuously a resident of the said Paris precinct, and entitled to registration therein, and that his name has not been entered upon the election register in said precinct or elsewhere; and prays that a writ of *mandamus* may be issued, directed to the said C. N. Watkins, registrar as aforesaid, commanding him to register his name in the manner prescribed by law."

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Upon the presentation of this petition the court granted an alternative writ of *mandamus*, directed to the said respondent, returnable on the 10th day of October, 1888. On the return-day of the writ the respondent filed an answer admitting certain facts alleged in the petition, and denying others, as follows: "The defendant admits all the facts set forth in the petition, except that it is denied that he is an elector of the territory of Idaho, for the following reasons, and none others: That the said petitioner is a member of what is known as the 'Mormon Church in Idaho,' which organization teaches, advises, counsels, and encourages its members to commit the crime of polygamy, and other crimes defined by law, as a duty arising or resulting from membership in such organization, and which practices bigamy or polygamy as a doctrinal rite of such organization." On the aforesaid return-day one H. M. Bennett filed his petition, praying the court to allow him to intervene on behalf of the public or people of the territory in said proceeding, and to become a co-defendant, for the reasons stated in his petition, which are as follows: "That said action is prosecuted for the purpose of procuring a judgment of this court upon certain questions in which said petitioner is deeply interested; that his interest in said questions is adverse to the interests, desires, and wishes of both plaintiff and defendant; that the issue therein is only colorable; that said action is collusively brought and prosecuted; that the defendant did the acts complained of by and with the advice and procurement of the agents and leaders of the Mormon Church; that the counsel for the plaintiff, and those interested with him, have either prepared or advised the preparation of the pleadings; that by the laws of this territory every member of an organization that practices or encourages the practice of crime among its members, or other persons, is ineligible to register, vote, or hold office; that within this territory there are many members of what is known as the 'Mormon Church;' that it is an organization that, among other things, encourages the practice of bigamy among its members; that the plaintiff and defendant, and their attorneys, are members of the said Mormon Church; that plaintiff's attorneys are not employed by plaintiff, but are retained and employed by the agents and representatives of the said Mormon Church; that this action is collusively brought to procure a judgment of

this court that will aid the leaders of said church in securing the registration of its members in violation of law; that said action is brought in such way that the agents, leaders, and representatives of said church may control both the prosecution and defense, and thereby prevent the examination and cross-examination of witnesses and parties further than they desire; that the Mormon Church, acting through its agents and leaders, has controlled and directed every step in this matter on both sides, from the inception to the present time, and intend to continue such control; that defendant, before refusing to register the plaintiff, registered a large number of Mormons upon the same showing made by the plaintiff, and that he would have registered the plaintiff in like manner if he had not been by those interested with the plaintiff influenced not to do so, in order to bring this matter into court for the purpose hereinbefore stated." Upon the presentation and filing of this petition, and by the consent of the relator and respondent, H. M. Bennett, the petitioner, was by order of the court permitted to become a party respondent, and to show cause, if any there were, why the writ of *mandamus* prayed for by the relator should not be issued. In pursuance of this order the said Bennett filed an answer on the same day, wherein he denies the relator's right to the relief prayed for on two grounds: "(1) That the relator is not a qualified elector of Bear Lake county, Idaho, or of any county of this territory; and (2) that he is a member of what is known as the 'Church of Jesus Christ of Latter Day Saints,' commonly called the 'Mormon Church;' that said church is an organization which teaches, advises, counsels, and encourages its members to commit the crime of bigamy, polygamy, and other crimes defined by law, as a duty arising or resulting from membership in that organization, and that practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization, and prays that the proceeding be dismissed," etc. The case was tried by the court below without a jury, upon the issues made by the aforesaid pleadings, and upon the evidence introduced by the relator and respondents respectively. Upon the issues and proofs so made and given the learned judge who presided at the trial, upon his findings of fact and conclusions of law, denied the writ, and entered judgment against the relator, with costs. From this

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judgment the relator appealed, and brings the record here for review.

Sheeks & Rawlins, for appellant.

A person who withdraws from a church does not continue a member of it simply because he holds the same religious faith and tenets with the members of that church. 2 Wait, Act. & Def. 257; *Lucas v. Case*, 9 Bush, 297; *Groesbeeck v. Dunscomb*, 41 How. Pr. 302; *Den v. Bolton*, 12 N. J. Law, 206; *Bouldin v. Alexander*, 15 Wall. 131.

The statute, being so construed as to disfranchise a person for past conduct or relations, and by requiring him, as a condition of the right to vote or hold any office, to establish his innocence of such past conduct or relation by means of an expurgatory test oath, is clearly in violation of the provisions of the constitution forbidding bills of attainder and *ex post facto* laws, and that no person shall be required to be a witness against himself. *Cummings v. State of Missouri*, 4 Wall. 277; *Ex parte Garland*, Id. 333; *Pierce v. Carskadon*, 16 Wall. 234, 239.

If a person is to be disfranchised because guilty of some past conduct or relation, his guilt must be first judicially ascertained. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law. *Minor v. Happersett*, 21 Wall. 176; *Huber v. Reily*, 53 Pa. St. 112; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Green v. Shumway*, 39 N. Y. 418.

R. Z. Johnson, Atty. Gen., and *Smith & Smith*, for respondents.

The right of suffrage is purely conventional, and is granted or withheld according to the legislative will. *Anderson v. Baker*, Brightly, Elect. Cas. 27.

A test oath may be prescribed to be taken in order to ascertain if the party offering to register or vote possesses the qualifications prescribed by law to entitle him to vote. *Blair v. Ridgely*, Brightly, Elect. Cas. 83; *Innis v. Bolton*, ante, 407, 17 Pac. Rep. 264.

Society must possess this power as a means of self-preservation, and it may disfranchise persons, or prevent them from holding office, on account of the belief they may entertain upon a given subject. *Clawson v. U. S.*, 114 U. S. 477, 5 Sup. Ct. Rep. 949.

This statute does not violate the first amendment to the constitution. It is in the power of the legislature to prohibit

criminal practice, even if performed in the name of religion, by imposing penalties or disabilities. *Reynolds' Case*, 98 U. S. 145; *Cooley, Torts*, 33.

WEIR, C. J., (*after stating the facts.*) The argument of this case at bar took a wide range, but the real questions involved lie in a narrow compass. They may be briefly stated in the following order: (1) Was the relator, at the time he demanded and was refused registration, a member of any order, organization, or association, and, if so, does that order, organization, or association teach, advise, counsel, or encourage its members, devotees, or other persons to commit the crime of bigamy or polygamy, or any other crime forbidden by law, as a duty arising from membership in such order, organization, or association? (2) Has the territorial legislature the power to legislate upon the subject of the elective franchise, and prescribe the qualifications of voters of the territory, and to declare by statute that these qualifications shall be verified by the oath of the elector? (3) If so, did that legislative body exceed its power and infringe upon any of the provisions of the constitution of the United States in the exercise of that power?

The relator and respondents disposed of one of the questions of fact involved in the first proposition by a stipulation in writing, which was given in evidence upon the trial below. This stipulation is expressed in these words: "In this cause the following facts are agreed to: That the plaintiff is a native-born citizen of the United States, over twenty-one years of age, and has resided in Bear Lake county and Paris precinct for ten years; that he is not under guardianship, *non compos mentis*, or insane, and that he has never been convicted of felony, bribery, or treason; that he is not a bigamist or polygamist; that he does not teach, advise, counsel, or encourage persons to commit the crime of bigamy or polygamy, or any other crime defined by law, or to enter into the relation known as the 'plural' or 'celestial' marriage, unless he does so by the bare fact that he is a member of the Mormon Church; that he is a member of what is known as the 'Utah,' or regular, branch of the Mormon Church, as distinguished from the reorganized, or 'Josephite,' branch of said church." By this agreement the fact is admitted that the relator was, at the time he applied for

and was refused registration, a member of an order, or organization, or association, known as the "Utah," or regular, branch of the Mormon Church. And the learned judge before whom the case was tried found from the evidence before him the fact that the order, organization, or association known as the "Utah," or regular, branch of the Mormon Church, of which the relator, by the agreement above recited, admits that he is a member, teaches, advises, counsels, and encourages its members, devotees, and others to commit the crime of bigamy or polygamy, as a duty arising or resulting from membership in said order, organization, or association. From a careful review of the evidence recited by the judge in his findings we think it is amply sufficient to sustain his conclusions of fact on this point.

The consideration of the second proposition requires an examination of the scope of the legislative power given by congress to the legislative assembly of the territory of Idaho. This power is embraced in the organic act, and is to be found in sections 1851 and 1860 of the Revised Statutes of the United States. Section 1851 provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the laws and constitution of the United States." Section 1860 declares that "at all subsequent elections, however, in any territory hereafter organized by congress, as well as at all elections in territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each territory, subject, nevertheless, to the following restrictions, * * * namely: (1) The right of suffrage and of holding offices shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States. (2) There shall be no denial of the elective franchise, or of holding office, to a citizen on account of race, color, or previous condition of servitude. (3) No officer, soldier, seaman, mariner, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote in any territory by reason of being on service therein, unless such territory is, and has been for the period of six months, his

permanent domicile. (4) No person belonging to the army or navy shall be elected to or hold any civil office or appointment in any territory," except officers of the army on the retired list. That these sections of the organic act confer upon the territorial assembly of Idaho the power to legislate upon the question of suffrage, and to prescribe the qualifications of voters in the territory, subject to the conditions and restrictions contained in said act, is, we think, very plain; too plain, indeed, to admit of argument. But it is contended by the learned counsel for the appellant that, if they do confer such power, congress afterwards, by the act of March 22, 1882, having assumed to legislate upon the same subject, thereby withdrew or revoked that power, and that the territorial statute in question, having been passed after that withdrawal or revocation, is void for want of authority in the territorial assembly to pass it. This theory of interpretation is, in effect, that congress, by the act referred to, repealed those provisions of the organic act above recited, which confer power upon the territorial legislature to prescribe the qualifications and disabilities of voters of the territory. This view may commend itself for ingenuity, but cannot be recognized as sound. It is not a correct construction of the statutes referred to. If congress intended that act to have any such effect, it would have so declared by express terms, and would not have left its intention to inference. Repeal by inference or implication is not favored in the law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. *Board v. Coal Co.*, 93 U. S. 619; *Movius v. Arthur*, 95 U. S. 144; *Arthur v. Homer*, 96 U. S. 137; *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. Rep. 255. A careful reading and comparison of the provisions of the act of congress of March 22, 1882, and those of the act of the territorial assembly of February 3, 1885, which bear upon this subject, fail to develop such a clear and irreconcilable conflict between them as brings them within the rule above stated; but, on the contrary, plainly shows that the power conferred by congress upon the territorial assembly to prescribe the qualifications and disabilities of voters in the territory is not absolute, and exclusive of the power of congress to legislate upon the same subject, but is concurrent, and must be exercised subject

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to the constitutional limitations and restrictions imposed by congress in the organic act.

The question involved in the third proposition is more difficult, and its solution requires careful thought. It is contended that those parts of the act of the territorial legislature which prescribe the qualifications of electors of the territory, and which require those qualifications to be verified by the oath of the elector, are in conflict with those provisions of the constitution of the United States which declare (1) that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; (2) that no religious test shall be required as a qualification to any office of trust under the United States; (3) that no bill of attainder or *ex post facto* law shall be passed; and (4) that no person shall be deprived of life, liberty, or property without due process of law. Those parts of the territorial statute objected to as obnoxious to these provisions read as follows: "No person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as 'plural' or 'celestial' marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory." Rev. St. 1887, § 501. That part of the oath which the elector is required to take to verify that he is not within the scope of any of these disabilities is as follows: "I do swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization; that I do not, and will not, publicly or privately, or in any manner what-

ever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty, or otherwise; that I do regard the constitution of the United States, and the laws thereof, and of this territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding."

More than three-quarters of a century ago that great lawyer and eminent jurist, Chief Justice MARSHALL, announced a rule of interpretation in cases involving alleged conflicts between statutes and constitutions, which has ever since commanded the highest respect of courts of justice. In *Fletcher v. Peck*, 6 Cranch, 87, he said: "The question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." And more than 50 years ago Chief Justice SHAW, in considering this question in the *Wellington Case*, 16 Pick. 95, used similar, if not stronger, language. In that case he declared that "the delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt." Again, Mr. Justice WASHINGTON, in rendering the opinion of the court in *Ogden v. Saunders*, 12 Wheat. 213, which involved a like question, said: "If I could rest my opinion in favor

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of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." This rule has been recognized and followed ever since by all the courts of last resort, state and federal, in the United States, in cases where they have been called upon to decide questions of this kind.

It will be observed, by a careful examination, that the law objected to as being repugnant to the first two provisions of the constitution above recited is not directed against the entertaining and free exercise of religious opinions and religious beliefs, but is expressly aimed against such overt acts as violate the law in putting those opinions and beliefs into practice. While congress, and, consequently, the territorial assembly, are deprived of all legislative power over mere opinion, they are left free to reach actions which are of a criminal nature, and are in violation of social duties, and subversive of good order. This distinction is stated with great clearness by the supreme court of the United States in the Reynolds Case, 98 U. S. 166. Chief Justice WAITE, in delivering the opinion of the court, in a few appropriate and well-chosen illustrations demonstrated the distinction with great force. He there said that "laws are made for the government of actions, and, while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and,

in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." This reasoning and these illustrations apply with as much appropriateness and force to the case in hand as they do to the one cited, and we do not think it necessary to extend the length of this opinion by further discussion to establish the soundness of the distinction pointed out. Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be members of such organizations or associations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes.

To demonstrate the unsoundness of the position so earnestly urged by appellant's counsel, namely, that the statute in question is in conflict with that provision of the federal constitution which declares against the passage of *ex post facto* laws, it is only necessary to compare the terms of the statute with what the courts have so often defined this provision to mean. They have decided time and again that an *ex post facto* law, within the meaning of this clause, is "one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage." 1 Kent, Comm. 409; Cummings v. State of Missouri, 4 Wall. 277; Ex parte Garland, Id. 333; Fletcher v. Peck, 6 Cranch, 97; Sedg. St. & Const. Law, (2d Ed.) 558; Pierce v. Carskaddon, 16 Wall. 234. By a careful reading of the law objected to it will be observed that it treats of the present and future, and not of the past. Its operation is entirely present and prospective, and does not come within the scope of the above definition, and is in no sense *ex post facto*. It does not possess any of the features or characteristics of such a law. A law which simply prescribes the qualifications of voters, and provides a mode of ascertaining those qualifications, does not, in our view, conflict with this clause of the constitution. "A state having the sovereign power to prescribe the qualifications of its electors may impose a test oath to be taken by every voter at the poll. This in no way violates the constitution of the United States." Blair v. Ridgely, 41 Mo. 63; Innis v. Bolton,

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17 Pac. Rep. 264.¹ It is also insisted that the law in question is null and void because it violates that provision of the constitution of the United States which declares "that no person shall be deprived of life, liberty, or property, without due process of law." The law under consideration does no more than prescribe the qualifications and disabilities of voters of the territory, and points out the mode by which these qualifications and disabilities shall be ascertained. It is difficult to see wherein these provisions are inconsistent with this clause of the constitution. "Among the absolute, unqualified rights of the states is that of regulating the elective franchise; it is the foundation of state authority. The right of suffrage is altogether a conventional one. It may be granted, abridged, or taken away by the state government in its discretion, except so far as it is secured by the state constitution." *Anderson v. Baker*, 23 Md. 531. Upon a careful consideration of the whole case we are unable to discover that the statute in question is so clearly repugnant to the provisions of the constitution of the United States as would justify us in declaring it void on that ground, and the judgment of the court below must therefore be affirmed. Judgment affirmed. All concur.

BERRY, J., (*concurring*.) This case came up from the district court, Bingham county, on appeal from an order refusing a writ of *mandamus*. The only points relied on by the appellant, or urged at the hearing, are: "That the legislature of this territory had no authority to enact the law prescribing the qualification of voters, passed February 8, 1887, and especially sections 501 and 504 of that act." The provision especially objected to is a part of section 501 of the statutes of Idaho, which reads as follows: "No person who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election," etc. The oath which the applicant is required to take is prescribed by section 504. The two sections do not fully correspond. While the latter section only relates to acts and teachings enjoined as a doctrinal rite of such or-

ganization, the former prescribes the same acts and teachings enjoined as a doctrinal rite or ceremony of such order, organization, or otherwise. There is no question as to such discrepancy, and the issue is made wholly on the validity of section 501. The effect of restricting the question to section 501 is to remove from the case a point made on the argument, that the denial of the right to vote is based absolutely upon a "rite" or "ceremony" of a religious order. The words "or otherwise" clearly exclude such restricted construction. The statute applies to secular institutions as well as to religious; and as to all secular institutions the argument against the act, from a religious standpoint, will of course fail to apply. But the argument that the legislative power to make membership in any organization a condition of right to vote would apply to either class alike had been withdrawn, as we shall hereafter see.

In considering the case the question as to whether the so-called "Church of Jesus Christ of Latter-Day Saints" is a religious organization, might be a material question, but the court below held that such organization is a religious association. From such holding no appeal is taken. Hence, however pertinent that question, from the proof in the court below, might appear, it is not at this time before the court, and we shall consider it, with reference to the rights of its members, as a religious organization.

The power of the territorial legislature to determine who shall and who shall not vote at a territorial election is subject to both constitutional and congressional restriction. The legislative power of a territorial legislature extends to "all rightful subjects of legislation, not inconsistent with the constitution or laws of the United States." Rev. St. U. S. § 1851. Such legislature is expressly given the power to prescribe the qualifications of voters at all elections after the first. Id. § 1860. This granted power is unrestricted, except as to certain specific exceptions, but neither of which exceptions touches this subject-matter. It is not pretended that congress has ever directly repealed this grant of power. If the legislature did not in fact have authority to enact this law, the power must either have been prohibited by the constitution, or it must have been withdrawn by implication, through some act of congress. In fact, the able and exhaustive argument of the counsel for the appellant is confined to these two points. His consti-

¹ Ante, 407.

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tutional argument centers in this: (1) That article 1 of the amendment of the constitution declares that congress (and of course the territorial legislatures) "shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press." (2) That the third subdivision of article 6 of the constitution provides that "no religious test shall ever be required as a qualification to any office, or public trust under the United States." (3) That section 9, art. 1, of the constitution provides that "no bill of attainder or *ex post facto* law shall be passed." (4) That "no person shall be deprived of life, liberty, or property, without due process of law;" and concludes (5) by citing the preamble to the constitution, declaring the purposes of that instrument to be "to secure the blessings of liberty to ourselves and posterity."

We are asked to construe these provisions of the constitution liberally, according to their purpose and design thus expressed. To do this it is necessary to consider the subject to which these provisions are to be applied. But before proceeding to do this, it may be observed that some, at least, of these constitutional provisions cannot apply to the case at bar. The fourth point can have no possible bearing upon this case. A law prescribing the qualifications of a voter does not even pretend to deprive a man of his life, liberty, or property, for such privilege is not essential to either. It is not even essential to citizenship, were the latter held to be within the meaning of either of these words. "Citizenship" and "suffrage" are by no means inseparable. Suffrage is not one of the inalienable rights with which men are endowed by their Creator; but it is altogether conventional. *Anderson v. Baker*. Brightly, Elect. Cas. 33. Again, none of the elementary writers include right of suffrage as among the rights of property or person. *Id.* 34. Such a law is in no sense a bill of attainder. It is not a punishment, or a means of punishment. It is not an *ex post facto* law; for it does not constitute or declare anything whatever, either past or present, to be a crime. It is not a test or qualification for office, either religious or otherwise, that we are considering. It is sufficient to consider that when the question shall arise. Nor is such law directed to the establishment of any religion; nor does it prevent, or tend to prevent, the free exercise of any religion; nor does it abridge, or tend to abridge, the freedom

of speech or of the press. Under it a member of the organization in question may do and enjoy all he would do without it, except that he may not have the privilege of voting at an election. We know of no law making such act a religious rite or ceremony.

This would seem to be a fair, plain statement of the case, and of the different reasons against the appellant's construction of each of these constitutional provisions. But he still insists that there is something in the nature of this case calling for a more liberal and enlarged construction. He assumes that any law which tends to turn men away from this organization in order that they may enjoy certain privileges tends to the subversion of the "blessings of liberty." We may suppose a case, perhaps, in which such a claim might be allowed, in which this preamble might be invoked to induce a more liberal construction. And, on the other hand, as in case of a claim to the exercise of license and crime, under the guise of "freedom of speech and of the press," may call for a more restricted construction. Whether such a declaration of purpose as this preamble contains calls for a liberal or a restricted meaning would, in this point of view, depend entirely upon the nature of the subject demanding the construction. In other words, if unrestricted license to do all that this organization aims at doing tends to the increase of the "blessings of liberty," then the appellant might possibly invoke the declared purpose of the federal constitution, as an aid by which he would have these provisions construed. But, on the other hand, if those aims and purposes shall, on examination, be clearly against morals, public and private; clearly antagonistic to the laws of the land; clearly debasing to Christianity, and subversive of true liberty,—then by the same rule a more restricted construction would be called for. Granting that in the case at bar the application of the rule as demanded by the appellant is correct, we may inquire, what are the aims and purposes of that organization which demands this immunity? Some of those aims and purposes are disclosed by the evidence given in the case. The notoriety which this organization has attained, might, perhaps, warrant the courts in taking judicial notice of some of its features; but we refrain from going beyond its authoritative record, and refer only to part of its book, "Doctrine and Covenants," given as a whole in evidence

upon the trial of this cause. Our reference must necessarily be brief and confined in scope.

On page 159 of that book, in what is there stated to be a "Revelation given through Joseph, the Seer, at Fayette, New York, January 2, 1831," we read: "Thus saith the Lord, your God, even Jesus Christ, the Great I Am, Alpha and Omega: * * * Gird up your loins, and be prepared. Behold, the kingdom is yours, and the enemy shall not overcome. * * * Behold, the enemy is combined; and now I show unto you a mystery, a thing which is had in secret chambers, to bring to pass even your destruction in process of time, and ye knew it not. * * * Fear not, for the kingdom is yours. * * * The rich I have made; and all flesh is mine; and I am no respecter of persons. And I have made the earth rich; and behold, it is my footstool. Wherefore, again will I stand upon it, and I hold forth and deign to give unto you greater riches, even a land of promise, a land flowing with milk and honey, upon which there shall be no curse, when the Lord cometh. * * * Ye shall have it for the land of your inheritance, and for the inheritance of your children forever, while the earth shall stand; and ye shall possess it again in eternity, and no more to pass away. But verily I say unto you that in time ye shall have no king nor ruler; for I will be your king, and watch over you. Wherefore, hear my voice, and follow me, and you shall be a free people, and ye shall have no laws but my laws, for I am your law-giver; and what can stay my hand? * * * And again I say unto you that the enemy in the secret chambers seeketh your lives. Ye hear of wars in far countries, and you say there will soon be great wars in far countries; but ye know not the hearts of the men in your own land. I tell you these things because of your prayers; wherefore, treasure up wisdom in your bosoms, lest the wickedness of men reveal these things unto you by their wickedness, in a manner which shall speak in your ears with a voice louder than that which shall shake the earth. But if ye are prepared, ye shall not fear. And that you might escape the power of the enemy, and be gathered unto me, a righteous people, without spot and blameless; wherefore, for this cause, I gave unto you the commandment that ye should go to the Ohio; and there I will give unto you my law; and there you shall be endowed with power from on high; and from thence, whomsoever I will, shall go forth among

all nations, and it shall be told them what they shall do; for I have a great work laid up in store; for Israel shall be saved, and I will lead them whithersoever I will; and no power shall stay my hand. And now I give unto the church in these parts a commandment that certain men among them shall be appointed, and they shall be appointed by the voice of the church, * * * and this shall be their work: To govern the affairs of the property of this church. And they that have farms that cannot be sold, let them be left, or rented, as seemeth them good. * * * And that every man, both elder, priest, teacher, and also member, go to work with his might, with the labor of his hands, to prepare and accomplish the things which I have commanded. * * * And go ye out from the wicked." In another "revelation," January 5, 1831, page 163, addressed to one James Coville: "Hearken and listen to the voice of Him who is from all eternity to all eternity, the Great I Am, even Jesus Christ. * * * Verily, verily, I say unto thee [Coville] thou art not called to go into the eastern countries, but thou art called to go to the Ohio. And, inasmuch as my people shall assemble themselves to the Ohio, I have kept in store a blessing such is not known among the children of men, and it shall be poured forth upon their heads, and from thence men shall go forth, into all nations. Behold, verily, verily, I say unto you that the people in Ohio call upon me in much faith, thinking I will stay my hand in judgment upon the nations; but I cannot deny my word; wherefore, lay to with your might, and call faithful laborers into my vineyard, that it may be pruned for the last time." Again, in a "revelation," December 25, 1832, page 304, at a time in the history of the United States when "nullification" troubles in South Carolina had culminated in calling a convention, which was thought at the time to portend civil war, and such trouble seemed imminent, we have: "Verily, thus saith the Lord, concerning the wars that shall shortly come to pass, beginning at the Rebellion of South Carolina, which will eventually terminate in the death and misery of many souls. The day will come that war will be poured out on all nations, beginning at that place; for behold, the southern states shall be divided against the northern states, and the southern states will call upon other nations, even Great Britain, as it is called, and they shall also call upon other nations in order to defend themselves against other nations; and

thus shall war be poured out upon all nations. And it shall come to pass after many days slaves shall rise up against their masters, who shall be marshaled and disciplined for war, and it shall come to pass also that the remnants who are left of the land shall marshal themselves, and shall become exceeding angry, and shall vex the gentiles with a sore vexation; and thus, with the sword and by bloodshed, the inhabitants of the earth shall mourn, * * * until the consummation decreed hath made a full end of all nations; that the cry of the saints, and of the blood of the saints, shall cease to come up into the ears of the Lord Sabaoth, from the earth, to be avenged of their enemies."

What motives and purposes do these so-called "revelations" disclose? Do they not point directly at results which this organization has since done much to attain? Are they not calculated to cause distrust and hatred of all who are not of this so-called church? They are of the essence of this so-called church, though those we have copied constitute but a small part of such teachings, and do not touch their plan of organization, polity, and system of government. Yet these may be sufficient to show the temporal features and nature of this "Church of Jesus Christ of Latter-Day Saints," with some of its aims and purposes; and help, with other like teachings, to explain the phenomenon of its history. Those parts we have copied are mixed with much matter apparently merely fustian and meaningless, and not apparently explanatory of the general purpose, as indicated by the extracts. These do not touch the extraordinary teachings of polygamy, or plural or celestial marriage; yet those are also included in the blessings of liberty and the pursuit of happiness. We are not at liberty to say these extracts have no meaning, nor that their true meaning and signification are not indicated by the language used. They speak of other people as "enemies," and evidently imply that their presence, their laws and institutions are to be looked upon as a "curse upon the land," which the church aspires to dominate; that in such land there is to be no government or laws, except those alone of the church,—evidently the germ of that state of chronic warfare which that "church" has ever, and still does, maintain against all governments save that of the church; that even the members of the "church" are not their own masters. Their individuality as freemen and citizens is denied them. Their

rights of choice and of action as freemen are merged in the church. Internecine wars are welcomed as a means by which the "gentiles are to be exterminated." The intent to despoil the unsuspecting people of Ohio, who vainly "called with much trust," among them that people then seeking a home, and who were giving to those people "much faith," is plainly intimated. The revelations on polygamy and plural or celestial marriage had not then been introduced. They came in 1843, and have since been propagated, with what success the public statutes and records of the courts in some degree show. None of these objectionable features have been expunged or modified, and now license to pursue and realize all these aims is demanded. It is time to speak plainly on this subject. The true interests of this people themselves and all others demand it. The tendency of such principles and purposes is clear. They do not lead to the "security of the blessings of liberty;" but they do lead to its utter subversion. The guaranty of the freedom of speech and of the press is not generally held to be a shield to protect license and crime; nor is there anything in the bare name of religion, when it seeks thus to deal with temporal matters, with the facts and interests of social and political life, that should exempt it from that wholesome rule conceded to license and crime.

We think, if we are at liberty to look at the preamble of the federal constitution, as the appellant asks us to do, as expressing the objects of that instrument, and as an aid in construing its provisions, such expression, applied to the aims and objects of this organization, does not favor the view of the appellant.

But to look further. The question of the validity of the election law has already been before the supreme court of this territory. *Innis v. Bolton*, 17 Pac. Rep. 264,² was a case where a party claiming the right to vote, being challenged, declined to take the oath prescribed in section 504; complying with the law in all other respects, but refusing to take the oath of non-membership. The right to vote was denied, and he brought an action for damages against the judges of election. Judgment was given for the defendants. The issue was as to the validity of section 504. The reasons for such invalidity were there alleged to be: (1) That the statute is in violation of the first amendment of the con-

² Ante, 407.

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stitution; (2) that it is in conflict with the act of congress of March 22, 1882. On the first point it was urged, as in this case, that to make membership in this organization a test of the right to vote was an infringement of religious liberty, and hence was forbidden. And under the second, that congress, in 1882, in the Edmunds act, in declaring that polygamists and bigamists shall not vote in the territory, had covered the whole ground; and that the legislature was precluded from prescribing any further test in any way, however remotely, connected with those crimes. On both of these points the supreme court overruled the appellants. We think the rulings should be followed. While the section of the statute is not the same in the case at bar as in that, yet the two sections are parts of the same act, and the principle involved in the two is practically the same. But while that case has our approval, it may be well in this to say further that several acts have been passed both by congress and by the territorial legislature, prescribing the qualifications of voters. The act of congress of March 3, 1863, organizing the territory of Idaho, is one of those acts. By section 5 of the organic act, it was provided that "every free white male inhabitant above the age of 21 years, who shall have been an actual resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election, * * * but the qualifications of voters, and of holding office at all subsequent elections, shall be such as shall be prescribed by the legislative assembly." The legislative power, (Id. § 6,) was declared to "extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act," except as to laws interfering with the primary disposal of the soil, taxing property of the United States, or taxing property of non-residents higher than property of residents. Those excepted subjects only were forbidden. The legislature exercised this right in 1864, and again, by Rev. Laws 1874, page 684, the law was entirely changed. The law of 1864 was repealed, and one enacted that "all male inhabitants over the age of 21 years shall be entitled to vote at any election," provided they be citizens, etc., and have resided in the territory four months, and in the county where they offer to vote thirty days; but no person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery, etc., unless restored to their civil rights,

shall be permitted to vote at any election.

In the Revised Statutes of the United States, passed at the first session of the forty-third session of congress, 1873-74, as further revised and reported September, 1878, provisions on this subject, "common to all the territories," are collated. These provisions differ from that under which the territory was organized, and under which its legislature had acted, up to that time. It is there provided (section 1860) that at all elections after the first "the qualifications of voters, and of holding office, shall be such as may be prescribed by the legislative assembly of each territory," except (1) the right of suffrage and holding office shall belong to citizens, or those who have declared their intention to become citizens, of the United States, over 21 years of age, and have taken an oath to support the constitution, etc.; (2) there shall be no distinctions on this subject between citizens on account of color, or previous condition of servitude; (3) no officer, soldier, or mariner, shall, etc., unless he has resided in the territory six months; (4) no person belonging to the army or navy shall hold any civil office. Now, although this act is very full in saying who may and who may not be allowed to vote, nothing is said about persons under guardianship, persons *non compos mentis*, or insane; nor of persons convicted of treason or other crimes; yet no one pretends that this general legislation by congress affected the *status* of such persons as voters. Congress had only its special purpose in view, and did not cover other ground. But, following that general act, on March 22, 1882, congress enacted the "Edmunds Law." Its object is expressed to be "to amend section 5352, Rev. St. U. S., in reference to bigamy, and for other purposes." No part of the act touches the power of the legislature, unless, as counsel claim, the eighth section does. That provides that "no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place." In the absence of any expressed intent to repeal the grant of power to the territories, it is not easy to see how this could at all affect such power. It must be borne in mind that the territorial legislature is but a creature of congress; and while it, for certain purposes, exercises

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the same power, it acts as a separate political organization. An act of congress is not an act of a territorial legislature, and *vice versa*. Each may act upon the same subject, from its own stand-point, and the acts of each may be valid. In such case their powers are clearly concurrent. But in the act of 1882 the act of congress does not cover, nor profess to cover, the same ground as the act of the territory. It does not deal with membership in any organization as a qualification to vote. The one subject is not even germane to the other; or, if it has a remote relation, as is contended, congress did not choose to enter on the ground covered by the territorial legislature. The counsel cites, in addition to the Edmunds act, *Houston v. Moore*, 5 Wheat. 22-24; *Prigg v. Com.*, 16 Pet. 618; *Passenger Cases*, 7 How. 400, and elementary authorities. All the cases cited involve the relation between the several state governments and the United States. In them it is a question of which sovereignty has the power in dispute. Congress exercises powers delegated by the states. If the former have those powers, the latter, except in exceptional cases, does not possess them. No such relations of antagonism exist between congress and the territories. The will of congress and that of the territorial legisla-

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tures are not two distinct wills, within the holding of some of those cases, but are for certain purposes (of which the act in question is one) one and the same will. While in their operation they are distinct, there is the relation of superior and inferior in all territorial affairs; and the superior may prohibit or nullify the acts of the inferior. Until it does so the acts of the inferior are as valid, within its province, as the acts of the superior. If it were true (though it is not true) that section 8 of the Edmunds act covered the whole ground of section 501, and that each was intended as a punishment for the same offense, under the authority cited by the appellant, (*Houston v. Moore*, 5 Wheat. 23,) it would seem that the combined acts would be only concurrent, and that both would be valid. See, also, *Innis v. Bolton*, 17 Pac. Rep. 264.³ But it is not necessary to go to the extent indicated in that case, as the two acts do not cover the same ground. After a careful consideration of this case, we do not find the act of the territorial legislature in conflict with any provisions of the federal constitution, or with any act of congress. The ruling and the judgment of the court below must be affirmed.

³ Ante, 407.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the Territory of Idaho

JANUARY TERM, 1890.

TERRITORY v. NEILSON.

(January Term, 1890.)

CRIMINAL LAW—REVIEW ON APPEAL—DEFECTIVE RECORD.

1. A conviction will not be disturbed on appeal though the evidence for the prosecution, as it appears in the record, is not sufficient to justify a conviction, when defendant introduced testimony which is not given in the record.

SAME—PEREMPTORY INSTRUCTIONS TO ACQUIT.

2. Under Rev. St. Idaho, § 7877, providing that the court may advise the jury to acquit, and section 7855, subd. 6, providing that the court must not charge the jury in respect of matters of fact, the court properly refused to instruct the jury peremptorily to acquit.

SAME—REVIEW ON APPEAL—WAIVER OF OBJECTIONS.

3. By introducing testimony after an order overruling his motion for a peremptory instruction to acquit, defendant waives his right to assign such order as error.

SWEET, J., dissenting.

Appeal from district court, Bear Lake county; BERRY, Judge.

Hans Neilson was convicted of unlawful fishing, and appeals. Affirmed.

Smith & Smith, for appellant.

Hearsay testimony and evidence of character on the part of the prosecution is not admissible. *Mima Queen v. Hepburn*, 7 Cranch, 290; *Davis v. Wood*, 1 Wheat. 6; *Regina v. Turberfield*, 10 Cox, Crim. Cas. 1; *State v. Thurtell*, 29 Kan. 148; *People v. Fair*, 43 Cal. 137; 1 Phil. Ev. 644; *State v. Lapage*, 57 N. H. 289; *Cheney v. State*, 7 Ohio, 222.

Where an act may be either guilty or innocent, and there is no proof as to which it is, or where a business may be lawful or unlawful, and there is no proof as to which it is, then it is clear that the presumption is that it is lawful or innocent, as the case may be. 1 Greenl. Ev. §§ 34, 35; Rosc. Crim. Ev. *17.

If error appears in a record, injury will be presumed, unless the contrary clearly appears from the record. That injury might possibly have resulted from erroneous ruling as to evidence and instructions is ground for reversal. *Leonard v. Kingsley*, 50 Cal. 628; *Smith v. O'Hara*, 43 Cal. 375; *People v. Murphy*, 47 Cal. 103; *People v. Stanley*, Id. 114; *Ponce v. McElvy*, 51 Cal. 222; *Estate of Toomes*, 54 Cal. 509; *People v. Furtado*, 57 Cal. 345; *MacDougall v. Railroad Co.*, 63 Cal. 431; *People v. Casey*, 65 Cal. 260, 3 Pac. Rep. 874.

That injury was highly improbable from the error will not prevent the reversal. *Chapman v. Quinn*, 56 Cal. 279.

The burden of showing immateriality of error is upon the respondent. The showing must be conclusive in a criminal case. *People v. Ybarra*, 17 Cal. 166.

Richard Z. Johnson, Atty. Gen., for the Territory.

Mere technical errors are not enough to produce a reversal, but it must be such error as produced injury to the substantial rights of the defendant, and upon him is cast the

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burden of showing it. *People v. Brotherton*, 47 Cal. 388, 404; *People v. Smith*, 59 Cal. 604; *People v. Johnson*, 71 Cal. 387, 12 Pac. Rep. 261; *People v. Turley*, 50 Cal. 471; *People v. Nelson*, 56 Cal. 82; *People v. Olsen*, 80 Cal. 122, 22 Pac. Rep. 126.

All intendments are in support of the judgment of the court below, and error is not to be presumed by the court here, but must affirmatively appear in the record. *People v. Williams*, 45 Cal. 27; *People v. Brotherton*, 47 Cal. 389; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. Rep. 254; *People v. Hope*, 62 Cal. 295; *People v. Winters*, 29 Cal. 661.

A general objection to evidence is not sufficient, but the particular grounds of objection must be stated. The party must lay his finger on the very point of objection. *People v. Chee Kee*, 61 Cal. 404; *People v. Manning*, 48 Cal. 335; *People v. Apple*, 7 Cal. 289; *People v. Glenn*, 10 Cal. 32; *Martin v. Travers*, 12 Cal. 243; *Leet v. Wilson*, 24 Cal. 399; *Winans v. Hassey*, 48 Cal. 635.

The court has no right to give peremptory instructions in a criminal case. Rev. St. § 7855, subd. 6; Rev. St. § 7877; *People v. Horn*, 70 Cal. 17, 11 Pac. Rep. 470.

The bill of exceptions nowhere states that the evidence therein set forth is all the evidence had at the trial, and there is no presumption here that it contains all, but the presumption will be that the necessary evidence was given at the trial. *People v. Leong Sing*, 77 Cal. 118, 19 Pac. Rep. 254; *People v. Marks*, 72 Cal. 46, 47, 13 Pac. Rep. 149; *People v. Huff*, 72 Cal. 118, 13 Pac. Rep. 168.

BEATTY, C. J. The appellant was indicted for unlawful fishing alleged to have been done in Bear Lake county. At the close of the people's testimony the appellant moved the court to instruct the jury to render a verdict of acquittal, which motion was overruled. The appellant then introduced testimony in his behalf, and thereafter the jury found a verdict against him, upon which judgment was rendered, from which he has taken his appeal to this court.

The appellant has assigned numerous alleged errors based upon the ruling of the court on the introduction of the evidence. All such alleged errors must be considered in the light

of our statute, adopted from the California Code, which is to the effect that all errors and mistakes in proceedings which do not prejudice the party in his substantial rights must be disregarded. Under this statute, which seems without ambiguity, it has frequently been held that errors which are not shown to have damaged the party complaining must be disregarded. The criticisms are largely to the admission of questions to which answers were not made, or were not against appellant, or were stricken out. There was also testimony to the effect that appellant had the reputation of being a fisherman. It is not conceded that a party can be convicted of an offense by testimony of general reputation that he has committed it; but the appellant was not charged with any offense of being a fisherman, nor is it an offense, nor does testimony of his reputation as such damage him. We do not think any of the alleged errors based upon the introduction of the testimony are shown to have damaged the appellant. That he was prejudiced in any of his substantial rights will not be presumed when not shown.

It is also claimed the testimony is not sufficient to justify a conviction. The only testimony before us is that introduced by the people, and, as it appears in the record, it is not sufficient. Had appellant rested upon that testimony, and brought it before us in the proper mode for its consideration, a reversal, probably, would be justified; but, instead, he proceeded with the introduction of testimony in his defense. That is not here. We do not know what it was. He may have convicted himself, as has frequently happened with defendants. At any rate, the jury, upon all the evidence, found him guilty, and we cannot interfere.

At the close of the people's testimony, appellant moved the court to instruct the jury to return a verdict of not guilty, which motion the court overruled; and this is assigned as error. Our statute (section 7877) is adopted from the California Code, and provides the court may advise the jury to acquit. By another section (7855, subd. 6) it is directed the court "must not charge the jury in respect to matters of fact." Had the court given the peremptory instruction asked, it would, in violation of this provision, have

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taken the facts from the jury. It is held in *People v. Horn*, 70 Cal. 18, 11 Pac. Rep. 470, that this the court cannot do, and that it can only advise the jury. Whether, when the court is satisfied the testimony is not sufficient, it must advise the jury to acquit, regardless of the form of defendant's motion, or whether, when there is any evidence tending against the defendant, the court may, in its discretion, leave the question to the jury, we need not now consider nor decide.

After appellant's motion for the peremptory instruction was overruled, he, by introducing his testimony, waived his right to assign as error the order overruling his motion, as is held in civil cases by authority which is controlling with us. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685. Our statute (section 7864) provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." We think, under our statute, the authorities above control in this case; and the judgment of the lower court is affirmed.

BERRY, J., concurs.

SWEET, J. I dissent from the opinion of the court. When the prosecution rested, there was not, in my judgment, sufficient evidence to warrant or sustain a conviction. The prosecution having failed to prove the guilt of the accused, the latter had a perfect right to invoke the statute. After the court refused to advise an acquittal, the defendant excepted, and offered testimony in his own behalf. It is urged in support of the judgment (1) that defendant moved for an instruction to acquit,—an instruction which the court was not authorized to give; (2) that, by introducing testimony in his own behalf, he waived his exception; and (3) that the evidence is not all here. I shall consider these points as here presented.

1. The prosecution examined several witnesses, and rested. The defendant then moved the court to instruct the jury to bring in a verdict of acquittal. It is proper to state that the exact language of the motion, which was evidently made in open court, and not reduced to writing, does not appear in the

transcript. On page 10 we find the following statement: "The defendant, by his counsel, here moved the court to instruct the jury to return a verdict of not guilty, which motion was by the court overruled." On page 49 of the transcript the motion is presented in this form: "Defendant now moves the court to instruct the jury to render a verdict of acquittal." I quote the two statements as they appear in the transcript for the purpose of showing that the exact words embodied by the defendant in his motion do not appear in the record. This is not material, however, as the substance of both motions is the same. Section 7877 of the Penal Code is as follows: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant; but the jury are not bound by the advice." The court overruled the defendant's motion asking for an instruction to acquit. There is nothing to indicate that the action of the court was governed by any informality in the language of the motion. If, in the judgment of the court, the evidence was such as to warrant it in submitting the case to the jury, it was its duty to overrule the motion. If, on the other hand, the prosecution had failed to establish the charge made in the indictment, it was the duty of the court to advise the jury to acquit. I believe that the exercise of such a discretion is subject to review. The attorney general urges that "the court had no right to give the peremptory instruction in a criminal case as asked at page 10 of the transcript." It is true the court had no right to give the peremptory instruction to acquit, but no court would presume that the motion was overruled by the court below by reason of the fact that the word "instruct" was used by the attorney who made the motion in place of the word "advise." It is proper enough for lawyers to deal in technicalities. By the discussion of technical rules, and the attempt to maintain a strict, technical construction of the language of a statute, and the efforts, on the other hand, to obtain a broad and liberal construction of a law, a just and equitable medium of practice is established and maintained. It is, therefore, presumed that, in overruling the motion asking for an instruction to acquit, the court in-

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tended to overrule a motion asking it to "advise" the jury to acquit. I shall therefore consider whether or not the court erred in refusing to grant the motion.

When the prosecution rested, I do not think the state had introduced evidence upon which any person could be legally convicted of a crime. I think it follows that the defendant was entitled to the instruction, and that the court erred in not giving it; not because the defendant's attorney, careless of the language he used, asked the court to "instruct" instead of "advise," but because the prosecution had utterly failed to make out a case. It was not an instruction to be given or withheld at the discretion of the court. In the absence of evidence to warrant a conviction, it must be given. To refuse the instruction was to give the sanction of the court to the conviction of the defendant without evidence to justify it; and the jury would have a right to suppose that, under the law, the evidence was sufficient to warrant a conviction. Certainly, such an act on the part of the court would interfere with the substantial rights of the defendant if, as a matter of fact, the evidence given would not warrant a conviction. Whenever a defendant asks an instruction of that character, he accepts the results that may follow a refusal on the part of the court to grant it. If, therefore, his request is refused, and the reasons therefor are sufficient, and he is prejudiced because of the order, the resulting misfortune is his own fault; but it does not justify the court in refusing the instruction asked for, if the *status* of the case demands it. The case cited by the attorney general (*People v. Horn*, 70 Cal. 17, 11 Pac. Rep. 470) simply declares that the court was not authorized to give the jury a peremptory instruction to acquit, but says the court was authorized to advise an acquittal. The theory of the law is that a man is innocent until he is proven guilty. This in very many cases is a fiction, and it not unfrequently happens that a person brought into court is required to prove his innocence. But the old theory is still the law, and while the personal liberty of the citizen is the paramount consideration of government it will continue to be the law. By refusing the instruction, when warranted, the court forces the prisoner either to go to the jury with a

declaration by the court to the effect, in substance, that the evidence already given warrants a conviction, or, in most instances, to testify in his own behalf; in other words, forces him to prove his innocence.

The attorney general urges that the court was not authorized to advise the jury to acquit under subdivision 6, § 7855, which reads that the court must not charge the jury in respect to matters of fact. We do not apprehend that section 7877 is at all in conflict with the provisions of section 7855. Section 7877 distinctly states that the jury is not bound to act upon the advice given by the court; and, if the court were to advise the jury to acquit, it would be the duty of the court to state that the jury were at liberty either to accept or reject its advice. The fact remains, however, that when a person is charged with crime he must be convicted by legal evidence. The jury pass judgment as to the facts. This is an authority upon which the court dare not trespass. On the other hand, the evidence upon which a person is convicted must be legal evidence; and as to whether or not the evidence tendered is sufficient, under the law, to warrant a conviction, the court, on the last appeal, is the absolute judge. The statute provides that, if the court deems the evidence insufficient to warrant a conviction, it must so advise the jury. If there is, practically, no evidence of guilt, it is not a matter of discretion with the court. Therefore, when the prosecution rested in this case, it was the duty of the court to advise the jury to acquit, regardless of any trifling mistake the attorney may have made in using one word for another. As well say that a court will refuse to dismiss an indictment, when sufficient reasons are given, because the prosecutor, following the old form, asks for a *nolle prosequi* instead of a dismissal.

2. It is urged that the defendant waived his exception to the order of the court under the rule laid down in *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685, and in *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The language of the court in the latter case (106 U. S. 701, 1 Sup. Ct. Rep. 494) is as follows: "It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant

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at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony, and introduces none in his own behalf; but, if he goes on with his defense, and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked." If the rule laid down in this case applies to the section before referred to from our Penal Code, and to the rules of criminal practice in this territory, the discussion would be ended and the question settled, so far as this court is concerned. Subdivision 5, § 4354, Code Civil Proc., under which an action may be dismissed or a judgment for nonsuit entered, gives the conditions under which a nonsuit may be had as follows: "By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." The decision of the supreme court before referred to would, unquestionably, control the method of procedure under this section; but let us place the section from the Penal Code by the side of section 4354 of the Code of Civil Procedure, and note how marked the contrast: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant." This is simply declaratory of one of the principles of the common law, namely, that the guilt of the accused must be proven. In civil cases the court "may," "upon motion," grant the order; under the Criminal Code, the court "must" make the order, without motion, if the condition specified exists. In the case at bar, if the evidence was not sufficient to sustain a conviction, when the prosecution rested, the defendant, under this statute, was authorized to call upon the court for its enforcement; and if, in the judgment of the appellate court, the evidence at that time warranted the request, the prosecution having failed to prove the guilt of the accused by legal evidence, the presumption of innocence and the peremptory statute entitled

him to that instruction. Evidence that would justify the court below in sending a civil case to the jury in the exercise of its discretion would be one thing, and evidence that would warrant the conviction of a person accused of a crime would be an entirely different thing. The distinction between the two, however, is no more clearly marked than the difference in the two statutes. This construction of the statute, and the rights of the accused under it, are also in harmony with the principles of the common law, which it is intended to modify; and, under the rules of construction, we cannot pass one step beyond the point to which the statute authorizes us to go. Taking this view of the question, it matters little whether, in asking the enforcement of the statute, defendant's counsel used the word "advise" or "instruct;" for, in the absence of evidence to warrant a conviction, it was the duty of the court, under the positive mandate of the statute, to advise the acquittal, whether the defendant asked it or not. The section referred to leaves the common law in force to that extent. Under the common law, the defendant was not heard either in person or by counsel. The case was brought before the court, and the state offered its evidence. If, under that evidence, his guilt was not established, the prisoner was discharged. With the exception of the old presumption still existing in favor of the accused, nothing remains of the old principle except this: "If the evidence does not warrant conviction, the court must advise acquittal." The mandate to obey what is left is as imperative as if the principle of the common law, and the practice under it, had never been modified at all. This is the only power left the court under which it may shield the prisoner in meritorious cases; but it is a positive right left the accused from the common-law practice, and must be exercised under the statute.

Let us consider the matter from the standpoint of another well-known principle. The ruling of the court was, in substance, a declaration to the effect that evidence had been given sufficient to warrant a conviction. If, under the legal effect of legal evidence, this was error, the rights of the accused were seriously and unlawfully injured. He was accused, arrested, and the state presented its

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evidence of guilt. He was in jeopardy. And, when the state rested, if the evidence was insufficient to warrant his being longer held, under the law and the statute that jeopardy was legally at an end, to the extent that the court "must," not "may," advise the jury to acquit; and it was defendant's right to invoke the statute. If the court deny the motion, the accused, if able, may rest and appeal to a higher court. If the accused is poor, he has but this alternative: to go to the jury in the face of this declaration on the part of the court, or attempt to show his innocence both to the court and jury. To testify in his own behalf is his only hope; and thus, if the court err, it ultimately forces the defendant to the witness stand, and indirectly enforces and continues his jeopardy. In other words, the prosecution having failed to prove the guilt of the accused, the latter must still come forward, and prove his innocence.

3. It is also urged that the evidence is not all here. The presumption is that the transcript contains all of the evidence bearing upon the objection made by the defendant. It is too late for the respondent to object to the transcript. The Idaho statute, under which a bill of exceptions is prepared in criminal cases, was taken from the California Penal Code, and the principle in issue has been repeatedly passed upon by the supreme court of that state. In the case of *People v. English*, 52 Cal. 211, the same question was raised that is presented here. The court held that a bill of exceptions, in a criminal case, is presumed to contain all the evidence given at the trial bearing upon the point of the objection, and that, if the bill of exceptions prepared by the defendant in a criminal case does not contain all the evidence given, bearing on the point made, the district attorney should be permitted to suggest an addition to the bill of such evidence; but the appellate court cannot take his suggestion that such evidence was given. It is the duty of the district attorney to see that the evidence is here. This principle was confirmed in *People v. Dye*, 62 Cal. 524. It is urged that, under our statute, the rules of evidence in civil and criminal cases are the same, except as otherwise provided by the Code. That is true. This is not, however, a question of admission of evidence. It is a question of practice, and

it is also a question of law; and I do not see that this rule of evidence has any bearing whatever on the issue at bar.

I must conclude that the court erred in declining to advise an acquittal, and that it was such an error as to interfere with the substantial rights of the defendant. It was such an error as might result in the conviction of an accused person through prejudice. In other words, under the evidence, it was an error that might prompt a jury to convict an innocent man, under the apparent sanction of the court, without evidence to warrant or sustain the conviction.

MARTIN *et al.* v. ATCHISON *et al.*

(January Term, 1890.)

CREDITORS' BILL—EQUITY JURISDICTION—FRAUDULENT CONVEYANCE BY DEBTOR.

1. A judgment creditor is without an adequate legal remedy when the title of defendant's property is clouded by a fraudulent assignment thereof, and by another judgment which, though fraudulent, is held a prior lien, and when such property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment.

ACTION AGAINST RECEIVER—WHEN MAINTAINABLE.

2. A receiver cannot be sued without first obtaining the permission of the court which appointed him.

BERRY, J., dissenting.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; LOGAN, Judge.

Action by John M. Martin and Morris Prager against John S. Atchison, administrator of the estate of Sylvester M. Wessells, deceased, the Kentucky Smelting & Mining Company, a corporation, and Henry S. Gregory and Frank C. Lowering, receivers. Plaintiffs had judgment, and defendants appeal. Reversed.

Albert Hagan, for appellants. *Chas. W. O'Neil*, for respondents.

BEATTY, C. J. The complaint alleges that on the 12th day of May, 1887, one Brile obtained judgment for \$650.25 in district court of Shoshone county against defendant the Kentucky Smelting & Mining Company, which was sold and assigned to plaintiffs; that on March 31, 1887, defendant company by a deed of assignment transferred, for the benefit of its creditors, to defendant Gregory, a certain smelting

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property described in the complaint; that said assignment was illegal and void; that on January 24, 1887, one Wessells filed his mechanic's lien against defendant company and its property for about \$1,400, and on February 23, 1887, commenced in said district court his foreclosure action on said lien; that on April 6, 1887, said Wessells died, when defendant Atchison was appointed his administrator; that on November 25, 1887, by stipulation of parties, said administrator recovered judgment against defendant company for about \$1,000, which was declared a prior lien against said company's property; that at the same time, defendant Lowering was appointed by said court receiver to take charge of said smelting property, sell it, and apply the proceeds to the payment of said Wessells' judgment; that the claim of said Wessells was fraudulent, and that defendant company was not indebted to him; that the Wessells judgment was recovered through such proceedings, which, if true, would make it fraudulent, and in them all the defendants except Lowering were concerned; that in consequence of these proceedings, the property being in the hands of the receiver Lowering, and the Wessells judgment being held the prior lien, plaintiffs are unable to enforce their judgment by the sale of said smelting property; and plaintiffs then ask, in effect, that their judgment be declared the prior lien and claim against said smelting property, and the receiver be restrained from selling the latter. To the complaint, defendants interposed their demurrer, which being overruled by the court, they refused to answer, and judgment was rendered against them as prayed. From this judgment they have appealed to this court, and the cause is submitted without argument, but upon briefs of the respective parties.

The defendants by their demurrer, and here, claim that plaintiffs had an adequate remedy at law. How and by what means? They allege the smelting property is all the defendant company had, and, this being in the possession and under control of the court, plaintiffs could not proceed against it. Suppose it had not been in the hands of the receiver, what adequate remedy at law would plaintiffs then have? All they could do would be to issue execution, and sell the property in pursuance of their judgment. But with this prior alleged invalid assignment of the property, and the lien of the Wessells

judgment against it, who would purchase it? The probability is no one would at anything over a nominal sum, or for anything near its value. The result would be that plaintiffs would be compelled to buy in the property, and then bring an action against all these parties to clear the cloud against the title. Plaintiffs may not want to purchase the property; they may prefer it to be sold for its full value, and they get their money. The only way this would be possible would be the clearing away of these claims against it, the clouds upon its title, all of which plaintiffs are entitled to if the allegations of their complaint are true. We do not think plaintiffs had an adequate remedy at law, but that they are entitled to a remedy, at least, similar to that they are pursuing by this action.

The appellants also claim there is a misjoinder of parties defendant, and in that the receiver Lowering is made a party defendant without permission first had of the court appointing him. We think the claim of appellants is correct. The receiver is an officer of the court, in all respects subject to its orders and directions, and, in so far as his duties as such go, is not amenable to any other power or authority, and at all times is under the protection of the court, and the property in his hands is *in custodia legis*. To permit any one to bring actions against him concerning such property would be to remove him from the protection of the court, and the property from its possession and control. If the action can be commenced against him, it may proceed to judgment, and the property actually in his possession by the prior order of the court sold; thus bringing the different orders and judgments of the court on the same subject directly in conflict. If such proceedings can be tolerated, then the appointment of receivers by courts would be a useless ceremony,—a farce. The plaintiffs are not without a remedy, for they may ask the court to allow the receiver to be made a party, under such restrictions as the court deems best for the preservation of the property, of its own authority, and the protection of its officers; or the court may, upon the proper showing being made, require the receiver, if the property is sold in pursuance of its former order, to hold the proceeds thereof subject to the further directions of the court. Upon principle, this question seems clear, without the citation of authorities. In support of the view above expressed, one

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controlling with us is *Barton v. Barbour*, 104 U. S. 128, which says: "It is a general rule that, before suit is brought against a receiver, leave of the court by which he was appointed must be obtained. *Davis v. Gray*, 16 Wall. 203, and cases there cited. But the learned counsel for plaintiff in error strenuously contends that the only consequence resulting from prosecuting the suit without such leave is that the plaintiff may be restrained by injunction or attachment for contempt, and that the rule applies only to cases when the suit is brought to take from the receiver property whereof he is in possession by order of the court. We conceive that the rule is not so limited." The court continues then to the distinct conclusion that an action cannot be commenced against a receiver without permission of the court which appointed him. There are some other questions discussed by appellants in their brief which we do not deem it necessary to further refer to, as they can be better determined by the lower court when upon the trial of the cause all the facts are before it. We therefore conclude the judgment of the lower court should be reversed, and the cause thence remanded for such action in harmony herewith as to such court may seem best; and it is so ordered.

BERRY, J. (*dissenting.*) A part of the subject of the assignment in question was personal property in the territory of Idaho. The assignor lived at the time of its execution in Utah territory, where the assignment was made. It was a voluntary assignment, in trust for the benefit of creditors, and is conceded to be valid under the laws of Utah territory. The assignee had gone into possession, and was in possession as such assignee, when the property was seized and taken from his possession by the sheriff of Alturas county, by virtue of a writ of attachment in favor of a creditor of the assignor, residing in the state of Minnesota, where the debt was contracted. The assignee brought replevin against the sheriff, and, on the trial in the court below, had judgment for the property. This appellant seeks to reverse that judgment. There is but one controlling question in the case, viz. whether that assignment, valid where it was made, should, under the statutes of this territory, be held to be operative here. Under our statute I think it is clearly valid and operative. The appellant rests upon section 5932 of the Revised

Statutes of Idaho, which provides that "no assignment of any insolvent debtor, other than as provided in this title, is legal or binding on creditors." This is the closing section of title 12 of the statutes. The act is headed, "Proceedings in Insolvency." The general scope and apparent purpose of the whole title of 58 sections is shown in its first section, as follows: "Every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities." No stronger terms are needed to show that the parties thus to be favored are the citizens of Idaho; certainly it was not designed to compel persons contemplating assignment to reside here six months before doing so, nor to compel into our courts citizens of other states and territories to get a discharge from their debts through insolvency proceedings. I do not believe that the revisers of our law in 1887 had any design that Idaho should take upon her a task of that magnitude; nor do I think there was any design to preclude parties out of this territory, who might have property in it, from making any assignment whatever for the benefit of their creditors, without going through our courts in insolvency proceedings. Of course, to hold that this act has an extraterritorial scope and meaning is to practically deny to a nonresident the right to make any assignment whatever of his property here. The statement of the proposition seems to me to carry with it a most forcible commentary. It is not claimed but that a state or territorial legislature may do so if it desires; but the precedents are that it will not be presumed to have so intended, unless its enactments to that effect shall be clear and unequivocal. *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460; *Ockerman v. Cross*, 54 N. Y. 29. In 1860 a statute was enacted in New York entitled "An act to secure to creditors a just division of the estates of debtors, who convey to assignees for the benefit of creditors." Such act forbade preferences. It provided how the assignment must be executed; that an inventory should be filed of the property assigned; the assignee should give bonds, etc.,—all substantially as provided in our act, but with a prohibition as to other assignments as strong as our own. An assignment was made by a debtor in Canada, valid according to the laws of Canada, but in no way complying with the requirements of the New York statute. Posses-

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sion in New York had been taken by the assignee, whereupon a New York creditor—not, as in this case, a foreign creditor—attached it; but the court held the act to apply to domestic assignments only. *Ockerman v. Cross*, 54 N. Y. 29. So in *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460; so in *Train v. Kendall*, 137 Mass. 366; so, also, in *Rice v. Courtis*, 32 Vt. 460. But we need go, I think, no further than to the internal evidences of the act, to be convinced that it was not intended to apply to foreign assignments; in fact, the title provides expressly that the assignor must be a resident of the territory. The judgment in the court below should be affirmed.

COFFIN *et al.* v. EDGINGTON *et al.*

(January 28, 1890.)

APPEAL—DISMISSAL—DEATH OF PARTY.

1. After judgment was rendered, but before notice of appeal was filed or served, one of the defendants died. No substitution having been made, *held*, that all proceedings on the appeal were null and void as to the representatives of the deceased defendant.

ATTORNEYS—DEATH OF CLIENT—POWERS TO BIND REPRESENTATIVES.

2. If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.

APPEAL—PARTIES—NOTICE.

3. Any party to an action, whether plaintiff or defendant, may appeal; but the notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or intervenors.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county.

Action by E. C. Coffin and others against T. J. Edgington, A. P. Turner, W. H. Nye, V. S. Anderson, and J. S. Lewis. There was judgment for plaintiffs, and defendants appealed. Before the filing and the service of the notice of appeal, defendant Lewis died. Plaintiffs moved to dismiss the appeal, and asked for an order affirming the judgment as to defendants Edgington and Lewis. Motion for affirmance overruled. Motion to dismiss granted.

Kingsbury & McGowan, for appellants.
V. S. Anderson, for respondents.

SWEET, J. These are appeals from the second district. It is unnecessary to make a statement of the facts involved in the case. It is here presented on a motion by the respondents to dismiss the appeals, and a review of the proceedings in connection therewith will enable us to dispose of the issue at bar.

On the 9th day of October, 1889, E. C. Coffin, R. W. Berry, J. M. Burkett, and W. H. Redway, doing business under the firm name of Coffin & Co., obtained a joint and several judgment against A. P. Turner, T. J. Edgington, W. H. Nye, V. S. Anderson, and J. S. Lewis for the sum of \$933.35, with interest. On the 11th day of October, 1889, defendants filed and served their notice of appeal. Defendants appeal from the judgment, as well as from the order overruling the motion for a new trial. The appeals were perfected, and the cause was regularly called for hearing in this court. The respondents submit two motions; one of them being a motion to dismiss both appeals. The other asks for an order of this court affirming the judgment of the court below as against appellants T. J. Edgington and J. S. Lewis. The motions were not presented in this order; but, for reasons that will appear, we consider the second motion first. The second motion is based upon an affidavit made by R. W. Berry, one of the plaintiffs, in which he sets forth the fact that after the entry of the judgment in the court below, "and before the notice of appeal herein was filed or served, and before any of the proceedings on the said appeals were had or taken," defendant Lewis died. The facts set forth in the affidavit are admitted. The affidavit of Berry was filed in this court before the cause was called for argument. This was the proper time to direct the attention of the court to the fact, and the manner adopted was approved in *Judson v. Love*, 35 Cal. 467. It further appears from the transcript, as well as from the admissions of counsel, that no substitution of the personal representatives of the deceased defendant was had in the lower court prior to the proceedings had on appeal, and that the attorney for Lewis acted in behalf of the latter's representatives, in said proceedings, without authority.

The question presented is as follows: Has

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this court jurisdiction to hear and determine this appeal, in view of the fact that all of the proceedings taken and had on the appeal were subsequent to the death of said defendant Lewis? We think not. In the case of *Sheldon v. Dalton*, 57 Cal. 20, the court say: "There were two plaintiffs in this case, one of whom died before this appeal was taken. There was no suggestion of the death, and no substitution of the personal representative of the deceased plaintiff. It is conceded that the appeal was prematurely taken, and the motion to dismiss is granted." In the case of *Judson v. Love*, 35 Cal. 466, the same question was involved. Judge SAWYER, speaking for the court, uses the following language: "A motion is made to dismiss the appeal as to the defendant Love, based—*Firstly*, upon exceptions to the transcript; and, *secondly*, upon affidavits filed showing that defendant Love died on the 15th of March, 1866, after the rendition of the verdict in the court below, and before any notice of intention to move for a new trial was given, on the ground that all subsequent proceedings, and motion for new trial, and the attempt to appeal, are void and ineffectual for any purpose as to said defendant Love and his successors in interest, for want of any proper party to the suit, or of any person upon whom a valid service of papers could be made." Again, the court say: "It is clear that all these proceedings, except the entry of judgment on the verdict before rendered, had since the death of defendant Harlow S. Love, on the 15th day of March, 1866, are irregular and void as to him, and his successors in interest. There was from that time forth no party before the court as to the interest of Love in the matter in controversy, and no one authorized to represent it. The power of attorney necessarily ceased with the death of the principal. No further proceedings could be had without bringing in the representatives of Love. The practice act authorizes a judgment to be entered upon a verdict when a party dies after verdict and before judgment, * * * but this is as far as it goes. *Warren v. Eddy*, 13 Abb. Pr., 30, is in point. Notice of argument had been served on the attorney of defendant after the death of the latter. The court say: 'At the time of the service of the notice, J. W.

Culver could not act for a dead man, and he had no authority to act for or represent the estate. The order of the general term for affirmance by default, founded on such notice, was therefore irregular, inasmuch as it was made without notice to any one representing the estate of Daniel F. Eddy.'" Again, the court say: "His former attorney could not give a notice of motion for new trial or of appeal that would be effectual, for he had ceased to have any authority in the matter. If he has no authority to give such notice, he has none to receive one, or act upon it, in the further stages of the proceedings, when it is received. He has become a stranger to the proceedings." It is unnecessary to quote authorities further upon this point. The principle is well known and thoroughly established. It is evident, therefore, that no proceedings can be had in this court affecting the interests of the representatives of the deceased defendant.

The next question is, could an appeal be taken by the defendants in this case before a substitution was made? It would seem to be impossible. The judgment rendered against defendants was joint and several in its character. No decision of this court can be rendered affecting one of the defendants without affecting all. This fact makes them adverse parties, within the statute. It may be worth while to define the meaning of "adverse party," as contemplated by law. In *Senter v. De Bernal*, 38 Cal. 640, the court say: "The question is as to the meaning of the words 'adverse party,' as here used; and as to that we think there can be no rational doubt. Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party,' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor. Such was declared to be the meaning of this language as used in the statutes and rules of the court of chancery of New York prior to the adoption of the Code in that state." Our statute allows an appeal to any and every person who may feel aggrieved; but it re-

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quires of the appellant that he shall serve a notice of his appeal upon all parties who may be affected by any decision the appellate court may render affecting the interests of the parties. This cause clearly comes within the rule, as any decision affecting the interests of the representatives of Lewis must certainly affect the other defendants to the action. In the case of *Thompson v. Ellsworth*, 1 Barb. Ch. 627, after stating that any person may appeal, whether the judgment against him be joint or several, the court say that he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formerly appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual; and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former, also.

It is further urged by counsel for respondents that this appeal should be dismissed for the reason that the undertaking was served prior to the notice of appeal. It is unnecessary to go into the merits of this question, inasmuch as the appeal must be dismissed for the reasons already stated.

But appellant asks that, in the event of an order of dismissal, the appeal be dismissed without prejudice. We do not see any reason why the representatives of defendant Lewis, in whose interest the appeal is taken, cannot appeal to-day, if they so desire. Each and every step taken in the proceedings had on appeal is utterly void. The representatives of the deceased defendant are not bound by them. In short, no appeal has been taken. Therefore the rights of the representatives of Lewis cannot be prejudiced. However, section 4823 of the Revised Statutes provides that "the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal." The court may, unquestionably, order the dismissal of an appeal without prejudice; and perhaps it is always safer to do so, when the facts justify it.

The motion submitted by respondents asking that the judgment be affirmed as against Lewis and Edgington is practically disposed

of by the authorities cited. If this court is without jurisdiction of the defendants, it certainly cannot make an order that would be binding upon them; and that no such jurisdiction has been acquired is evident. The motion, therefore, to affirm the judgment as against Lewis and Edgington is overruled, and the motion to dismiss the appeal as to all the defendants is granted, without prejudice to another appeal.

BEATTY, C. J., and BERRY, J., concur.

DUNNIWAY *et al.* v. LAWSON *et al.*

(January 29, 1890.)

APPEAL—DISMISSAL.

1. In an action where relief is granted both parties, on motion to dismiss the appeal under rule 3, supreme court, the certificate of the clerk below, under rule 4, not showing the nature and substance of the judgment appealed from, *held*, that such certificate will not justify a dismissal of the appeal.

SAME—RULES OF COURT.

2. Also that rule 3 is directory, and gives no right to a party to demand its enforcement.

SAME.

3. Also that the court will not dismiss an appeal under rule 3, unless it be made to appear that justice requires such dismissal.

(Syllabus by the Court.)

Appeal from district court, Custer county.

Action by one Dunniway and others against Paul P. Lawson and others. There was judgment for plaintiffs, and defendants appealed. Plaintiffs moved to dismiss the appeal. Motion denied.

J. T. Morgan, for appellants. *Angel & Sullivan*, for respondents.

BERRY, J. This is a motion by respondents to dismiss an appeal in the above-entitled action, which motion is made under rules 2, 3, and 4 of this court, and upon the certificate of the clerk of the district court of Custer county. The rules are as follows: *Rule 2*. "When an appeal or writ of error has been perfected thirty days before the commencement of the next regular or adjourned term of this court, the transcript of the record shall be filed at least three days before the first day of such regular or adjourned term." *Rule 3*. "If the transcript of the record is not filed within the time prescribed [by rule sec-

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ond,] the appeal or writ of error may be dismissed, on motion, without notice, on Monday of the week during which the cause is subject to call, under rule eight. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party. Unless so restored, the dismissal is final, and a bar to any other appeal or writ of error from the same order or judgment." *Rule 4.* "On such motion there shall be presented the certificate of the clerk below, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the motion of appeal, or issuing of the writ of error; the fact and date of the filing; the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one; and also that the appellant has received a duly-certified transcript, or that he had not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded."

It is clear that rule 3 is more in the nature of a statement, or notice by the court, of what it will be likely to do under a given statement of facts, than of a declaration of rights of a party litigant. The right in the court to dismiss, when in its opinion the interests of justice demand such action, and only when it is so demanded, puts upon the party requesting such action the burden of convincing the court, by a proper showing of facts, that the interests of justice require such action. Rule 4 seems specially intended to effect that purpose. The certificate of the clerk is to inform the conscience of the court. The clerk of the court below makes his certificate in substance as follows: "That on the 2d day of October, 1889, judgment was rendered in said district court, in favor of the plaintiffs * * * and against said defendants, for costs of plaintiffs in said action amounting to the sum of \$858.95, and that each of said defendants be adjudged to pay one-third thereof, to-wit, the sum of \$286.32, and that Paul P. Lawson and Chris. Rogers have, and each of them has, the right to the use of 10 inches of the water of Alder creek, a tributary of Big Lost river, and to use no more than 10 inches each, measured under a four-inch pressure, unless there shall

be more than 220 inches of water running in said creek; and I further certify that on the 29th day of November, 1889, I received an order made by C. H. Berry, judge of said district court, ordering and directing that all papers and files, including evidence, in above cause, be sent to the clerk of the district court at Blackfoot, which was accordingly done; and I further certify that no notice of appeal from the judgment entered in said cause on the 2d day of October, 1889, has been filed in this office, nor has any been presented at this office for filing, nor has any statement on appeal from said judgment been settled and filed in this office, nor has any person requested that a transcript of the record of said action be made out and certified to the clerk of said district court, and sent such request to this office, but on the 5th day of December, 1889, an undertaking for stay of execution was made out by Paul P. Lawson, one of the defendants in said action, in the sum of \$600, being more than double the amount named in said judgment, and was duly filed in this office according to law."

It will be observed that this certificate, while it states many facts, states few required by rule 4. Incidentally upon the argument, however, it appeared that a notice of appeal by the defendants from the judgment had been served more than 30 days prior to the first day of this term of the supreme court, and that an appeal-bond, regular in form, had been filed in the office of the clerk in the court below; also that the action in which the judgment was entered was an action in equity, in which a decree was made in favor of the respondents in those things constituting the subject-matter of the said action. Aside from those general facts, this court is not further informed in the case. It is not alleged that any hardship to the respondents exists by reason of the failure to file in time the transcript on appeal; and if the respondents are not being injured, *prima facie* at least, they have no cause to complain. But the appellants' counsel gives reasons for the delay. He alleges that, in addition to the appeal from the judgment, it is his purpose to move for a new trial of the case, and thereby reach a more comprehensive remedy than would alone be an appeal from the judgment, or the bringing into this

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court of the judgment roll; that, in case his motion for a new trial is denied, he desires to appeal the order of denial; and that, if he gets a new trial, the necessity for any appeal may be avoided. He also avers that the statement of his case, on which he proposes to move, on account of causes beyond control, is not settled, or even yet made; and that, in view of such facts, the court below has extended the time for settlement of a statement to a time not yet expired.

There is nothing to cast doubt upon the entire good faith of these allegations, and in themselves they are certainly consistent with fairness and the interests of justice. We do not think, from this stand-point, that we are called upon to exercise this reserved power, and summarily dismiss the appeal. But beyond this, as we have seen, the respondents' counsel has not brought himself within the conditions prescribed by rule 4. The certificate does not even show the nature of the judgment appealed from, except in the single matter of costs and certain minor provisions in favor of the appellants. In the absence of a more full and complete showing, the court is precluded, by its own rules, from dismissing the appeal as prayed, and the motion to dismiss must be denied.

MURPHY v. BARTSCH.

(February 12, 1890.)

PLEDGE—NEGLIGENCE OF PLEDGEE—LIABILITY.

1. When a party takes any property as a pledge for the security of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary care and diligence in all cases.

SAME—LOSS—BURDEN OF PROOF.

2. When there is no contract as to the disposition to be made of the pledge, and the pledgeor claims it is lost by neglect, he must show the neglect, and that damage resulted to him therefrom.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county.

Action by John Murphy against Edwin Bartsch on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

A. F. Montandon, for appellant.

Defendant's order, being specific as to amount, acceptance, and time of payment, was a bill of exchange, negotiable, and sub-

ject to all rules of commercial paper. Code, §§ 3520, 3525, 3546, 3550; Cowan v. Hallack, 9 Colo. 572, 13 Pac. Rep. 700; Pars. Merc. Law, (2d Ed.) p. 84, § 1; Pars. Notes & B. pp. 52, 54, 353, § 1.

Plaintiff, being the holder, was bound to make demand for payment, and, if dishonored, to give defendant "drawer" notice. Dean's Bryant & S. Com. Law, § 353; Donohoe v. Gamble, 38 Cal. 340.

Kingsbury & McGowan, for respondent.

There being no exception in the record, if complaint states a cause of action, and will support a judgment, the judgment must be affirmed. Lamkin v. Sterling, 1 Idaho, 120; Purdy v. Steel, Id. 216; Gamble v. Dunwell, Id. 268; Diehl v. Hull, Id. 352; McCoy v. Oldham, Id. 465; Hyde v. Harkness, Id. 638; Fox v. West, Id. 782.

BEATTY, C. J. On October 18, 1886, appellant delivered his promissory note to respondent for the sum of \$500, due the next day, and, as collateral security for its payment, transferred a demand he held against one Shaw, payable on the 1st day of November, 1886. At this latter date, Shaw was solvent, but by April following became insolvent; just when does not appear. In August, 1887, this action was commenced for the recovery of the \$500 note, to which appellant interposed the defense that respondent had neglected to collect the claim against Shaw, which by the latter's subsequent insolvency became wholly lost to appellant. Judgment followed for respondent, from which defendant appeals here, and he now claims the demand against Shaw was a bill of exchange, of the dishonor of which he is entitled to notice, according to the law merchant; also that defendant's failure to collect the same must be held such negligence as will charge him with its loss. The record does not inform us clearly of the nature of this claim against Shaw. Appellant, in his answer, says it was a "bill of items" for goods sold to Shaw; that Shaw admitted the same was correct, indorsed his acceptance thereon, and appellant then assigned it to respondent. The findings refer to it as an order drawn by appellant on Shaw, payable to respondent; also as a "demand" against Shaw. Appellant has not shown it was a bill of ex-

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change, or even a chose in action, negotiable in form. It was, however, an evidence of a debt admitted by Shaw to be due from him to appellant, and by the latter transferred as collateral security to respondent. The record shows respondent made no special demand of appellant for payment of his note; neither did the latter request respondent to collect the Shaw claim, nor did the latter attempt to collect it. No agreement existed between the parties for its collection other than that implied by law. The record simply shows the collateral was accepted, was not collected, that Shaw became insolvent, and the claim against him was lost. Does its loss, under such circumstances, become the loss of the respondent?

From the briefs of counsel, we conclude they were unable in their researches to find relevant authorities by which the court might be aided to the correct conclusion, and in our effort to supplement their labor we have found the courts on this question in considerable at least apparent conflict, in part the result of difference in the facts of the cases. It is impossible to prescribe any definite, unyielding rule applicable to every case of property pledged as collateral security. Each case must be determined more by the attendant facts and circumstances than by any fixed standard. In all cases, however, the pledgee will be responsible for any loss resulting from his gross negligence; and generally, to avoid such responsibility, he must exercise at least ordinary care and diligence. It must be borne in mind he does not sustain to such property the relation of owner. As such, he would, of course, bear all loss, whether occurring through theft, fire, or other accident. When he holds it as pledgee, it operates as an accommodation to the owner also, by extending the time of payment of his liability; and the pledgee so holding it would not be liable for its loss by accident, unless the result of his gross carelessness. In this case, what is the negligence of respondent of which appellant can complain? The latter says he was entitled to prompt notice of the dishonor by Shaw of the claim. We do not think so. One of the objects of giving notice of the dishonor of commercial paper is that the indorser may be held responsible. It does not appear that the claim here against Shaw

was a bill of exchange; and even if it were, and respondent had given appellant prompt notice of its dishonor, he would not have had any recourse against respondent, or in any way added to his responsibility. Hence, all the reasons of the rule requiring notice of the dishonor of commercial paper not existing, the rule itself is subject to modification.

The appellant invokes in his behalf the provisions of section 3601 of our statutes. That and the next preceding section clearly refer alone to written evidences of debt sold and transferred for value, and not to those deposited as collateral security. These sections provide that when the assignee, after due diligence, fails to recover thereon, he can then hold the assignor responsible. But in our case, had the respondent made every effort to collect the debt, and failed, he could not have any recourse against appellant therefor, or even for his expenses incurred in his effort to collect. In this case it does not appear that the respondent was grossly negligent, nor does it appear there were any particular acts of negligence. It does not appear certainly that he could, if he had tried, have collected the Shaw claim. There may have been good reason why he could not. As he did not the presumption is that he could not, rather than that he would not. There is no actual evidence of his neglect, unless the mere fact that he did not collect it must be so construed. If, however, the appellant insists such is the legal conclusion, it still devolves upon him to show that such negligence resulted in his damage; for damage cannot be presumed,—it must affirmatively appear. It would be preposterous for appellant to claim a benefit from the harmless negligence of respondent. The question, then, is not whether respondent was negligent, but whether he must be presumed, without proof, to have committed such neglect as resulted in appellant's damage. There is not in this record any such proof. *Lawrence v. McCalmont*, 2 How. 454, is a case where notes deposited as collateral security were not duly protested, and the court says: "No evidence was shown at the trial to establish any loss or damage * * * for want of due protest and notice; * * * and, in the absence of such proof, we are not at liberty to presume that the agents did not do their

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duty." The same is held in *Aldrich v. Goodell*, 75 Ill. 457. In *Wilkinson v. Culver*, 33 Fed. Rep. 708, it appears bonds and choses in action were assigned as collateral security, with the agreement that the proceeds from their sale should be applied to the reduction of the secured debt. The pledgee failed to sell the same, and loss resulted to the pledgor. The court says the obligation of the pledgee did not differ from that "usually and naturally resting upon holders of collateral security of same character, viz., that a sale, in the absence of a request to sell, or the commencement of suits, was not compulsory, but was to be at the discretion of the pledgee." In *Bast v. Bank*, 101 U. S. 93, a valid judgment was assigned as collateral. The bank neglected to collect it, and in the mean time it became worthless. The court held it was not the bank's loss. *Rice v. Benedict*, 19 Mich. 132-135, is a cause much like this, in which it was held the pledgee was not responsible for the loss of the securities; and in the same line are *Rozet v. McClellan*, 48 Ill. 345; *Robinson v. Hurley*, 11 Iowa, 412; *Goodall v. Richardson*, 14 N. H. 567; *Fletcher v. Harmon*, 7 Atl. Rep. 271; while more or less to the contrary are *Kennedy v. Rosier*, 33 N. W. Rep. 226; *Easton v. Bank*, 24 Fed. Rep. 523; and *Hanna v. Holton*, 21 Amer. Rep. 23. To these, many others might be added, entertaining almost every shade of view on the question. But, after considerable examination, we conclude the judgment of the court below should be affirmed, except that it should be so modified as to bear interest from its date at the rate of 10 per cent. per annum; and it is so ordered.

BERRY and SWEET, JJ., concur.

TERRITORY v. BOWEN.

(February 12, 1890.)

DISORDERLY HOUSE—EVIDENCE—GENERAL REPUTATION.

To establish the fact that a house is kept for the purpose of prostitution, evidence of its general reputation as such is competent.

(Syllabus by the Court.)

Appeal from district court, Ada county;
H. W. WEIR, Judge.

One Bowen was convicted of keeping a

house for the purpose of prostitution, and sentenced to a fine and imprisonment. She appeals. Sentence of imprisonment remitted.

D. P. B. Pride and *T. D. Cahalan*, for appellant. *R. Z. Johnson*, Atty. Gen., for the Territory.

BEATTY, C. J. The indictment in this cause charges that the appellant "did unlawfully keep a house for the purpose of prostitution," upon the trial of which she was found guilty of the charge; and thereupon the court rendered judgment against her of imprisonment in the county jail of Ada county for the period of four months, and that she be fined in the sum of \$150. From such judgment she has prosecuted her appeal to this court, and now, without further contest here, she represents that she suffered imprisonment under such judgment for the period of three weeks before being released on bonds; that she has discontinued the offense of which she was charged, and prays the court for a modification of the judgment against her. The attorney general, representing the territory, not disputing the statement made by appellant, consents to a modification of the judgment, but claims that the law as given by the trial court should be affirmed.

The section (6842) of our statutes upon which the indictment is based provides that "every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor." Rev. St.

Under this indictment and the statute two questions are involved: Was the house referred to in the proceedings kept for the purpose of prostitution? and did the appellant keep it?

The first question is disposed of by establishing the character of the house. To do this it is not incumbent on the prosecution to prove particular, or any, acts of prostitution committed in the house. This, in the nature of things, would be impracticable, and generally impossible. Such acts are veiled from the public eye, and are known

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only to the participators therein, whose interest it is to carefully conceal them. Whatever difference of opinion may have existed on this subject, it is now settled by the weight of authority that in actions of this nature evidence of the general reputation of the house is competent and admissible to establish its character; and so we hold. *People v. Buchanan*, 1 Idaho, 688; *Sara v. State*, (Tex.) 3 S. W. Rep. 339; *State v. Smith*, (Minn.) 12 N. W. Rep. 524; *Drake v. State*, (Neb.) 17 N. W. Rep. 117; *State v. Mack*, (La.) 6 South. Rep. 808; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *State v. Brunell*, 29 Wis. 435.

There was evidence to the satisfaction of the jury that the house was kept for the purpose of prostitution, and that the appellant was its keeper, which justifies the judgment, but, in consideration of the facts above stated, we direct that the trial court so modify its judgment that the sentence of imprisonment be remitted; but in all other respects the judgment is affirmed.

CHAMBERLAIN v. WOODIN.

(February 13, 1890.)

APPEAL—REVIEW—WAIVER OF OBJECTIONS.

1. When a motion for nonsuit is made by defendant at the close of plaintiff's testimony because of its insufficiency, and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.

SAME—CONFLICTING EVIDENCE.

2. A judgment will not be reversed when there is a substantial conflict in the testimony, or unless it seems the result of passion or prejudice.

ELECTIONS—IRREGULARITY AND FRAUD—EVIDENCE.

3. When an election is so irregular and fraudulent that the true result cannot be ascertained from the returns of the poll, they should be rejected, and the true result shown by other evidence.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; C. H. BERRY, Judge.

Action by D. F. Chamberlain against W. A. Woodin to contest the right of defendant to the office of sheriff of Bingham county. From a judgment for plaintiff, defendant appeals. Affirmed.

Hawley & Reeves and *W. H. Savidge*, for appellant.

The issues being all material, it was the

duty of the court to find thereon, and the failure to fully find upon them, and each of them, is sufficient ground for reversal of the judgment herein. *Porter v. Muller*, 65 Cal. 512, 4 Pac. Rep. 531; *Campbell v. Buckman*, 49 Cal. 362; *Dowd v. Clarke*, 51 Cal. 262; *Speegle v. Leese*, Id. 415; *People v. Forbes*, Id. 628; *Kennedy v. Berry*, 52 Cal. 87.

To avoid the election, the misconduct of election judges must be such as to procure a person to be declared elected when he has not received the highest number of votes. Rev. St. § 5027; *Paine, Elect.* 187–196; *McCrary, Elect.* 105–510, 600.

The presumption is in favor of the validity of the election. *Com. v. Lee, Brightly, Elect. Cas.* 98; *People v. Clark*, 1 Cal. 408.

It is only where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, that the entire poll may be rejected; and even in such case the legal votes actually polled must be computed. *Littlefield v. Green, Brightly, Elect. Cas.* 493; *Piatt v. People*, 29 Ill. 72; *People v. Cook*, 8 N. Y. 68; *Mann v. Cassidy*, 1 Brewst. 60; *Chadwick v. Melvin, Brightly, Elect. Cas.* 256.

Thoughtless interference by outside persons with the election officers is not ground for setting aside the election. *Boileau's Case, Brightly, Elect. Cas.* 268; *Skerrett's Case, Brightly, Elect. Cas.* 320; *Sprague v. Norway*, 31 Cal. 173; *Dale v. Irwin*, 78 Ill. 170.

Nor do mere irregularities or omissions to observe directory provisions of law. *Gilleland v. Schuyler*, 9 Kan. 569; *Sprague v. Norway*, 31 Cal. 173; *Sudbury v. Stearns*, 21 Pick. 148; *Weeks v. Ellis*, 2 Barb. 320.

Smith & Smith and *John T. Morgan*, for respondent.

Immaterial issues, or those rendered immaterial by the facts found, need not be found. *Estate of Wooten*, 56 Cal. 326; *Porter v. Woodward*, 57 Cal. 535; *Whiting v. Townsend*, Id. 519; *McCourtney v. Fortune*, Id. 617; *Knowles v. Seale*, 64 Cal. 377, 1 Pac. Rep. 159; *Robarts v. Haiey*, 65 Cal. 397, 4 Pac. Rep. 385.

There must be a total deficiency in evidence, or such great preponderance as to show passion or prejudice, to warrant the setting

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aside of a verdict or finding. *Glenn v. Arnold*, 56 Cal. 631; *People v. Manning*, 48 Cal. 335; *Bensley v. Whipple*, 57 Cal. 267.

If there is any evidence to support the finding, it will not be disturbed. *Lick v. Madden*, 36 Cal. 213; *Hill v. Smith*, 32 Cal. 167; *Wilson v. Fitch*, 41 Cal. 363; *Cox v. Stage Co.*, 1 Idaho, 376; *Trenor v. Railway Co.*, 50 Cal. 222.

BEATTY, C. J. At the general election held in November, 1888, the parties to this action were opposing candidates for the office of sheriff of Bingham county, to which the appellant was declared elected. The respondent, in pursuance of our statute for "Contesting Certain Elections," beginning with section 5026, commenced this action of contest, alleging as the grounds thereof—*First*, malconduct of the board of judges of election in Rexburg precinct, in said county; and *second*, that illegal votes were cast in said precinct, and counted for appellant. At the trial of the cause, when respondent closed, appellant interposed his motion for nonsuit, which being overruled, he proceeded with the introduction of his testimony. By the judgment of the court the respondent was declared elected to said office, and the appellant here asks its reversal.

All the alleged errors complained of by appellant may be considered under the following subdivisions: (1) That the court erred in overruling his motion for nonsuit because respondent's testimony was insufficient to warrant a judgment in his favor; (2) that the findings do not support the judgment; (3) that the court failed to find on all the issues raised; and (4) that the judgment is not warranted by the facts and the law.

The consideration of these questions has required an examination of perhaps the most voluminous record that has ever been submitted to the review of this court, and it has been found a most onerous duty to comply with the closing suggestion of appellant's brief, in which he "commends it to our careful attention and thorough consideration." We earnestly urge a closer observance of the provisions of our statutes which forbid the incumbering of the record with "redundant and useless matter." Even when an appeal is taken upon the ground of the insufficiency

of the evidence, it is entirely unnecessary to incorporate all that has been said by witnesses, including questions and answers. The statute will protect the appellant who inserts in his record, in narrative form, only such evidence as is pertinent to the material issues, and procures thereto the proper certificate of the judge, showing that all such evidence is included.

Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover. Did the court err in overruling the motion for nonsuit? The motion, as above stated, was based upon the alleged insufficiency of the evidence. In the determination of this question, examination of the testimony is unnecessary, for any error the court may have made in this matter was entirely waived by the subsequent introduction of appellant's testimony. It is so settled by the highest authority, to which, for the justification of our ruling, we refer. *Bradley v. Poole*, 98 Mass. 179; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; and *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685.

Do the findings support the judgment? The appellant claims the findings do not justify and support the judgment. It is admitted they would be more satisfactory if more specific, but, being "proceedings" under our statute, they must likewise be liberally construed. They are, in effect, that "the judges of said election in said precinct permitted legal voters to be arrested, intimidated, and prevented from voting;" "that they permitted legal voters to be arrested for challenging illegal voters;" "that they permitted a large number of persons, whom they suspected were illegal voters, to vote without challenge;" "that they themselves were terrorized by threats of arrest, if they challenged illegal votes;" "that one of the clerks was violently arrested and taken away because he had challenged illegal votes;" "that they conducted the election almost the entire day without any election register;" "that they and others were intimidated and prevented from challenging any person offering to vote by armed men who were sent there from without the precinct by the United States marshal." Our statute does not define what

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constitutes misconduct of the officers of election, but it must be held that any proceedings which result in unfair elections, that deprive the qualified elector of the opportunity of peaceably casting his ballot and having it counted as cast, or that permit illegal votes to be cast and counted, are within the statutory provisions. Section 570 of our statutes directs that the judges of election must challenge any person offering to vote whom they know or suspect not to be qualified; also it is required the "election register" must be at the polls. That the judges themselves were intimidated does not justify such conduct on their part as results in an unfair election. The design of the law is that the election shall be so conducted as to result in the free expression of the legal voters' will. If this fails from any conduct on the part of the judges, regardless of the cause, the law is not fulfilled. It cannot be doubted from these findings that the election was irregular in the highest degree. The findings further show that those irregularities procured the appellant to be declared elected, when he had not received the highest number of legal votes; that illegal votes were cast for him; that, if the illegal votes cast and counted for him were deducted from his total vote, it would leave him with fewer legal votes than respondent had; and upon these findings the court rendered judgment that defendant was elected to the office, and appellant was not, which we think they fully sustain.

Were all necessary findings made? The appellant's next assignment of error is that the court did not find upon all the issues. This question seems for the first time to be suggested in his argument, as the record does not disclose that he asked any additional findings, or excepted to those found as insufficient, or made any objection whatever. It is noted that his objection now is not to a failure to find on all material, but on all, issues raised in the case. By numerous decisions it has been held that findings must be made upon all material issues, but even this ruling is modified in various ways; as that, "when the court fails to find on a material issue, * * * judgment will not be reversed if the finding must have been adverse to the appellant." *Hutchings v. Castle*, 48 Cal. 156; *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6

Pac. Rep. 481; *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 65, 7 Pac. Rep. 123. Also, if the facts found sustain the judgment, there is no necessity to go further, and find on other issues, (*Roberts v. Haley*, 65 Cal. 402, 4 Pac. Rep. 385;) and this court has said: "It must be held that all questions put in issue, and not found upon, would have been found against the appellants, or they were deemed immaterial," (*Gamble v. Dunwell*, 1 Idaho, 271.) However, the question before us is not the establishment of a rule for the formulation of findings, but was it necessary in this case to find others than those in the record? This is solved by the pleadings themselves. The findings made are almost in the language of the allegations in the complaint, and substantially responsive to all thereof, while the answer simply denies those allegations, and hence raises no additional issue. It is held by numerous authorities that findings which follow the language of the pleadings are sufficient; and, these being responsive to all the material issues tendered by the pleadings, we deem others are unnecessary.

Is the judgment sustained by the evidence? The only remaining question for consideration is whether the testimony is sufficient to justify the decision of the trial court. The reversal of a judgment on this ground must be only upon clear and convincing evidence that the court erred in its conclusion. In *Ainslie v. Printing Co.*, 1 Idaho, 643, it is held that whenever "there is a substantial conflict in the testimony it will not disturb the verdict or the decision of the court below." Other courts have gone even further, and by abundant authority it has become the established rule to sustain the conclusion of the trial court, unless it appears it is supported by so little evidence, and contradicted by so much, that it must be inferred it was reached through passion or prejudice. We will briefly consider the testimony concerning—*First*, the alleged irregularities of the election; and, *second*, the rejection by the court, as illegal voters, of those persons who claimed to have withdrawn from the Mormon Church just prior to the election.

It was claimed in argument that the deputy-marshals were there in pursuance of law, and only for the purpose of preserving the

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peace and the purity of the ballot-box. Attention has been directed to the chapter on the "Elective Franchise," commencing with section 2002, Rev. St. U. S., as containing the authority under which the marshal acted. The only section therein at all relevant provides that "when an election at which representatives or delegates to congress are to be chosen is held in any city or town of 20,000 inhabitants or upwards, the marshal shall, on application in writing of at least two citizens residing in such city or town, appoint special deputy-marshals." No power under this section is given for such appointment, the place not having the necessary population. Section 2023 provides that, when an arrest is made, "the person so arrested shall forthwith be brought before a commissioner, judge, or court of the United States for examination." Instead of the record showing any compliance with this provision, it appears therefrom that most of the parties arrested were simply held as prisoners until the polls closed, and were then discharged. This being so, the marshals, instead of upholding the law, were, in its name, violating the rights of citizens. It is also in testimony that they were armed; that in a threatening manner they dictated how the election should be conducted; that they arrested and carried away those who were peaceably and lawfully challenging those suspected of being illegal voters; that they arrested election officers; that unauthorized persons that day registered illegal voters, who were permitted to vote; that part of the time the necessary election books were not at the polls,—all of which is disputed by other witnesses, who further testified that other persons, representing the opposite party, were there with a large number of warrants, with the design of intimidating registered voters by arresting them. From this mass of conflicting testimony the court undertook to sift the truth, and, from the record and statements made in argument, it appears the court concluded the election was attended with such irregularities as to wholly vitiate it, and it set the poll aside. With such a conflict in the testimony it cannot be concluded the court erred, but, on the contrary, the testimony shows the election was a farce. It was a scramble between contending parties, in which the law was ignored. The indul-

gence of such methods would speedily convert the beneficent power of the ballot into an engine of fraud and lawlessness. The lower court properly treated it as void, and set the returns aside, which is justified by the law as well as the facts. McCrary on Elections (2d Ed.) §§ 302, 416, lays down the rule that when there are such irregularities, and disregard of the law, as that the real expression of the legal voters is not had,—when the true result cannot be ascertained by the returns,—the poll must be set aside; but he adds: "It does not follow that legal votes cast at such poll must be lost. They may be proven by secondary evidence, * * * [the poll being primary,] and, when thus proven, may be counted." Other authorities sustain the view, which we see no reason to condemn. In this case, the court, having treated the election as irregular and invalid, permitted the parties to produce those who had voted, and by inquiring into their qualifications, and how they voted, ascertain the true result. This examination involves one of the questions most complained of by the appellant. A large number of those who had voted for him had been members of the Mormon Church, and shortly prior to the election had, in form, severed their connection therewith. Appellant insists this was done in good faith; that they thereby became qualified electors, and, having been registered as such, were entitled to vote; that the court, if it inquired into their qualifications, was bound to so hold, because they were no longer members of that proscribed organization.

There can be no doubt of the court's power, in a case of an election contest, to inquire into the qualification of those who voted, and reject all disqualified. If in this case it found the alleged withdrawal from the church by those parties was a mere form,—a pretense to avoid the letter of the law,—and that in faith and practice they still adhered to such organization, it would be justified in rejecting them as legal voters. These persons were before the court, and from their own statements and the facts of the case we may judge them. A very large number withdrew on the same day, and all within about two weeks immediately prior to the day of election. They say this was absolutely without counsel or advice from any one, and general-

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ly without knowledge that others were doing the same. In most of the cases it was done by a written resignation, which each claimed he had written out himself. Yet appellant in his brief says these withdrawals were by "notices in writing, and in substantially the following forms." Then follows the form. It is most remarkable that so many persons, at about the same time, but without instructions or concert of any kind, should sever their association with this organization in a form of words so similar that appellant can reproduce what he alleges is substantially the form used. They also testified their reason for leaving the church was their desire to vote, and be endowed with all the privileges of American citizenship; that, while they had two years prior been denied the privilege of voting for the same reason, they had not until shortly before the last election been impressed with the gravity of the situation, and that the desire to change their *status* came upon them rather suddenly. While claiming they had acted in good faith, most of them admitted they still wore their "endowment garments." The general explanation of this was, they would wear them until they wore out, but one explained, "they will never wear out." Should it prove true that they acted in good faith, we will much regret our present doubts. Gladly would we see them in the enjoyment of all the rights accorded to American citizenship, but only through voluntary allegiance to the government, and full obedience to all its laws. In view of all the testimony, we must conclude, with the court below, that those people did not act *bona fide*; that such withdrawals resulted from a concert of action, most likely through the counsel of their leader, and for the sole purpose of evading the law; and that they were not entitled to vote. Even should the evidence in the record justify a reversal, we would be precluded therefrom by another fact contained therein. On page 654 it is certified that testimony, in the form of exhibits, used by the parties at the trial, is not included in the record, and respondent claims it is important. There is no certificate of the judge showing that the omitted testimony is immaterial. Without all the material testimony upon all material issues, it cannot be found the evidence is insufficient to support

the decision of the lower court. Its judgment is therefore affirmed.

BERRY and SWEET, JJ., concur.

FIRST NAT. BANK OF LEWISTON v. WILLIAMS.

(February 24, 1890.)

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — FINDINGS.

1. In an action on a promissory note, by an assignee after maturity, defendant alleged that he signed the note as surety on the principal's agreement to give a mortgage to the payee to secure the note, which fact the payee knew, and that the payee accepted the mortgage with the note pursuant to such agreement. There was uncontroverted evidence of the truth of such allegations, and the mortgage, which showed the description of land covered and the purpose to secure the note, was in evidence. The judge, sitting without a jury, refused defendant's request to find on such allegations, except as to the giving of the mortgage; and also refused requests to find as to the condition and purpose of the mortgage, which plaintiff claimed was defective. *Held* reversible error.

SAME—ANSWER—IMMATERIAL ALLEGATIONS.

2. Where the mortgage is not in fact invalid, allegations in the answer that the principal has given subsequent mortgages on the land, to its full value, and that, unless the note be paid from the land, defendant will be damaged, as the principal has no other property, are immaterial, and properly stricken out, as the first mortgage has precedence.

SAME—RIGHTS OF SURETIES.

3. Rev. St. Idaho, § 4520, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage. * * * In such action the court may * * * direct a sale of the incumbered property, and the application of the proceeds" to the debt, etc., and, if a balance still remains, "judgment can then be docketed for such balance against the defendant or defendants personally liable." *Held*, that where a mortgage was given by the maker to secure a note, and for the surety's safety, and the security is valuable, an action could not be maintained on the note alone against the maker and surety, ignoring the mortgage.

Appeal from district court, Nez Perces county; JOHN L. LOGAN, Judge.

Action by the First National Bank of Lewiston against M. M. Williams and another on a promissory note. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant Williams appeals. *Reversed*.

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The other facts fully appear in the following statement by BERRY, J.:

On the 30th day of October, 1884, Alonzo Leland and the appellant, M. M. Williams, duly made their joint and several promissory note, payable to the order of one A. J. Shaw, six months after date, and thereafter delivered the same to the payee. The note was given for the debt of Leland, and Williams joined in it at the request of Leland, as surety only, though the fact that he was surety did not appear on the face of the note. To induce Williams to join in the making of the note, it was agreed between Leland and Williams that Leland should give to Shaw, the payee, a first mortgage on real estate to secure the note, so that he, (Williams,) in case Leland did not pay the note, "would only have the balance to pay that the property did not bring;" which agreement was known to Shaw, and was assented to by him at the time. A mortgage was made, on the 1st day of November, 1884, by Leland to Shaw, acknowledged on the 6th day of the same month, and recorded by said Shaw, in said county, on the next day, the 7th of November, covering 160 acres of land therein described, the property of the mortgagor, setting out the note in full, and stating upon its face that it was "intended as a mortgage to secure payment of" this note so set out, and containing the usual power of sale. Whether the mortgage was delivered at the time of delivery of the note does not appear. On receipt of the mortgage, Shaw reported to Williams that it had been given to him by Leland. A little over three months after the note and mortgage fell due, in Shaw's hands, the latter assigned both note and mortgage to one Volmer, the president of the plaintiff, who, on the same day, assigned them to his bank, this plaintiff. That, at the time he received the note and mortgage from Shaw, Volmer discovered that the mortgage was unsealed. The plaintiff brought his action against both the makers upon the note alone, by filing his complaint against both, but did not proceed further against Leland, and did proceed to a final judgment against Williams only. The answer, besides stating, in substance, the foregoing facts, (all of which appear either in the complaint, or were proven at the trial,) contains the following clause:

"That after the mortgage to secure the note had been recorded, two mortgages, still valid and existing, have been executed and delivered by said Leland,—the first to said Volmer, and the second to the plaintiff itself,—both amounting to \$1,600, covering the same land described in the said mortgage, to secure the note, and were recorded before the commencement of this action; that said two subsequent mortgages are for the full value of said lands, and that said Leland has no personal property not exempt; and that, unless the note in suit be paid from such real estate, this defendant will sustain damage." This clause in the answer was by the court, on motion, stricken out before trial, the appellant excepting to such order. The answer further demands that, in case the defendant is held to pay the note in suit, said Williams be subrogated by judgment to the original rights in said mortgage of this plaintiff, and, of course, of said Shaw.

Hawley & Reeves, for appellant.

The surety is only bound to fulfill the promise in the sense in which the promisee knew at the time the promisor intended it; and it matters not in what way the knowledge of the meaning is brought to the mind of the promisee. *De Coly. Guar.* pp. 7, 8, and authorities cited; *Miller v. Stewart*, 9 Wheat. 680.

A surety is always discharged by the laches of the creditor; and, should the creditor fail to do anything which he is bound or agreed to do for the protection of the surety, then the surety is discharged. *De Coly Guar.* p. 432 et seq.; *Story, Eq. Jur.* § 324; *King v. Baldwin*, 2 Johns. Ch. 554; *Watts v. Shuttleworth*, 7 Hurl. & N. 353.

A want of diligence in taking security, or a security worthless by reason of the laches of the creditor, discharges the surety. *King v. Baldwin*, 8 Amer. Dec. 415; *Ex parte Mure*, 2 Cox, Ch. 63.

Any material variation of the original contract will discharge the surety. *Meiswinkle v. Jung*, 30 Wis. 361; *McWilliams v. Mason*, 31 N. Y. 294; *Ham v. Greve*, 34 Ind. 18; *Mellendy v. Austin*, 69 Ill. 15.

Parol evidence may be offered to show the signer of a note is in reality a surety. *Weston v. Chamberlin*, 7 Cush. 404; *Holt v. Bodey*, 18 Pa. St. 207; *Bank v. Mallett*, 34

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Me. 547; *Core v. Wilson*, 40 Ind. 204; *Hubbard v. Gurney*, 64 N. Y. 457; *McMillan v. Parkell*, 64 Mo. 286.

T. D. Cahalan and Brumback & Lamb, for respondent.

If illegal evidence is admitted on the trial, it is not error for the court to refuse to find a fact proven by such evidence. *Hutchings v. Castle*, 48 Cal. 152; *Campbell v. Buckman*, 49 Cal. 362; *Glascok v. Ashman*, 52 Cal. 420.

Where there is no issue tendered in the pleading upon a material matter, the court or jury will not be presumed to have found on such matter. *Gifford v. Carvill*, 29 Cal. 589; *Bernal v. Gleim*, 33 Cal. 668; *Bosquett v. Crane*, 51 Cal. 505; *Dilla v. Bohall*, 53 Cal. 709; *Watson v. Cornell*, 52 Cal. 91.

The true test of the sufficiency of findings is this: would they answer if presented by a jury in the form of a special verdict? *Breeze v. Doyle*, 19 Cal. 101.

A surety on a note cannot require the security to be exhausted before an action can be maintained against him. *Allen v. Woodward*, 125 Mass. 400; *U. S. v. Hodge*, 6 How. 279; 2 Daniel, Neg. Inst. § 1328.

Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. *Campbell v. Robbins*, 29 Ind. 271; *Crocker v. Getchell*, 23 Me. 392; *Bank v. Caverly*, 7 Gray, 217; *Kern v. Von Phul*, 7 Minn. 426, (Gil. 341); *Bank v. Smith*, 27 Barb. 489; *Buckley v. Bentley*, 48 Barb. 283; *Mason v. Graff*, 35 Pa. St. 448.

BERRY, J., (*after stating the facts*.) The alleged grounds of error, mostly occurring on the trial in the findings of the court, in refusing a new trial, and in the judgment, will more fully hereafter appear. The case was tried by the court without a jury. The evidence received upon the trial was introduced and given without objection. Being so given, the question of its admissibility, if objected to, does not arise. The complaint shows the note to have been past due when transferred by Shaw, the payee, to the president of the plaintiff; that on the same day he transferred it to his bank; and that both transfers were by "assignment." Whatever equities existed in favor of the ap-

pellant against the note, or the right to sue upon the note in the hands of the original payee, continued to exist against it in the hands of this plaintiff. It is proper, then, in the outset, to inquire as to the rights of the appellant, as against the original payee of the note. The obligations of Shaw will be considered as equally the obligations of the plaintiff. On the trial, when the plaintiff had rested his case, the appellant, the defendant below, called John P. Volmer, who testified that he had been president of the plaintiff corporation "ever since the bank was organized;" identified the note; and, on being shown another paper, said: "That is a mortgage executed by defendant Leland to A. J. Shaw, the payee named in this note. I notice there is no seal of party executing it on this mortgage. It is in the same condition, as to execution and acknowledgment, as when I received it from Mr. Shaw. It may have been at the time I had transaction with Mr. Shaw that I noticed lack of seal. I never mentioned or said anything to Williams about there being any defect in the mortgage." Mortgage introduced in evidence by appellant. Alonzo Leland testified: "This is the note executed by me to A. J. Shaw. This is my signature. The other signature is that of Williams. I am principal debtor on the note. Williams signed it as surety only; and it was signed by him on condition that I should execute, to secure the payment of the note, a valid first mortgage upon real property. That was a condition of his signing the note. That condition was known also by Mr. Shaw, the payee of that note, and the agreement was assented to by him at the time. It was on those conditions, and under that agreement, that defendant Williams signed the note. That is my signature, and I executed that document, and supposed it to be a mortgage upon the land." M. M. Williams, the appellant, testified: "I am defendant sued in this action. I signed this note as surety only. I signed it on condition and under the agreement that Leland should secure the payment of it by a first mortgage on property, and he would get the money from Mr. Shaw, and I would have only any balance to pay that the property did not bring. Mr. Shaw, the payee, knew of the agreement and condition of my signing the note. I don't

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know whether the mortgage was executed or not. Mr. Shaw called right away, and told me he had the mortgage upon the land. Mr. Volmer, nor any officer of the bank, ever told me the mortgage was defective, or said anything about the mortgage."

There was no evidence in any way controverting either of these facts. Each was within the issues made by the pleadings. The judge in his findings, though specially requested by the defendant, refused to find upon either of these facts, except the fact that the mortgage to secure the note was, at Williams' request, given by Leland. To this refusal to find (1) as to the conditions on which the defendant Williams became a maker of the note, also as to the connection of Shaw with that agreement, and signing of the mortgage; (2) as to the condition of the mortgage as to seal, and what lands it was upon; (3) as to the knowledge of the plaintiff, in becoming the successor of Shaw in the ownership of the note,—the appellant excepted. This raises the question of the materiality of the issues involved in the points, or any of them, on which the judge refused to find. The description and amount of lands covered by the mortgage are shown in that exhibit, as well as its object to secure this note. The evidence, as we have seen, will warrant findings only as claimed by the appellant. Contrary findings on either point, upon the evidence, could not be made. Those points are: (1) Was Williams only a surety upon that note? (2) Did Shaw, in taking that note, know what relations Williams held to it? (3) And for what purpose the mortgage was executed? And did he become a party thereto, by knowing the agreement between the principal and surety on the note, assenting to the agreement, and accepting the mortgage as security for the note? Of course, if he did, he was bound in good faith not to defeat the measures which the appellant had taken for his protection, and which Leland had placed in Shaw's hands as special security for the note. The mortgage security became and was a part of the contract between Shaw and the makers of this note. Besides the fact of its being the condition of appellant's signing, the payee of the note held it as a lien on property of the principal debtor, to

which it was his duty to look before resorting to the surety on the note. If this were not an elementary principle of law, it became a controlling principle in this case, by virtue of the agreement between the makers, known and assented to by Shaw, and by his act in accepting the mortgage, pursuant to such agreement, together with the note. It is clear that those facts are material to this defendant. The counsel for respondent contends that, where there is no material issue tendered by the pleadings, findings on such matters will not be required. But the amendment to defendant's answer does tender these issues. The matter was material, and evidence was given upon it without objection, and was so submitted to the court as a part of the defendant's case. The authorities are numerous and conclusive that a failure to find upon a material issue, where the same is not in effect waived, but is requested, is error, and ground for reversal. Hayne, New Trials & App. §§ 239, 240, and cases cited; Porter v. Muller, 4 Pac. Rep. 531.

The appellant further contends that the court below erred in striking out a part of the answer, in effect as follows: "That since the execution and delivery of the mortgage by which the note herein sued upon is secured, and since the recording of said mortgage, that two mortgages, still valid and existing, have been executed and delivered by the defendant Leland,—one of said mortgages to John P. Volmer, president of the First National Bank of Lewiston, plaintiff herein; and the other of said last-named mortgages to the plaintiff herein," aggregating \$1,600 in amount, and "covering the lands herein described," (the lands in the Leland mortgage,) "both of which were recorded prior to the commencement of this action;" and that said lands are not worth more than sufficient to pay said last two mortgages, etc.; and claiming such act was to the damage of the defendant. It appears by the evidence that the plaintiff claimed the Leland mortgage to be defective, in not having been sealed; that such supposed defect was discovered by the president of the plaintiff when taking the note and mortgage from Shaw, and before taking the subsequent mortgages from Leland, upon the same property; but that the fact of such supposed defect was not

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communicated to Williams by any holder of these papers. It is only in view of the invalidity of this first mortgage that any injury to Williams could arise from those other mortgages. By the statute in force when the Leland mortgage was made, no seal was necessary. Section 1, "Act Concerning Conveyances," approved January 12, 1875. In effect, this statute was the same, as to the seal, as section 2920, Rev. St. Hence the mortgage was not invalid on that account, and it did in fact have precedence of the other two mortgages. This part of the answer was then immaterial to the issue, and was properly stricken out.

But the plaintiff was the holder of the note, and of a valid mortgage on real property to secure the same; yet instead of bringing an action to foreclose the mortgage, and for any balance that might remain after applying the proceeds of sale upon the sum due on the note, as he might have done, he filed his complaint against both of the defendants on the note alone, but had summoned only the surety on the note, and proceeded for a money judgment against him alone. This he had no right to do, not only because it was his duty to exhaust the securities of the principal debtor in his hands, placed there specially as a prior security, to protect the defendant, but also because the statute denies another action, by any party, for the foreclosure of the mortgage.

Section 4520, Rev. St. Idaho, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff; * * * and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc.

There are no other provisions in that chapter affecting this case. As we have seen, the mortgage was valid, and it is not

pretended that the security is valueless. The appellant claims that, upon a note so secured, an action ignoring the mortgage cannot be sustained; and cites *Bartlett v. Cottle*, 63 Cal. 366. In that case the court holds "that, in such case as the one at bar, an action cannot be maintained on the note alone, unless the security is valueless." In that case also the value of the security appears to have been in issue, and it was not shown to be without value. This was decided under section 726 of the California Code of Civil Procedure, which substantially corresponds with the Idaho statute above quoted. *Vandewater v. McKee*, 27 Cal. 596, was an action by the holder of a note, secured by a mortgage on real estate, against indorsers of the note. Commenting upon the statute in question, the court in that case say: "The words [in the statute] 'secured by mortgage' are descriptive of the right or personal liability contemplated by the section, and any personal liability not so secured is manifestly without its purview. * * * A mortgage which, by its terms, is made applicable to the promise of the maker only, can in no just sense be regarded as collateral either to the personal liability or to the 'right' of which the contract of indorsement is the source." The judgment in that case, for the reason that the defendants' contract was not that of makers of the note so secured, but was that of indorsers only, and so was not secured, was against the indorsers. But the doctrine of *Bartlett v. Cottle*, supra, is fully recognized.

There can be no question in the case at bar, that the mortgage was given to secure the note, for the safety of the appellant. So, in *Ould v. Stoddard*, 54 Cal. 613, it was held that where a mortgagee had prosecuted an action in Ohio to final judgment, upon a note secured by a mortgage on lands in California, he could not maintain, in the latter state, an action for foreclosure, for the reason that under this statute there can be but one action for the recovery of any debt secured by mortgage. But the respondent's counsel contends that as the note was several as well as joint, under section 4106 of the Statutes, the plaintiff, at his option, might sue either or both of the defendants; and if he chose to sue only the surety on the note, as he was

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not the maker of the mortgage, foreclosure of the mortgage, in that suit, was impossible; also that it is optional with the plaintiff to abandon the mortgage security altogether; and cites *Ladd v. Ruggles*, 23 Cal. 233. On that question, if there be any doubt about it, we do not decide. But this joint and several note was the debt secured by this mortgage; and a judgment against either, upon the note, equally precluded a judgment of foreclosure of the mortgage, and in effect canceled it. Subrogation of the defendant, to the rights of the plaintiff in said mortgage, even had it been made, as there was a mere pretense of doing, (but which was not done,) would be of no use or value to him. He could no more foreclose it than could the plaintiff. The plaintiff had no right, by prosecuting this action, thus to deprive the defendant of the benefit of his original stipulation, for security to be given for the note, for his own protection, on his becoming a co-maker of it. He had a right to plead this statute, and the several decisions of the court on that question, and the judgment rendered, were each and all erroneous. There are other points of error assigned, but, from the conclusions reached in the foregoing, they need not be considered.

The judgment in the court below, and the order overruling motion for a new trial, must be reversed. Judgment reversed, and new trial ordered. All concur.

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(February 24, 1890.)

JURY—COMPETENCY OF MORMON.

1. A juror must have all the qualifications now prescribed for an elector, and a member of the so-called "Mormon Church" cannot be a juror.

CRIMINAL LAW—APPEAL—ORDER OVERRULING CHALLENGE TO JUROR.

2. No exception is by statute allowed to an order overruling a challenge to a juror for general cause, hence such order is not error.

DEPOSITIONS—COMPETENCY IN CRIMINAL CAUSE.

3. Depositions taken in the presence of the accused may be used on trial, when, on account of death or other good cause, the presence of the witness cannot be had. Our statutes do not forbid such use, nor is it in violation of the sixth amendment to the constitution of the United States.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county; BERRY, Judge.

Henry Evans was convicted of resisting an officer in the discharge of his duties, and appeals. Affirmed.

Smith & Smith, for appellant.

A person is not competent to act as a juror if he be not an elector of the county. Rev. St. § 3941; *Sampson v. Schaffer*, 3 Cal. 107.

A memorandum or deposition taken before an examining magistrate is not competent evidence against the defendant upon trial. *State v. Thomas*, 64 N. C. 74; *Jackson v. Com.*, 19 Grat. 656; *People v. Lambert*, 5 Mich. 349; *People v. Chung Ah Chue*, 57 Cal. 567.

Richard Z. Johnson, Atty. Gen., and *Hawley & Reeves*, for the Territory.

A decision upon the challenge for actual bias is not the subject of exception or review on appeal. *People v. Taing*, 53 Cal. 602, 603; *People v. Riley*, 65 Cal. 107, 108, 3 Pac. Rep. 413; *People v. Cotta*, 49 Cal. 169.

Where a witness fails to appear at the trial of the cause, but has previously, either on a former trial or at the preliminary examination of the accused, given evidence in the cause, and the defendant has had an opportunity to cross-examine him, his deposition, or proof of the testimony given by him, can be admitted as evidence. *State v. McO'Blenis*, 24 Mo. 402; *Summons v. State*, 5 Ohio St. 325; *Sneed v. State*, 47 Ark. 180, 1 S. W. Rep. 70; *People v. Riley*, 75 Cal. 98, 16 Pac. Rep. 544; *Brown v. Com.*, 73 Pa. St. 321; *Barnett v. People*, 54 Ill. 325.

All omissions in the bill of exceptions are to be construed against the party presenting it. *People v. Williams*, 45 Cal. 25; *People v. Marks*, 72 Cal. 47, 13 Pac. Rep. 149; *People v. Huff*, 72 Cal. 119, 13 Pac. Rep. 168.

BEATTY, C. J. The appellant was charged with the offense of resisting an officer. From the judgment rendered upon his conviction thereof he has appealed to this court, and now contends that the trial court erred (1) in admitting as a trial juror a person "who was a member of an organization that taught * * * its adherents * * * to commit the crime of bigamy or polygamy;" and (2) in admitting as evidence before the trial jury the depositions of witnesses taken before the committing magistrate.

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Must a juror have all the qualifications of an elector? Whether a juror must have the same qualifications now required of an elector is the question involved in the first assignment of error. Sections 3941, 3942, Rev. St., together provide that jurors must be citizens of the United States, and electors of the county. Sections 500, 501, require that electors, besides having certain qualifications, must not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." While these statutes seem clearly to exclude as jurors all persons who belong to such "organization," it is contended such a construction will do violence to the legislative will and intention, for which the reasons following are assigned: (1) That when the law first provided a juror should be an elector (Laws 8th Sess. p. 704) the only qualifications of an elector were citizenship and residence, and, in changing the qualification of electors (13th Sess. p. 106) by requiring they must not belong to said organization, it was not designed to apply this restriction to jurors, also; (2) that, if jurors must have all the qualifications of electors, they must also be registered, which, under the operation of the registration law, would often result in the temporary exclusion of good citizens as jurors, who are otherwise qualified electors; and (3) that in some counties in this territory so many of the people are members of such organization that the courts would thus be practically without jurors.

1. The authorities holding that statutes will not be repealed by implication are not applicable to general laws which are in conflict with, and repugnant to, each other. When a general law is in apparent conflict with some prior private or special act, passed for the benefit of some particular interest or municipality, the presumption is indulged that it was not designed by the general to repeal the special law; but no such presumption is entertained in the case of conflicting general statutes. They cannot stand together. There can be no question that the two statutes prescribe different qualifications for electors, and the older must yield to the later. It may be added that the act of the thirteenth session was an election law, and by its last section it not only expressly re-

pealed the former law on the same subject, but also "all acts or parts of acts in conflict with this act," which must be held to exclude any presumption that the legislature did not intend the repeal of all conflicting statutes. However, the fact that on the 11th day of January, 1887, the legislature by one act swept out of existence all former legislation and laws of Idaho, and enacted a complete revision thereof, now embodied in our Revised Statutes, including sections 3941, 3942, as they now are, is sufficient answer to all suggestions that the legislature did not intend the statutes as they now read. One of the prime objects of a revision is the elimination of doubt. What is included therein must be construed together as the law, and all that formerly existed, and not included, is clearly repealed. Section 19, Rev. St.

2. It is not conceded an elector must be registered to act as a juror. Section 500 says he must be registered to vote. It does not follow that, if he has all the qualifications of an elector, he must be registered, to sit in the jury-box. Registration does not go to his qualification, but is only a precaution to prevent fraud in the election. But, even if the law should be construed that a juror must be registered, it would generally result in only a few being temporarily debarred the privilege of jurors.

3. It is, unfortunately, true that in some counties such a large proportion of the people belong to said "organization" that juries cannot be selected from the mass of the people, and courts may at times find it even inconvenient to procure them. So, also, communities might be found where the qualification of citizenship, or any other general qualification, might result in the same inconvenience. On the contrary, we think the legislature meant to exclude from jury service those belonging to the so-called "Mormon Church." By section 501 they are distinctly enjoined from "holding any position or office of honor, trust, or profit." Laws are construed in the light of the facts and circumstances under which enacted. We are justified in supposing the law-maker took notice of the generally admitted fact that the members of that church are more obedient to its teachings, which are antagonistic to the laws of the land, than to the latter.

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View this question in any light, we are forced to the conclusion that under our laws a juror must have all the qualifications now required of an elector, and that the court should have excluded the juror objected to by appellant. That this conclusion will lead to inconvenience in some localities may be true, but we cannot change what seems to be a positive and clear statute. If there is any need of a change, we respectfully refer it to the legislative department.

Exception to Order Overruling Challenge for General Cause. Respondent insists, however, that, even if the juror was not qualified, the statute does not allow appellant an exception to the order of the court overruling his challenge to such juror. Inconsistent as it may appear, it seems such is the statute. Section 7831 divides causes of challenge to jurors into (1) general, including "a want of any of the qualifications prescribed by law to render a person a competent juror," (7832,) and (2) particular, which includes implied and actual bias (7833.) The cause of challenge in this case was a general cause; and the statute in no place provides for or allows an exception to an order overruling such a cause of challenge. Our section 7940 (Pen. Code Cal. § 1170) allows exceptions only in matters of challenge based on implied or actual bias. Here, then, we have a statute which declares a juror disqualified, but provides no remedy to the aggrieved party when the court admits him. On the principle that there is a remedy for all wrongs, we would be inclined to hold that such action of the court is reviewable. But our statute on this subject is an exact copy of that of California, and in adopting their laws we adopt also their construction of them. Partially in point is the case of *People v. Riley*, 65 Cal. 107, 3 Pac. Rep. 413, and cases cited, which hold that a defendant is not allowed an exception to the ruling of the court disallowing a "challenge for actual or implied bias," because the statute makes no provision for such exception, but only allows it to the decision of the court "in admitting or rejecting testimony, or in charging the triers in the trial of a challenge to a juror for actual bias." The direct question is decided in *People v. Fong Ah Sing*, 70 Cal. 8-11, 11 Pac. Rep. 323, being a cause

in which defendant was found guilty of murder. A juror who was not a resident of the county, as required by law, was admitted against defendant's challenge. On appeal it was held this was a general cause of challenge, to rulings in which no exception is allowed. The case seems approved in *People v. Ward*, 77 Cal. 113, 19 Pac. Rep. 373. We therefore hold the appellant's exception to the order of the court overruling his challenge to the juror is not well taken.

Depositions may be Used on the Trial. Was it error to admit in evidence the depositions referred to in the cause? Appellant claims it was, because not permitted by the statute, and contrary to the constitution of the United States. Under the common law, the depositions of witnesses, taken in the presence of the defendant, could be used at the trial of the cause in case of the death or absence of the witness, but it seems they could not be used before the grand jury. Does our statute abrogate the common-law rule, or prohibit the use of depositions? Sections 7576 and 7634 provide for the taking of the depositions, and their use before the grand jury. It seems probable these provisions were designed to procure the testimony of witnesses while it is fresh in their minds, and also in the interest of economy and convenience. The question of testimony before the trial jury was not under consideration. The two questions are not sufficiently relevant that the consideration of one necessarily involves the other. It is evident this legislation referred only to the use of such evidence before the grand jury; for it provides for its use even when the presence of the witness can be procured, which is never permitted in the use of such testimony before the trial jury. The subjects not being relevant, failure to provide for its use before the trial jury does not operate to exclude it. Our statutes expressly establish and recognize the principle of the use of depositions on the trial in certain cases, of the absence or death of the witness. Sections 7588 and 8161. Then why not in all cases, if not expressly forbidden? Section 8161 provides expressly for the taking of depositions of defendant's witnesses for use on the trial, and the fact that no provision is made therein for taking the deposition of the people's wit-

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nesses strongly suggests that it was designed they should not be used. But it does not appear we have abolished the common-law rule on this subject, nor have we directly enjoined the use of such testimony; and it does appear that all the depositions above referred to are taken in the same way, in the presence of the accused, thus justifying the presumption of a like use of all so taken; and section 7864 provides that "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." There is no doubt this is a question relating to "the rules of evidence," nor is there that depositions may be used in civil actions. We think our statute permits their use before the trial jury when duly taken in the defendant's presence, and the witnesses cannot, for good cause, be brought before the court.

The Use of Depositions not Forbidden by United States Constitution. It remains to consider whether article 6 of the amendments to the constitution of the United States, providing that the accused must be "confronted with the witnesses against him," absolutely requires the presence of the witnesses at the trial. This question has been discussed time after time in the courts of the states having the same or similar constitutional provisions; and, while the decisions have not been uniform in their conclusions, the weight of authority is that depositions taken in the presence of the defendant, with the right of cross-examination, is being "confronted by the witnesses," and meets the demands of the constitution. Such depositions have been admitted when it appeared the witness was dead. If constitutional in such case, the same justification can be urged for their use in case of absence of the witness. Of the many authorities sustaining this view are *State v. McO'Blenis*, 24 Mo. 412, a murder case, in which depositions were allowed notwithstanding a constitutional provision that "in all criminal prosecutions the accused has the right to meet the witnesses against him face to face." *Summons v. State*, 5 Ohio St. 340, was a murder case. The constitutional provision was: "In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face." The testi-

mony of a witness given in a former trial was permitted to be testified to by those who heard it; the witness having in the mean time died. To same effect are *Gilbreath v. State*, 26 Tex. App. 318, 9 S. W. Rep. 618; *Sneed v. State*, (Ark.) 1 S. W. Rep. 70; and numerous authorities. Had the depositions been improperly admitted, the appellant has failed to furnish the court such a record as will authorize it to correct the error. Section 8236 is: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." The appellant has entirely failed to show us he was prejudiced in the least by the alleged error of permitting the use of the depositions. That the court may judge whether they were detrimental to appellant, he should have brought them here, which he has failed to do. It is not enough for appellant to show error. He must, under our statute, show damaging error. Under the plain provision last noted, we do not need the guide of other courts to lead us to this conclusion; but in harmony with it are *People v. Brotherton*, 47 Cal. 388; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. Rep. 254, and cases cited; and *People v. Olsen*, (Cal.) 22 Pac. Rep. 126. The judgment in this cause should be and is affirmed.

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(February 24, 1890.)

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EXPORTATION OF FISH.

Section 7193, Rev. St. Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, art. 1, of the constitution of the United States, providing for the regulation by congress of commerce between the states, is void.

(Syllabus by the Court.)

Appeal from district court, second district; C. H. BERRY, Judge.

Thomas Evans was convicted of violating the provisions of Rev. St. § 7193, making it "unlawful for any person to make any dam, or use any nets, seines, fish-traps, or any similar device or measures for catching fish, or to ship the same out of this territory for

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speculative purposes," and appeals. Judgment set aside, and indictment dismissed.

Hawley & Reeves, for appellant.

Penal statutes must be construed strictly, and cannot be extended by implication, or beyond the legitimate import of the words used. *U. S. v. Gooding*, 12 Wheat. 460; *Rawson v. State*, 19 Conn. 299; *Martin v. Hunter's Lessee*, 1 Wheat. 326; *People v. Tisdale*, 57 Cal. 104; *Stuart v. Allen*, 16 Cal. 473; *Hankins v. People*, 106 Ill. 628; *Pacific v. Seifert*, 79 Mo. 210; *Chase v. Railroad Co.*, 26 N. Y. 523.

Our legislative assembly may perhaps be able to entirely prohibit by statute the catching or transportation of fish, as a proper exercise of the police powers of the territory, but cannot make it lawful to transport and sell fish within the territory and a crime to do so beyond its boundaries. *In re Barber*, 39 Fed. Rep. 641; *Harvey v. Huffman*, Id. 646; *Swift v. Sutphin*, Id. 630; *Gibbons v. Ogden*, 9 Wheat. 1; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; *Ward v. Maryland*, 12 Wall. 418; *Henderson v. Mayor*, 92 U. S. 259; *Mugler v. Kansas*, 123 U. S. 623, 8 Pac. Rep. 273; *Railway Co. v. Husen*, 95 U. S. 465; *Walling v. Michigan*, 116 U. S. 446, 6 Pac. Rep. 454; *In re Watson*, 15 Fed. Rep. 511; *Smith v. Turner*, 7 How. 283; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091.

Richard Z. Johnson, Atty. Gen., for the Territory.

BEATTY, C. J. The appellant, Thomas Evans, was indicted with George Rae for a violation of section 7193 of the Revised Statutes of Idaho, which, as amended by act of the fifteenth legislative assembly, reads: "It is unlawful for any person in this territory to make any dam, or use any nets, seines, fish-traps, or any similar device or measures for catching fish, or to ship the same out of this territory for speculative purposes." The appellant, Evans, alone, was tried upon this charge, and from the judgment rendered against him upon his conviction thereof he has appealed to this court. While the record contains various specifications of alleged error, the appellant has in his argument of the cause referred to but two, viz.: That the statute does not pro-

hibit the exportation of fish, and, if it does, it is in violation of section 8, art. 1, of the Constitution of the United States.

It is true the statute does not read as it undoubtedly was intended it should, and it is surprising that it passed unchallenged the ordeal of six readings in the presence of careful legislators. Construed as it reads, it prohibits the exportation from this territory only of dams, and the use of nets, fish-traps, and other devices for catching fish, and not the fish themselves. As dams cannot be shipped, and the use of a thing is an incorporeal right, this statute, if construed by its words, undertakes to prevent the performance of an impossibility, hence, in effect, is void. Conceding, however, that it may be construed to prohibit the exportation of fish, as the legislature undoubtedly designed it, is it in violation of the section referred to of the supreme law of the land? This question was involved in the court below, in the demurrer to the indictment, on the exceptions to the instructions, and in the motion for arrest of judgment, and is saved by appellant's exception to the ruling of the court in those matters. The provision of section 8, art. 1, of the Constitution of the United States, that "congress shall have power * * * to regulate commerce with foreign nations and among the several states," having been so frequently and fully considered by the ablest, including the highest, courts in the nation, it will not be expected we shall, to any length, now attempt its discussion. It is clearly settled and conceded by all, that the above provision of the constitution confers upon congress the exclusive power to regulate commerce between the states, and any statute which attempts to prohibit the shipment into or out of a state of any lawful commodities or articles of commerce or trade is in conflict therewith, and necessarily void. To each state is reserved the power of regulating commerce within its borders, but not that extending across its boundary lines. The state may also, under its police power, enact such laws as are necessary to the protection of the lives, the health, and comfort of its citizens, and for the promotion of good order within its limits. But whenever, under the pretense of an exercise of its police power, the state

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enacts any statute which operates to prevent the free exchange between the states of lawful articles of trade, it is void because in conflict with that constitutional provision. This is clearly illustrated in a number of recent and interesting cases. *Railroad Co. v. Husen*, 95 U. S. 468, is a case in which the state of Missouri, under the claim of exercising its police prerogative, and to prevent the spread of contagious cattle disease in the state, enacted a statute forbidding the unloading of Texas cattle within the state, but allowing their passage through it on board of cars or vessels. The court held that cattle were subjects of lawful commerce, and could not be excluded, except when diseased; that the statute practically operated, not in the exclusion of diseased cattle alone, but of all Texas cattle, and was void. The business of butchering cattle, and shipping the dressed fresh meat into the surrounding states from the place of slaughter, has in recent years become an important pursuit, but one which came in conflict with local dealers. To prevent this, statutes were enacted in several of the western states, purporting to be in pursuance of their police power, and to promote the health of their inhabitants by preventing the importation of diseased meat. They required that all animals should be inspected within 24 hours before their slaughter, and the sale of meat of animals not so inspected should be prohibited. The courts have uniformly held that such statutes are not within the police power of the state, and that, whatever their design, they operate as a prohibition to the importation of dressed meat, which is a lawful article of trade, and whenever these statutes have come before the courts for consideration, they have been held void. The following cases on this subject will be found of interest, and in them the whole subject is fully reviewed: *Swift v. Sutphin*, 39 Fed. Rep. 630; *In re Barber*, (Cir. Ct. U. S. D. Minn.) Id. 641; *In re Christian*, (State Dist. Ct. Minn.) Id. 636; *Harvey v. Huffman*, (State Cir. Ct. Ind.) Id. 646; *Ex parte Kieffer*, (Cir. Ct. U. S. D. Kan.) 40 Fed. Rep. 400. In the state of Indiana a statute prohibiting the exportation of natural gas from the state through pipes has, upon the same principle, recently been held void.

The state of Kansas has had a statute to prevent the shipment therefrom of fowls and other game. For a violation of this, an express agent was indicted for shipping to Chicago four prairie chickens. The act only prevented the exportation of chickens, and did not prevent their capture and use by the denizens of Kansas, but seemed rather to preserve them for their exclusive use and comfort. It was held void in *State v. Saunders*, 19 Kan. 128. By the law of this territory we recognize fish as a lawful article of trade. The statute only attempts to preserve them for us, and to deprive our neighbors of their use, which, in the light of the authorities, we must conclude is in violation of the constitutional provision referred to, and therefore void. It follows that the demurrer to the indictment above referred to should be sustained, and it is therefore ordered that the judgment appealed from be set aside, and the indictment dismissed.

BERRY, J. I concur that the act, so far as it prohibits the shipping of fish out of this territory for speculative purposes, is unconstitutional. I think the statute is not against the shipping of dams, etc., but is against shipping of fish only.

SWEET, J., concurs.

TERRITORY v. NELSON.

(February 24, 1890.)

Appeal from district court, Bear Lake county.

One Nelson was convicted of violating the provisions of Rev. St. § 7193, making it "unlawful for any person to make any dam, or use any nets, seines, fish-traps, or any similar device or measures for catching fish, or to ship the same out of this territory for speculative purposes," and appeals. Judgment set aside, and indictment dismissed.

Smith & Smith, for appellant. *R. Z. Johnson*, Atty. Gen., for the Territory.

BEATTY, C. J. This cause involves the same question disposed of in *Territory v. Evans*, ante, 634, 23 Pac. Rep. 115, and both causes were heard and considered together. Upon the authority of the other case, it is ordered the judgment in this be set aside, and the indictment be dismissed.

BERRY and SWEET, JJ., concur.

Fury v. White.

FURY, Sheriff, v. WHITE et al.

(February 24, 1890.)

**ATTACHMENT—INDEMNIFYING BOND—LIABILITY OF
SUBSEQUENT ATTACHING CREDITOR.**

Where a sheriff levies on personal property under attachment, and, holding under such levy, receives a second attachment, and levies on the same property under the second attachment, and afterwards, but before sale on either, a third person claiming the property, the second attaching creditor indemnifies the sheriff against loss under the second attachment, and the sheriff sells under execution in the first attachment suit, and pays all the proceeds to the first attaching creditor, the claimant of the property having recovered of the sheriff the value of the property sold, *held*, (1) that the sheriff cannot recover on the indemnifying bond of the second attaching creditor; (2) the complaint not claiming, nor the proof showing, that after the levy the sheriff did any act under the second attachment, the second attaching creditor is not liable, (BEATTY, C. J., dissenting;) (3) in such case, when the plaintiff has rested, it is not error for the court to instruct the jury to find for the defendant; (4) in such case, also, the effect of an indemnifying bond must be determined by its own conditions.

(Syllabus by the Court.)

Appeal from district court, Alturas county.

Action by Charles H. Fury, sheriff, against E. A. White and others, on an attachment bond. There was judgment in the probate court for plaintiff, and defendants appeal to the district court. From a judgment of the district court for defendants, entered upon a verdict directed by the court, plaintiff appeals. Affirmed.

Angel & Sullivan, for appellant.

The sheriff's right to recover on the attachment bond does not in any manner depend upon the question whether the giver of the bond was benefited or not by the seizure and sale, nor upon the fact whether he received any part of the money for which the property was sold. *Weber v. Ferris*, 37 How. Pr. 102; *Herring v. Hoppock*, 15 N. Y. 409; *Davidson v. Dallas*, 15 Cal. 75.

The several indemnity bonds were independent securities for the same object, and a sheriff who holds several indemnity bonds for the same object may resort to either at his option. *Brandt*, Sur. § 195; *Muller v. Downs*, 94 U. S. 444.

Kingsbury & McGowan, for respondents.

If the evidence is not set out, instructions will be presumed correct if possibly so under any conceivable state of facts. *People v.*

Bourke, 66 Cal. 455, 6 Pac. Rep. 89; *People v. Johnson*, 61 Cal. 142; *People v. Smith*, 57 Cal. 130; *People v. Dick*, 34 Cal. 663; *People v. Levison*, 16 Cal. 98; *People v. King*, 27 Cal. 507.

All presumptions are in favor of the regularity of the action of the court below. Error will never be presumed, but must affirmatively appear in the record. *Gonzales v. Huntley*, 1 Cal. 32; *Lowe v. Turner*, 1 Idaho, 108; *Goodman v. Mining, etc., Co.*, Id. 131; *Folsom v. Root*, 1 Cal. 374; *Hazard v. Cole*, 1 Idaho, 276-282; *People v. Baker*, 1 Cal. 404-406.

BERRY, J. Previous to June 21, 1883, the plaintiff, as sheriff of Alturas county, holding two writs of attachment from the probate court of that county,—one in favor of Donaldson and Young, and another in favor of Bartch and Mills,—both issued against one Bolton, levied upon and took into his possession certain personal property as the property of Bolton. After such levy, and while such property was in his possession, the defendant White, on the 21st day of June, placed in the hands of the sheriff a third writ of attachment in his favor, against said Bolton. The answer of White alleges that the sheriff, having such property in his possession, attached to this said writ a schedule of such property, and indorsed thereon that he had levied on the property under said attachment. Aside from this admission by White, there is no evidence of such levy under White's attachment.

It appears that afterwards, the property being claimed by one Braden, an assignee for the creditors of Bolton, a bond of indemnity, dated June 22, 1883, was given to the sheriff by the defendant White as principal, with the defendants Riley and Fox as sureties. That bond is the subject of the action at bar. Its conditions are "that if the obligors shall well and truly indemnify and save harmless the said Fury, sheriff," etc., "of and from all damages, expenses, costs, and charges, and against all loss and liabilities, which he, the said Fury, as sheriff," etc., "shall sustain, or in any wise be put to, by reason of attachment, seizing, levying, taking, or detention by the said sheriff, in his custody, under said attachment [the attachment of White against

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Bolton] of said property claimed [by said Braden] as aforesaid, then the above obligation to be void."

The case is presented on bill of exceptions; the only exception being to the charge or direction of the court to the jury to find a verdict for the defendant. The appellant, in his brief, states "that on the 6th day of December, 1887, this cause came on for trial before a jury, and the evidence showed that the property described in said indemnity bond had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under the attachment in the case in which said indemnifying bond was given, and the appellant admitted that the defendant E. A. White received no part of the money for which said property was sold; that thereupon the defendants moved the court to peremptorily instruct the jury to bring in a verdict for the defendants, which motion was sustained by the court, and the jury was thereupon instructed to, and did, bring in a verdict for the defendants." To this ruling and instruction the plaintiff excepted.

The arguments upon the hearing in this court have been mainly based on the decision in *Davidson v. Dallas*, 8 Cal. 227, holding that where property is seized under two attachments, and the property is claimed by a third person, and both attaching creditors indemnify the sheriff, who goes on and sells it, and pays the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property recovers judgment against the sheriff for the value of the property, the recourse of the sheriff is only against the first attaching creditor, for whose benefit the property was sold; and the same case, 15 Cal. 75, in which, while the former decision is affirmed for that case, its doctrine is commented upon and doubted. But we do not find it necessary, in this case, to enter into that question. The case at bar is widely different from that, and the action of the court below may well have been based on other grounds than upon the doctrine of that case. A review of this case makes the distinction apparent.

The issue in the court below was as fol-

lows: In the probate court the complaint, in substance, sets up: (1) The official character of the plaintiff. (2) Alleges the making of the bond, setting it out in full. (3) "That defendants have failed, neglected, and refused, and still fail," etc., "to comply with the conditions of said bond, and to save harmless this plaintiff, to-wit, that on," etc., "said Braden, [the assignee of said Bolton,] mentioned in said bond, assigned to T. E. Picotte all his rights in and to said personal property, * * * and all claims for damages for taking and seizing said property by the plaintiff that had accrued to said Braden, * * * and that said Picotte was entitled to said personal property, and to all damages accruing to said Braden for taking and detention thereof by the plaintiff; that said Picotte, as successor in interest as aforesaid, and as assignee for the benefit of creditors of the said Bolton, on the 24th day of March, 1884, commenced an action in the district court of said Alturas county, against the plaintiff, to recover the sum of \$2,500, claimed as damages for the taking and detention of said personal property under and by virtue of said writ of attachment." And (4) that said Picotte, as such assignee and successor of Braden, recovered judgment against the defendant for damages and costs, \$1,580. (5) That the plaintiff has paid the judgment, and in addition the sum of \$212 in defending the suit. (6) That the plaintiff has demanded of these defendants payment of the penal sum of the bond, which was refused,—and closes with a demand for judgment.

The complaint is silent as to any act done, either by seizure, detention, or sale of the property, in the suit of White against Bolton, or under either of the senior attachments. The defendants answered, putting in issue each allegation of the complaint; and on this issue a trial was had in the probate court, and judgment had for the plaintiff. From that judgment an appeal was taken to the district court in Alturas county, and a retrial was had. Before trial in the district court the complaint was amended by adding thereto the following allegations, to-wit: "(1) That the damages in said complaint alleged to have been sustained by the plaintiff were sustained by reason of the plaintiff's levying upon and holding the property de-

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scribed in Exhibit A, which was the bond in suit. (2) That the judgment in the district court, referred to in the complaint, by T. E. Picotte, as assignee of C. E. Bolton, was recovered against this plaintiff by reason of his having levied upon and detained the property described in said Exhibit A." The levying and detention is not alleged to have been under White's attachment. No sale of the property is alluded to, nor do the defendants appear to have had notice, or to have taken any part in the action by Picotte against this plaintiff. For all that appears, previous to the trial in the district court, the property was still held, as at first taken, by the sheriff, under process "of prior attaching creditors." It is not alleged, nor does it anywhere appear, that there was any privity between those "prior attaching creditors" and the defendant White. The answer puts all the allegations of the amended complaint in issue, and upon these issues the case was tried in the district court, and judgment was rendered for the defendants.

We may here inquire: (1) What were the contract obligations of the defendants to the plaintiff? (2) Was that contract broken by the defendants? And in what manner was it broken? And (3) in what, if anything, was the error of the court in its charge to the jury?

And first: What were the obligations of the defendants? This bond was not strictly statutory, hence its effect is not the subject of statutory construction. It was voluntary, and its effect must be gathered from its own conditions. The statute in view of which a bond might be given, and by reason of which, presumably, this was given, is section 240 of the Revised Laws (8th session) of Idaho, which provides: "If the property levied on be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. * * * If their verdict be in favor of the claimant, the sheriff shall relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." This is, of course, after judgment has been rendered

for the creditor, and execution is issued. But when attached, and before judgment, section 131, Id., provides that, "if any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of claim after levy upon execution." As to the validity of these provisions as a means of determining the ownership of property levied upon, or how far such proceedings will protect the sheriff, is a question not here in issue; and we do not intend to intimate any opinion upon it. Yet the statutory preliminary conditions for calling a sheriff's jury seem to have arisen by claim of Braden to the property as assignee of Bolton. But if, under any of the attachments, such conditions existed, it was optional with the sheriff to call or not to call a jury. Had they existed under White's attachment, they must have existed as well under the senior attachments, and the sheriff must have released the liens of such prior attachments, or taken indemnity under them. If he did not dismiss or take indemnity, it was his own fault. In no event, however, as the case stood, did the sheriff have right to demand indemnity from the defendant White. But if he had such right, and had done so, the statute prescribes no form for the bond, and only, if it be under the statute, that it must be "sufficient." The question of sufficiency is left entirely between the creditor and the sheriff. If there were any doubt as to the nature of the instrument in question, the brief of the appellant settles it for this case. It says: "We maintain that the liability of the defendants depends simply upon the terms of their contract with the plaintiff." The bond was then purely voluntary, and must be construed by its own conditions. Those conditions are, simply, that the defendants shall save the sheriff harmless from loss or liability which he may incur "by reason of attaching, seizing, levying, taking, or retention by said sheriff in his custody, under said attachment, of said property," or under the attachment in favor of White. The acts, then, for which the sheriff was indemnified, were only those done under and by virtue of White's attachment. The defendants, in terms, guaranteed against nothing that was not to be for

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White's benefit, or acts done by the sheriff on his account. If, then, the sheriff did no act under that attachment causing loss or damage to himself, the defendants incurred no liability.

It must be noticed that there is no allegation in the complaint, nor any evidence alleged as given on the trial, that White's attachment was the reason for anything which the sheriff did. The plaintiff's bill of exceptions avers that on the trial in the district court the evidence showed that the property involved had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under White's attachment. The allegation in the answer of White "that plaintiff, as such sheriff, under said writ of attachment, did no act to or with any of said property, nor did the defendant White, or either of the defendants, receive any part of the proceeds of the property," seems to be fully sustained. The appellant contends that it could make no difference whether he did or did not receive benefit. We are not prepared to go so far as that. Were it shown that defendant White did receive benefit, that question might arise; but it does not arise as the case stands.

It is also to be noted that the claim of the plaintiff that he had suffered damage is controverted, and the bill of exceptions refers to no proof that he had sustained damage, or that the judgment alleged in the complaint in favor of Picotte, which is put in issue, was ever, in fact, rendered; nor was there any offer made by the plaintiff to show that fact, or to show any other fact which was not shown on the trial.

At what stage of the trial the request was made by the judge to instruct the jury to find a verdict for the defendants, does not affirmatively appear. Presumably, it was under section 4354, subd. 5, and section 4385, Rev. St. Idaho, and when the plaintiff had rested his case, and on statutory motion for nonsuit. The presumption is that the proceedings in the court below were regular till the contrary appears. It was, presumably, a "special instruction," having the effect of a judgment of nonsuit; and given on the ground that "the plaintiff had failed to prove a sufficient case for the jury." It is not ap-

parent to the court that there was any breach of covenant on the part of the defendants. As the case stood, when the court was requested to instruct the jury the judge was fully justified in giving the instructions demanded by the defendants; and the assignment of error on that account cannot be sustained. Judgment affirmed.

BEATTY, C. J. I do not concur in any part of this opinion which may be construed as holding that a subsequent attaching creditor is not liable on his indemnity bond when he received none of the proceeds of sale of the attached property; but, for other reasons stated therein, I agree the judgment should be affirmed.

SWEET, J. I concur in affirming the judgment of the court below. The failure of respondent to tender certain proofs renders it impossible for this court to consider or pass upon the legal questions involved at the trial in the lower court. My concurrence, therefore, is based upon the failure of the record to present the real issues involved; and beyond this I express no opinion.

BURKE et al. v. McDONALD et al.

(February 28, 1890.)

MINES AND MINING — VEINS — DISTINGUISHING MARKS.

1. Though, to constitute a vein, it is not required that well-defined walls be developed or paying ore found within them, there must be rock, clay, or earth so colored or decomposed by the mineral element as to mark and distinguish it from the inclosing country.

SAME—LOCATION OF CLAIM—INACCURATE BOUNDARIES.

2. Easterly of the discovery point the M. claim was marked 150 feet longer than the calls of the notice, and was wider than allowed by law, but the westerly 1,000 feet was marked substantially correct in size. *Held*, that where the ground was of such character that accuracy of measurement was very difficult, and the L. claim was discovered and located mostly on the westerly end of the M., where the latter was correctly marked, the locators of the L. could not be deemed to have been misled by the inaccurate marking of the M., and that the M. was not void for inaccuracy of boundaries.

SAME — ACTION TO SETTLE ADVERSE CLAIMS — PLEADING—WAIVER OF PROOF.

3. Under Rev. St. 1887, § 4217, providing that every material allegation of the complaint

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not controverted by the answer must be taken as true, an allegation in a complaint, in an action to decide an adverse claim, filed against an application for a patent to a mining location, that plaintiffs filed in the land office their adverse claim to the property in dispute, need not be proved when not denied by the answer.

SAME—VERDICT—INSUFFICIENCY.

4. In such action a verdict simply finding that plaintiffs are entitled to the right of possession, and which does not allege that they have such right by reason of a compliance with the absolute requirements of law, or that they have it as against the government, as well as against defendants, is bad, and will operate to reverse a judgment based thereon; Act Cong. March 3, 1881, providing that, if no title to the ground in controversy be established by either party, the jury shall so find.

TRIAL — SUBMISSION OF SPECIAL ISSUES — DUTIES OF COURT.

5. Under Rev. St. 1887, § 4397, providing that "the court may direct the jury to find a special verdict in writing upon all or any of the issues," it is the duty of the court to submit special issues at the request of parties when the issues are of a complicated nature; and a refusal to do so is reversible error.

Appeal from district court, Shoshone county; WEIR, Judge.

Action by J. M. Burke and others against Scott McDonald and others to determine title to a certain mining claim. There was judgment for plaintiffs. From an order overruling a motion for a new trial, defendants appeal. Reversed.

Wm. H. Clagett, F. Ganahl, and Albert Hagan, for appellants. *Woods & Heyburn*, for respondents.

BEATTY, C. J. The appellants, as claimants of the Lackawanna lode mining claim, situated in Yreka mining district, Shoshone county, Idaho, filed in the local land office their application for patent therefor, to which the respondents, as claimants of the Mammoth claim, within the times required by law, filed in said land office their adverse claims, and commenced this action in the district court, in said county. Upon the trial of the cause before a jury, a general verdict was found in respondents' favor, upon which a judgment being rendered, the appellants moved for a new trial, and, from the order of the court overruling such motion, they have appealed to this court. Whatever the value of the property in controversy may be, the cause, having been so ably and fully presented by eminent counsel, merits careful consideration. This has been given it, so far as the brief time between its sub-

mission and the necessarily early adjournment of the court permits. Our attention has been directed to numerous propositions involving questions of both law and fact, of not all of which will we attempt a consideration. Appellants earnestly urge that no vein was discovered in the Mammoth prior to its location or that of the Lackawanna. The difficulty is not so much ignorance of the law's demand, or of what constitutes a vein under it, as its willful violation. The practice of posting notices upon any ground within which the existence of a ledge may be imagined has become so common that the emphatic requirement of the law, that a ledge discovery must initiate the location of a claim, is nearly forgotten. The courts will insist upon and enforce this most important provision of the law wherever opportunity offers. It must be remembered that every seam or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, nor every ridge of stained rocks, its cropping. Nor, on the contrary, is it required that well-defined walls shall be developed, or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to mark and distinguish it from the inclosing country. While the contents of ore-bearing veins widely differ, there is that indescribable peculiarity in the "ledge matter," the matrix of all ledges, by which the experienced miner easily recognizes his ledge when discovered. The evidence in this case does not clearly show such discovery of a vein in the Mammoth as the law requires.

It is also claimed by appellants that if the locators of the Mammoth did post their notice on September 17, 1885, as claimed, they, before marking its boundaries, left it, to prospect for and locate other claims, and, before their return, the Lackawanna was located on the following day, and, as an evidence of the irregularity of their locations, I refer to the fact that in four days, commencing on September 16th, Smith, Catline, and Flaherty located 15 claims. The law does, in its liberality, allow the prospector, after the discovery of his vein, a reasonable time in which to develop its course, and then mark accordingly the boundaries of his claim; but it does not permit him, after having posted his notice, to leave his claim incomplete, and, going in quest of other claims, post his notice here and there over

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the country, to the exclusion of other prospectors, and at his leisure prospect and mark out his claims. While no hardship or unusual exertion is required of him, good faith and reasonable diligence are. So long as he exercises the latter, the courts will shield him, but not in the commission of any fraud upon the law. If in this case the evidence clearly showed as true what appellants claim, this court would place its seal of condemnation upon the Mammoth location. But these questions above referred to, with that concerning the performance of the annual assessment work on said claim, were submitted, under the instructions of the court, to a jury, composed in part, at least, of miners, and, in view of the conflicting testimony on these questions, this court would not be justified in disturbing their conclusion.

Were the boundaries of the Mammoth so large as to render the location void? Easterly of the discovery point it was marked about 150 feet longer than the calls of the notice, and was considerably wider than allowed by law, while the westerly 1,000 feet was marked substantially correct in size. Strict accuracy in the marking of claims cannot be expected or required. The character of the ground over which the locator must make his measurements must be considered; if even, with unobstructed view, greater accuracy would be required than when the surface is broken, and covered with timber. If a claim is made excessive in size with fraudulent intent, it is void. If made so large that it cannot be deemed the result of innocent error, fraud will be presumed, or if from any cause it be made so large and with such indistinct markings that its boundaries cannot be readily traced, and subsequent locators, after reasonable diligence, cannot find the same, it would be void, as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case. In Montana, it has been held a claim located 1,763 feet long is void, and the tendency there is towards strict accuracy of boundary; while in other courts it has been held that in the absence of fraud the claim will be held void only as to the excess. *Stem-Winder Case*, (Idaho.) 21 Pac. Rep. 1040; ¹ *Mining Co. v. Rose*, 114 U. S. 579, 5 Sup. Ct. Rep. 1055; *Jupiter Min. Co. v. Bodie Con-*

solidated Min. Co., 11 Fed. Rep. 675. In this case it appears the ground is such that accuracy in measurement could not be expected; also that the Lackawanna was discovered and located mostly on the westerly end of the Mammoth, where the latter was correctly marked. It cannot be presumed, from all the circumstances of the case, the Lackawanna locators were misled by these markings, and the conclusion of the trial court is sustained.

The respondents having alleged in their complaint the filing by them in the land office of their adverse claim, appellants insist such filing must be proven, though not denied by them, and rely upon *Rosenthal v. Ives*, 12 Pac. Rep. 904,² decided in this court, and *Mattingly v. Lewisohn*, (Mont.) 19 Pac. Rep. 310. The latter holds it a necessary allegation, but does not say it must be proven when not denied. In the former, this court held citizenship must be alleged, proven, and found, even though not denied. But why did it so hold? The reason is evident. Citizenship is an absolute qualification to the holding of mineral land. The government grants its lands only to its citizens. Before it will issue its patent to any one, it must know positively that he is a citizen; hence the necessity of showing by the judgment of the court the citizenship of the applicant. Whether the plaintiff files or proves the filing of his adverse claim in the land office is a matter of no interest or consequence to the government. That is simply a question of practice which it provides for the protection of the interests of the adverse parties, and which they may waive, if they desire. The appellants, not denying the allegation, waived their right of its proof by respondents, and the latter are clearly justified by section 4217 of our statute in not tendering testimony thereon.

We will consider together the alleged error of the court in not submitting special issues to the jury, and the informality of their verdict, which is as follows: "We, the jury in above-entitled cause, find the title to the right of possession of the area in conflict described in the complaint to be in favor of the plaintiffs;" upon which a judgment was rendered to the effect that plaintiffs were entitled to the possession of the ground in controversy as against the defendants. It must be observed this verdict simply finds the plaintiffs are entitled to the right of possession; it does not

¹ Ante, 421.

² Ante, 244.

In re Havird.

show they have such right by reason of a compliance with the absolute requirements of the law, or that they have it as against the government, or any but the defendants. It amounts to a declaration that, as between the parties to the action, the plaintiff showed the better right, and should prevail, which in *Golden Fleece G. & S. Min. Co. v. Cable Con. G. & S. Min. Co.*, 12 Nev. 320, was held the rule; but whether or not such was the law then, it has not been since the congressional act of March 3, 1881, providing that, if "title to the ground in controversy shall not be established by either party, the jury shall so find." Since this act it has become necessary that the decision, whether by court or jury, must show, not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government, and by a compliance with all the laws applicable. The government is interested in knowing, before issuing its patent to a party, that he is a citizen; that he has discovered a vein; that he has performed the \$500 development work; that he has complied with the law. It is provided that upon the judgment in these adverse claim cases being certified to the general land office, together with the proper certificates of such claim, a patent shall issue to the successful party. If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party as against his opponent, it might frequently happen that a patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of congress. In the following cases judgments were reversed because of the insufficiency of the verdicts, some of which were more specific than the one under consideration: *McGinnis v. Egbert*, (Colo.) 5 Pac. Rep. 660; *Manning v. Strehlow*, (Colo.) 18 Pac. Rep. 625; *Thomas v. Chisholm*, (Colo.) 21 Pac. Rep. 1020. And *Rosenthal v. Ives*, (Idaho,) 12 Pac. Rep. 904,³ was reversed because the judge who tried the cause failed to find the successful party was a citizen. This was not because that was a material issue under our practice, but that it was necessary to show his compliance with the laws. All these authorities are sustained by *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep.

³ Ante, 244.

1110, and we must hold the verdict in this case informal and cause for reversal. Our statute, by section 4397, after designating the class of cases in which it is optional with the jury to find a general or special verdict, further provides that "the court may direct the jury to find a special verdict in writing, upon all or any of the issues." In cases where the number and nature of the issues are such as likely to confuse the jury, the court can greatly aid it by formulating such issues into separate, distinct propositions, and thus have them submitted in logical, concise questions, instead of in one confused mass. Through a general verdict, a jury is more likely to jump to a conclusion, or yield to its impulse or sympathy, than when special issues are submitted, to which the facts can be directly applied. Certainly the court must submit only those material, and only in such number and form as will aid, and not bewilder, the jury. Is this a matter left entirely to the discretion of the court? It might be so held if the statute were designed alone for the convenience of the court, but it is not. On the contrary, its object is to aid the jury to the proper conclusions, and to promote justice in the administration of the law. It is a discretion that must be soundly exercised by the court, and subject to review as any other discretionary power when not properly exercised. The complicated nature of the issues in this case is such as to render it one in which special issues should be submitted, if ever necessary in any case, and the court's error in refusing the request of appellants in this matter is also cause for reversal. The appellants also asked the court to have the jury view the premises, as permitted by our statute. There are many features of this case which mark it as one in which this request should have been granted, but whether the action of the court is cause for reversal, it is unnecessary to determine. It follows from the foregoing that the judgment and order appealed from must be reversed, and the cause remanded for a new trial; and it is so ordered.

In re HAVIRD.

(February 28, 1890.)

APPEAL—REVERSAL—EFFECT.

1. A suit was brought under Act Idaho, Jan. 30, 1885, to contest the election of a sheriff who had received a certificate of election from the

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canvassing board of the county. On appeal to the supreme court the act was declared unconstitutional, and the judgment reversed. *Held*, the effect of such reversal was to declare the suit a nullity, and it should have been dismissed by the court below.

DE FACTO SHERIFF—RIGHTS TO FEES—MANDAMUS.

2. Though Code Idaho, § 380, forbids the county commissioners to issue warrants for the salary of an office during the pendency of a suit to contest an election thereto, a person who is in possession of the office of sheriff, and performing the duties thereof, under a certificate of election issued by the canvassing board, is entitled to the fees and expenses of the office; and on application a writ of *mandamus* will issue to compel the commissioners to issue warrants therefor.

SUPREME COURT RECORDS—VALIDITY—FRAUD.

3. An entry on the records of the supreme court cannot be attacked, on the ground of fraud, on an objection to its introduction as evidence. Its validity can only be questioned upon allegations of fraud fully and fairly made, and issue positively tendered.

Application by Cary C. Havird for a writ of mandate commanding the county commissioners of Boise county to order the issuing of warrants payable to plaintiff as compensation for services rendered by plaintiff as sheriff of said county. John Gorman, a contestant for said office of sheriff, was admitted as a party defendant. The application was granted. Defendant Gorman then applied for permission to appeal the cause to the supreme court of the United States. Permission given.

J. W. Huston and John S. Gray, for C. C. Havird. *Geo. Ainslie*, for John Gorman. *H. W. Dunton*, for Boise County.

SWEET, J. Cary C. Havird was a candidate for sheriff at the regular election in Boise county held in November, 1886. He was declared elected to said office by the canvassing board of said county, and in due time received a certificate accordingly. Within the time prescribed by law, John Gorman, the opposing candidate for sheriff at said election, commenced a proceeding under an act of the territorial legislative assembly approved January 30, 1885, in which he contested the right and title of said Havird to said office. The cause was heard by the district judge in and for said county, as by said act provided, and a judgment was rendered in favor of the applicant herein. John Gorman, the intervenor in this action, moved for a new trial,

which motion was by said judge overruled; and from the order overruling said motion said Gorman appealed to the supreme court of the territory. The cause came on for hearing before said court at its January, 1889, term, and on the 11th day of March, 1889, the opinion of the court was rendered by Mr. Justice BERRY;¹ the court, by said opinion, declaring the act under which the trial before the judge in said Boise county was held to be unconstitutional and void, and by reason thereof caused to be entered in the records of this court an order reversing the judgment rendered by the judge of said district. On the 18th day of the same month the judgment of the court as rendered on the 11th was amended on motion of counsel for the respondent, and, by this amended judgment, it was ordered that the action be dismissed; the substance of said order being that the word "dismissed" was substituted for the word "reversed." On the following day an entry appears in the record setting forth that Chief Justice WEIR and Justice LOGAN, two of the members of said court, having reconsidered the action of the court as entered of March 18th, ordered that the motion to amend the original entry of March 11th be denied, and that the word "reversed" should stand as the judgment of the court in place of the word "dismissed."

The matter comes up at this time on an application by Cary C. Havird for a writ of mandate commanding the county commissioners of said Boise county to order the issuing of warrants, payable to the order of said Havird, as compensation for services rendered as aforesaid, in the form of salary, and for fees and expenses allowed by law. The commissioners answer the order to show cause by stating that the title to the office is involved in an action now pending in the district court in and for that county, and that, under section 380 of the statute, the said board is prohibited from ordering any warrants drawn in payment of salary during the pendency of an action over the title of the office. John Gorman, the intervenor, avers that the action is still pending in the court below, and that, while such action is pending, he is an interested party, and invokes section 380 of the statute to show that this court is without authority to

¹Ante, 498, 25 Pac. Rep. 294.

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issue said writ. The allegations contained in the pleadings cover a much wider range of investigation. Indeed, under the complaint and answer, it might be possible to try the entire case, as it is averred on the one hand that one party was elected, and, on the other hand, the election of the first party is denied, and the election of the second party averred. A greater portion of these declarations *pro* and *con* are *res adjudicata*, and will not be considered by this court. The only question here presented is the *status* of the case after the decision rendered by the supreme court at its last session.

What purports to be the record of the court, particularly the entry of March 19, 1889, is not regular upon its face, and in terms states that the action therein taken is the result of a conclusion reached by two of the members of the court; but it is not declared to be the action of the court by the court, and, from its very appearance, would perhaps suggest that any person interested would be justified in seeking to investigate its character. The intervenor, as well as the board of county commissioners, in answering plaintiff's application in the matter now at bar, rely upon the entry made on March 19th, and upon the *remittitur* sent down by the clerk of this court to the court below, as justifying the position taken by them, which is that the action over the title to said office is still pending in said Boise county. Unquestionably the *remittitur* so states. It is before us; and, although the entry of March 19th does not declare that the conclusion therein mentioned was reached by the court, the *remittitur* was to the effect that such was the order, not of two of the justices, but of the court. Counsel for plaintiff offer to show that the entry of March 19th is not a record of this court. They contend that that entry was made out of term-time, after the court had adjourned, upon the order, not of the court, but of two of its individual members. If this statement were true, it would not only not be a record, but it would be a false entry in a record, and must result in very serious consequences to those who made it.

The plaintiff introduced those entries in the record appearing as of March 11th and March 18th, and there rested. When the intervenor and defendant offer to introduce the entry of March 19th, plaintiff

objects, and offers to prove by parol evidence the irregularities above set forth. Defendant and intervenor contend that the record of the court is conclusive, and that it cannot be assailed, and numerous authorities are cited in support of the proposition. On general principles, this court will not question the doctrine. It is a fact, however, that no instrument is sacred if in any manner tainted with fraud. A judicial record cannot be assailed, but this is a different proposition from denying the existence or validity of a record. In other words, the record, once established, is unassailable, and, as the honest record of the court, is absolutely unquestionable. In *Lowry v. McMillan*, 49 Amer. Dec. 503, the court uses this language: "A record is entitled to great sanctity in the law, but then it must be an honest record. It is in vain to talk of the danger of altering or explaining a record by parol. Everything imbued with fraud must give way before credible sworn testimony." Note 5, p. 170, of *Bigelow on Fraud*, reiterates this doctrine, and there distinctly states that the question of fraud may be raised so long as it was not a question involved in the trial of the cause; in other words, if it in any manner tampered with the rights of the parties, the jurisdiction of the court, or the correctness of the proceeding, at such time or in such manner as that the interested party was not able to be heard to protect himself. The general principle, therefore, is that a judicial record cannot be contradicted by parol evidence. It is an equally well-known, indeed an elementary, principle, that no instrument, no record, no document, is valid, or can exist, in the face of fraud, corruption, or dishonesty. But, in the matter at bar, is the applicant in position to assail the record? We think not. Without attempting to specify how such a record may be assailed, and in what form the allegations should be made to admit of the introduction of parol evidence to contradict the record, it is sufficient to say that to entitle the plaintiff to offer parol evidence in proof of so serious a charge, and of a fraud so serious in its character, and so far-reaching in its effect, the allegation must be fully and fairly made, and the issue clearly and positively tendered. In this case, and under the allegations of the complaint, the entry of the 19th of March cannot be assailed.

This court is called upon, then, to settle

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the *status* of this case upon all of its records here, the effect of the action of this court a year ago, and the rights of the parties under it. The opinion of the court as rendered last March, duly filed on the 11th of said month, and these various entries, will be used to guide us in reaching a conclusion in the matter at bar.

The opinion declares that the act of the legislature under which the contested election case was tried was unconstitutional and void. To say that the act is unconstitutional and void, and that the proceedings under it may be valid, is an absurdity too patent to be discussed. This court reversed the court below. Reversed what? Reversed its decision? No. It simply declared that there was nothing to decide; that the act under which they were proceeding was in itself void, and, as a matter of course, the proceedings themselves could not possess more validity than the act under which they proceeded. Then, why should it be sent back? Sent back for another trial under an unconstitutional act? But this discussion may be ended by declaring that when the supreme court held the act of January 30, 1885, to be null and void, the Case of Gorman v. Havird no longer existed, and as a legal entity, so far as its having any possible effect upon either of the parties to the suit is concerned, never had existed.

We now pass to the record. We find an entry on the 11th of March declaring that the judgment of the lower court is reversed; another, on the 18th, to the effect that it should be dismissed; and on the 19th two of the judges, personally, have reconsidered what the court did on the 18th, and restored the action of the 11th, or at least attempted so to do. Perhaps it is as well to pass this record with this statement; for, whether it be a true record or not, it is entitled to but little consideration, and the more it is studied the more doubt it creates as to how the opinions of the court were decided, and how that particular decision was announced. It amounts to but a quibble, at best. The one entry declares that the court below shall proceed as it may deem best; and the other, that the action shall be dismissed. The opinion of this court was certified down to the court below; and, no matter what the court below may have thought, there was but one thing for it to do, and that was to dismiss the action. And this brings us down to the next

point in the matter, or to the next quibble presented, namely, whether this court should send the case back to be dismissed by the judge of the district, or whether this court should order it dismissed. It is a distinction without a difference. When the supreme court thus clearly indicated the invalidity of the law, and the inevitable *status* of the case under it, the applicant should have had his money, and the expense of this litigation ended. The case having been returned, however, we find that it has been continued from time to time; and the plaintiff is still carrying on the expense of conducting the executive business of the county without pay, and, judging of the future by the past, without prospect of ever having any, or without any probability of ever reaching a settlement of the legal questions involved.

Let there be no misunderstanding about the conclusion reached this time. The case ought to have been dismissed. It was the intention of the supreme court a year ago that it should be dismissed; and the retention of the case in court, and its continuance, did not, and does not, afford the plaintiff not only a speedy and adequate remedy at law, but affords him no remedy at all. Under such a condition of affairs, he was authorized to appear before this court, and declare that he had no speedy and adequate remedy at law, and invoke the extraordinary powers given this court to secure to him the rights and privileges guarantied him by law. Let it not be understood that the intervenor or the commissioners are in any manner at fault. They were bound by the *remittitur* sent down to them; and, unless the judge saw fit to act in accordance with the implied order of the court, these parties had no alternative but to await the remedy or the relief that time would bring. The intervenor, Gorman, is but exercising the right of a citizen in contesting this election; and, until the act under which he was proceeding was declared unconstitutional and void, he was pursuing methods prescribed by law. It is no wonder that, under the conflicting entries in the records of this court, and the *remittitur* sent down, both counsel and client were at a loss to know what steps to take, or in what manner to proceed.

We now pass to the question of fees and salary claimed by plaintiff, and the distinction, if any there be, as to the amount due on account of salary, and the amount

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due by law, and allowed by the board, for expenses and fees. In the absence of a statute on the subject, plaintiff would be entitled to receive both the salary and the fees pertaining to the office of sheriff, for the reason that, being in possession of the certificate declaring him duly elected, and having qualified as provided by law, he would be presumed to be entitled to all of the fees and emoluments of the office; and, if the title to the fees were subsequently declared to belong to another, the person subsequently declared elected would be entitled to sue the *de facto* officer for all fees and emoluments received by him during the time he was in office. Even then, however, the *de facto* officer would be entitled to receive the necessary expenses incurred by him in earning the fees and emoluments received. These principles are laid down in the case of *Mayfield v. Moore*, 5 Amer. Rep. 52, and *Auditors v. Benoit*, 4 Amer. Rep. 382. Our statute, by section 380 of the Code, preserves the salary to which the *de jure* officer is entitled by forbidding the issuance of the warrant during the pendency of the suit. As before stated, were it not for this decision, plaintiff would be entitled to receive the salary attached to the office of sheriff of his county by virtue of his *prima facie* right to exercise the duties of the office, and, naturally, to receive the compensation therefor. But we do not think that this section applies to that portion of the sheriff's bill or bills which have been allowed by the board on account of his expenses. For instance, plaintiff was allowed by the board of commissioners, for boarding prisoners, \$692.25; for jailer's fees, \$1,302; for transportation of prisoners, \$156.15; and other items of like character. He is entitled to this money even if the intervenor were finally to recover the title of the office. It is due for money expended; and Mr. Gorman, never having expended the money, would not be entitled to it, either from the county or from plaintiff. In other words, the plaintiff, in possession of his certificate of election, and all other *indicia* of office, made necessary expenditures out of his own pocket on behalf of the county. There can be no question of his right to receive that money, and it should have been paid to him long ago. It was proper enough to withhold the \$2,978 on account of salary during the pendency of the action inaugurated to test the title of the office; but, when that action was disposed of by

the highest court in the territory, there was no longer any reason for withholding the payment of the salary. It is true that, under the *remittitur* sent down from this court, this action may seem like a hardship against Gorman. It is, unquestionably, an unfortunate condition of affairs for both; for, as will be seen by glancing at the history of this case, not only has the plaintiff been denied a speedy and adequate remedy, but the intervenor seems to be without remedy at all. The condition of the record, the continuance of the case, and the numerous awkward circumstances with which the entire transaction is surrounded, seem to have been reached without the co-operation, or even knowledge, of the intervenor or his counsel, while it is perfectly plain that the county commissioners would not know what to do, and could be safe only in doing nothing.

In accordance with the decision heretofore rendered, the judgment of the court is that the action which by the *remittitur* before us appears to be now pending in the lower court should be dismissed, and that a writ of mandate forthwith issue, under the seal of the clerk of this court, directing the defendants, the county commissioners of said Boise county, to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amounts heretofore allowed by said board during the time specified on account of fees and expenses, and that, immediately upon the dismissal of said action by said district court, a writ of mandate shall issue, under the seal of the clerk of this court, commanding said commissioners to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amount due him as salary for the time specified, and that a copy hereof be certified to said district court.

BEATTY, C. J., and BERRY, J., concurring.

ON APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

(March 5, 1890.)

A writ of mandate is given or withheld in the sound discretion of the court, but the exercise of this discretion is subject to review. In the matter of *Havird v. County Commissioners*, (Gorman, intervenor,) the court ordered the issuing of the writ. The intervenor has applied for permission

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to appeal to the supreme court of the United States. The appeal is not so much desired on the ground of questioning the exercise of discretion by this court as for the purpose of reviewing the decision rendered by the court a year ago upon the constitutionality of the act under which the case was tried. The writ was granted in the matter at bar by virtue of the decision rendered a year ago, and the intervenor declares that that decision was wrong, and expects the supreme court of the United States to so hold. We are of the opinion that when this matter is presented to the supreme court of the United States, it will simply inquire as to whether this court abused its discretion in ordering the writ, but will refuse to review the decision of a year ago upon the constitutionality of the act, and that the appeal would, therefore, be dismissed. We are also of the opinion that, if the supreme court of the United States did review the decision of a year since, and reverse the judgment of the supreme court of this territory as to the constitutionality of the act, and by reason thereof a new trial was had, and Gorman should recover the title to the office in question, still Havird would be entitled to his fees and expenses. As the *de facto* officer, and in possession of all the *indicia* of office, we do not entertain the slightest doubt as to Havird's rights in this matter, and that Gorman's action against Havird must be for the profits only. But the intervenor contends that we are wrong, and asks that we grant him an appeal to the supreme court of the United States; and we are not disposed to deny it. If Havird were a mere usurper of the office, he would not then be entitled to receive anything. His right, however, to receive his expenses as a *de facto* officer shows clearly the line drawn between a mere usurper and a person in possession of a certificate duly certifying his election. We feel that, in granting this appeal, we are trespassing seriously upon the rights of Havird to receive forthwith the money which he has expended in the interests of the county, and which, in any event, he is entitled to recover. Perhaps the appeal ought not to be granted, under such circumstances. Still, we do not feel like refusing to any petitioner at the bar the privilege of being heard by the highest court in the land, if, by any construction of the statute, it may be held that he is entitled to the writ. It is ordered, therefore, that the appeal may be had.

GILPIN v. SIERRA NEVADA CONSOLIDATED MIN. CO.

(February 28, 1890.)

MINES AND MINING — RIGHTS OF OWNERS — FOLLOWING DIP.

1. Rev. St. U. S. § 2322, provides that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular from their course downward as to extend outside the vertical side lines of such surface locations." *Held*, that an owner of a mining claim has no right to follow a vein into an adjoining claim unless such vein has its apex within his own side lines.

SAME — RIGHTS OF ADJOINING OWNERS — VEINS — EVIDENCE.

2. On bill to enjoin an adjoining owner from working a vein on plaintiff's claim, defendant alleged that such vein had its apex on his claim. Defendant's claim adjoined plaintiff's on the east of the latter; and it appeared that plaintiff sunk a shaft near his eastern line, in ledge matter, consisting of various substances, including some ore. Following the dip of the ledge matter, and deflecting to the south about 150 feet, he struck defendant's under-ground workings, finding some ore before doing so. The ledge matter was continuous. Defendant's ore was of a kind sometimes found in "blanket veins," without apices or dips, and it was doubtful if the vein was a fissure vein. The dip was nearly at right angles with the north side line of plaintiff's claim, and deflected little, if at all, from the lead of defendant's ledge. The true average dip of a vein is always at right angles to the lead. All of defendant's tunnels were on the bed-rock or floor of the ore deposits, rose slightly as they receded from their mouths on defendant's claim, were at right angles with a line formed by their mouths, and pursued an almost due westerly course. The mouths were at an outcrop of a deposit, nearly horizontal in position, on a mountain-side. The dip of the floor of the ore deposits was from north to south. *Held*, that it was not shown that the apex of the vein was on defendant's claim, and hence defendant had no right to extend its works into, and extract ore from, plaintiff's claim.

ACTION — BY WHOM MAINTAINABLE — UNLAWFUL INTERFERENCE WITH MINE.

3. One who is in possession of mining ground, claiming title thereto, and who makes a *prima facie* case covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his claim.

INJUNCTION — WHEN LIES — REMOVAL OF ORE FROM MINE.

4. Rev. St. Idaho, § 4288, provides that an injunction may be granted (1) when the complaint shows that plaintiff is entitled to the relief demanded, which consists in restraining the com-

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mission or continuance of the act complained of; (2) when the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to the plaintiff; and (3) when the defendant is doing some act in violation of the plaintiff's rights, having a tendency to render the judgment ineffectual. *Held*, that injunction would lie to restrain continuance of the unlawful removal of ore from plaintiff's mine, whether or not the injury, if consummated, would be irreparable.

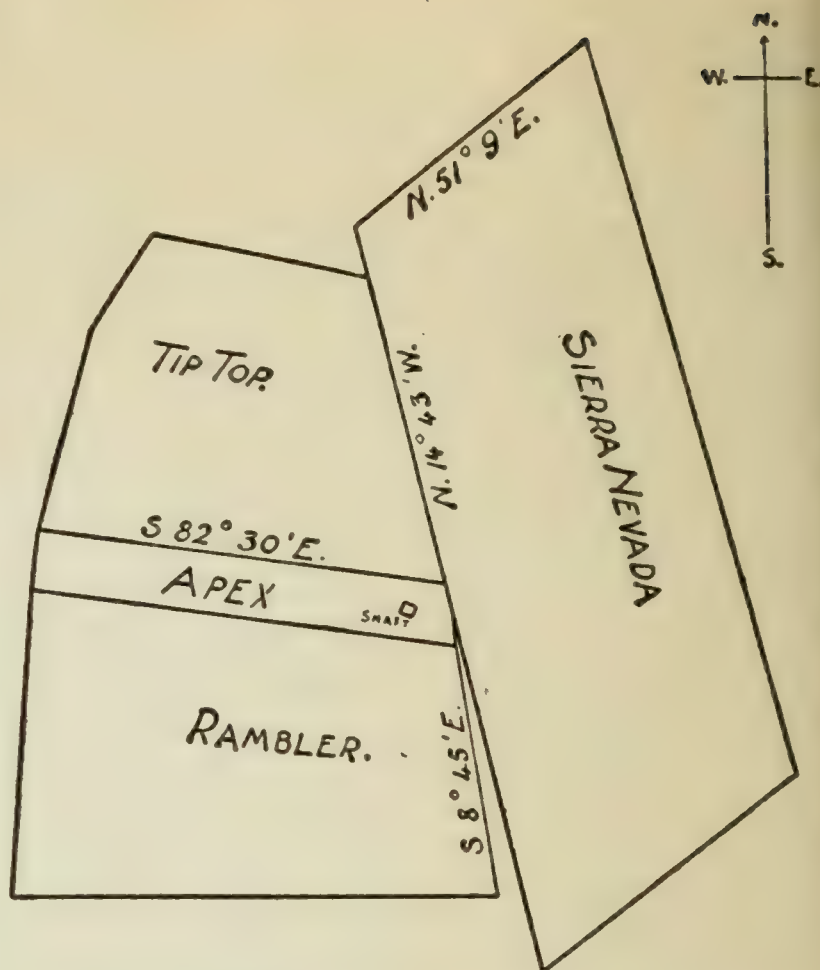
SWEET, J., dissenting.

Appeal from district court, Shoshone county; SWEET, Judge.

Action by E. M. Gilpin against the Sierra Nevada Consolidated Mining Company to restrain defendant from working a vein on plaintiff's claim. From an order denying the injunction, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by BERRY, J.:

The complaint shows the plaintiff to be the owner, and entitled to the possession, of one compact piece of mining lands in the Yreka mining-district, Shoshone county, Idaho territory, embraced within the outer boundary lines of three contiguous mining claims, called the "Apex," the "Rambler," and the "Tip Top," all constituting the plaintiff's said mining grounds; that while the plaintiff was so in possession, on the 29th of October, 1888, the defendant, a corporation, entered upon such grounds of the plaintiff, and with force, etc., took possession, and unlawfully ejected the plaintiff, and still unlawfully withholds the same from the plaintiff, to his damage of \$100,000; that the plaintiff's said claim is upon a mineral zone or belt containing gold, silver, and other precious metals; that previous to such ouster the plaintiff had been working and mining the three locations named as above, as one mining claim, continuously since the 3d day of November, 1887; that the defendant owns a mining claim adjoining on the east of these several claims of the plaintiff, so constituting one claim, the defendant's claim being called the "Sierra Nevada;" that the western side line of the Sierra Nevada is coincident with eastern end boundary line of said Tip Top claim, and also with the eastern end line of the Apex claim, and nearly coincident with the eastern end line of the Rambler claim. The relation of the properties of the parties is shown by the following diagram:



The plaintiff further claims, in substance, that the plaintiff's middle claim, the Apex, is upon and along said mineral zone or belt; that the mineral-bearing rock in place is a part of such zone, and crops to the surface in and upon the Apex location, the true apex of the zone or belt being within the exterior boundaries of the Apex claim; also, that the zone or belt is of greater width than the Apex claim, and extends on either side of the Apex, and is covered by the Rambler and Tip Top locations. The plaintiff also claims, and the fact is admitted by the defendant both in its cross-complaint and in argument, that the defendant, prior to the commencement of this action, has been working the Sierra Nevada claim, and from the under-ground tunnels in the Sierra Nevada claim has extended its works and tunnels, beyond its western side line, into and upon the grounds claimed by the plaintiff, and maintains his possession thereof against the plaintiff, and has been and is extracting and carrying away ore therefrom, and is, as the plaintiff avers, preventing the plaintiff from working his mines within his own mining grounds; that such acts are waste, and irreparable damage to the plaintiff's property; to recover which property, with other purposes, this action is in-

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stituted; that the defendant is a foreign corporation, and insolvent; and prays that pending the litigation a temporary injunction be granted, etc. The allegations of the complaint are made positively, as of the plaintiff's own knowledge, and the same are verified in the same manner.

The answer is upon information and belief, and is so verified. It admits that the defendant is a foreign corporation. Except this admission, it denies every other material allegation of the complaint, and prays that the complaint be dismissed. The defendant also files his cross-bill, and prays affirmative relief; and for such purposes makes this plaintiff, Larry O'Neill, A. D. Bevin, David Le Ban, A. M. Baldwin, Edward Leonard, W. T. Malony, William Rogers, C. J. McMillen, B. F. Bates, and W. B. Heyburn, parties defendant, and avers: (1) The corporate character of the cross-complainant. (2) That on the 6th of April, 1886, the lands of the Sierra Nevada claim were public domain, and unoccupied mineral lands, and on that day were duly claimed, by parties named, as a mining claim, under that name; that said locators, with others who had become interested in the Sierra Nevada claim, on June 3, 1886, "having discovered the true strike and course of said vein," filed an amended location of said claim, as it now appears on the diagram heretofore given; that the cross-complainant became the owner of such amended location and claim on the 15th of November, 1886, and is still such owner, and in possession of the same, and has expended \$100,000 in improvements thereon, in tunnels run in and upon said vein, cross-cuts, shafts, etc., and is still in possession of all such tunnels, etc. (3) "That, while said E. M. Gilpin claims to be the owner in his own right of said Apex mining claim, as a matter of fact, each and all of the parties hereto, to-wit, [the other defendants in this cross-complaint named,] are the owners of undivided interests therein as tenants in common with the said E. M. Gilpin," and the claim of said Gilpin to be the sole owner is untrue; wherefore said parties are joined as defendants herein in order that "their claims, together with the claim of the said E. M. Gilpin, may be fully and finally determined, adjudicated, and settled;" that said defendants "actually claim an interest

unknown to the cross-complainant in and to the premises hereinbefore described, and in and to the vein thereon, which is the Sierra Nevada lode mining claim and vein;" and, that such claim may also be settled, it is necessary that all of said defendants be made parties. (4) That all of the defendants are insolvent, and are pretended owners of a mining claim described in the complaint of the plaintiff, Gilpin, as the Apex, Rambler, and Tip Top mining claims, and, as such alleged owners, have by their under-ground workings entered upon the Sierra Nevada claim, and by shafts, etc., have gone down and broken into the works of the cross-complainant, "made by its following its said vein, upon the dip thereof, into the ground," and threaten to take and hold possession, etc., of said workings so broken into, and are engaged in under-ground works with that intent. (5) That the locations of the Apex, Rambler, and Tip Top are in fact void and of no effect, because they were made, or attempted to be made, within the line of the Sierra Nevada, etc., and that, if the defendants be allowed to carry out their designs, the cross-complainant will sustain irreparable damages. (6) And prays that the defendants named, except said Gilpin, be brought in as defendants; that all such defendants be decreed to have no right to any of the ground in controversy; that pending this suit the defendants be enjoined from entering upon, etc., any of the grounds in dispute, and upon the determination of the action the injunction be made perpetual.

A large amount of evidence was taken upon the issues so made up, and upon the 5th day of February, 1890, his honor, Judge SWEET, by order, denied the injunction. From that order an appeal is taken by the plaintiff to this court.

W. B. Heyburn and *W. W. Woods*, for appellant. *Wm. H. Clagett* and *Albert Hagan*, for respondent.

BERRY, J., (*after stating the facts.*) There are three principal points in this case: (1) Is the plaintiff the owner of the mining grounds claimed by him, so as to be entitled to invoke the aid of this court to prevent the acts complained of? (2) Is the injury alleged of such a character as to warrant the exer-

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cise of the equity power of the court? And (3) is such injury, in fact, threatened or being done?

As to the question of non-joinder of parties plaintiff, that is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury. A party may intervene to protect by injunction his own interests, as well as the interests of his co-tenants. But, if this were otherwise, the deeds to plaintiff introduced in evidence on the hearing cover all the interests of each of those persons in each of the three claims alleged by the plaintiff to belong to him, except said W. B. Heyburn, who is not shown to have any interest in either of said claims; and from the evidence there appears to be no ground for such claim.

We may first inquire, then, as to whether the plaintiff has shown sufficient to give him a standing in court. This case seems to have been tried, in part at least, upon the theory and tacit understanding that *prima facie* proof of the plaintiff's title was all, on the question of location, that need be shown in such a case as this. After some evidence had been put in by the plaintiff tending to show the validity of his location of the Apex claim the court asked: "Are you gentlemen going into matters showing everything which goes to show a valid location? Plaintiff's Counsel. We do not want to. Defendant's Counsel. We do not either. Plaintiff's Counsel. We just propose to make a *prima facie* case,"—and passed immediately from the subject of the Apex location (which to that point had been the subject of the evidence) to the location of the Rambler. This may not be considered as a stipulation releasing the plaintiff from the obligation to introduce further evidence on the location of the Apex, or that the evidence already in made a *prima facie* case of location; but it seems to express the mutual understanding between the court and the counsel on either side as to the theory and rule of law on which the case was to be heard and determined, and may well have had an effect in restricting the amount of evidence which either side might deem necessary after making a *prima facie* case. It is not to be presumed that the defendant, on a preliminary motion, and especially under such

circumstances, would introduce all the evidence he would on the trial. From a review of the plaintiff's evidence up to the close of the examination of John Gill this theory was evidently relied on; but afterwards, however, the plaintiff returned to the subject of the location of the Apex, introduced Michael Gibbons, John M. Burke, W. Clayton Miller, J. M. Porter, C. D. Porter, and other witnesses as to the facts of locations, as to the character of the ledge claimed in the Apex, its outcrop within the Apex lines, the character of the material as to ore, its appearance or non-appearance in the shaft sunk from the surface of the Apex, the dip of the underground veins, and the relation of the ledge claimed for the Apex with the defendant's drifts beyond the west side line of the Sierra Nevada, and on other points. Much of this evidence was controverted by the witnesses of the defendant, and some of it was corroborated; but, on the whole, the weight of the testimony seems to be in favor of the validity of the plaintiff's locations. He certainly makes a strong *prima facie* case, covering his surface locations, and, of course, to the vein in the Apex, whatever it may be, and wherever it may run or dip. The defendant, in its brief, says: "The plaintiff should establish his title to the surface ground under which he claims, which, to say the least, is very doubtful upon the showing." This is the defendant's view after the evidence is all in. It must be noted that the plaintiff is in possession of his claim, and the presumption is that his possession is lawful, and the burden is on the defendant to repel such presumption, and also that one object of this action is to settle the question of that right. In the cross-bill the defendant demands that it shall be settled. The action of the judge, or of either of the judges, before whom this motion has been considered, did not affect, or tend to affect, that settlement. The judges had no authority to do that. The fact of the plaintiff's compliance with the law, or his non-compliance, is a question of fact only, to be determined on the trial of the case. If, then, after all this preliminary proof on both sides is in, the question is pronounced by the defendant as "doubtful upon the showing," the *status* of the plaintiff as a proper party to demand the preservation of the property he

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is contending for is practically conceded. But without such concession the law insures such right to the plaintiff.

We may then inquire as to the character of the injury alleged. By section 4288, Rev. St. Idaho, subds. 1-3, it is provided that an injunction may be granted "(1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;" and "(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff; (3) when it appears during litigation that the defendant is doing * * * some act, in violation of the plaintiff's rights, respecting the subject of the action, and [having a] tendency to render the judgment ineffectual." The statute seems to be framed to meet the case of such an injury as is here complained of. The subject-matter of the litigation is a mine, which is valuable only for the mineral it contains. To remove that mineral is certainly waste, and waste is one ground for the issuance of this writ. It is also great injury; and that is another ground, whether it be repairable or not. Irreparable injury is still another ground, disjoined in the statute from the other grounds. To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a "tendency to render ineffectual" any judgment which the plaintiff might recover. Conceding the plaintiff's rights to his mining claim and to the ledge to be as stated in the complaint, it cannot be argued that continuing to remove the ore from the mine is not waste of the property, nor that such acts do not constitute great damage, nor that to do so does not tend to render a judgment in his favor ineffectual. The chief argument of the defendant is that the defendant is solvent, and abundantly able to pay any damage which may be found against it. But even on this point the case is against the defendant. The complaint states that the defendant is a foreign corporation. That is admitted. Also, positively, that it is insolvent. That is only denied on information

and belief. There was no evidence given on the subject at the hearing. Hence that allegation of a fact in the case, except for the purposes of pleading only, must be taken as unanswered. On the whole, upon this point, it may well be questioned whether the plaintiff has not fully shown that the injury, if consummated, will be irreparable. But, whether it be fully shown or not, the other statutory grounds, as we have seen, are sufficient to authorize him to claim an injunction.

We may then turn to the main and last consideration in this case, and inquire whether the evidence taken shows that the injury complained of is in fact being done. We have before said that, *prima facie*, a miner is confined within the boundary lines of his claim. Section 2322, Rev. St. U. S., provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The claim of the defendant is that the veins of ore on which the defendant admits it is working are veins, the top or apex of which lies inside of the side lines of the Sierra Nevada claim. On the other hand, the plaintiff avers that the apex of such veins is not within the side lines of the Sierra Nevada claim, and hence that the defendant has no right to follow it within the plaintiff's lines. His theory is that the true apex of the lode is in his Apex claim, and that its strike is nearly at right angles with the western side line of the Sierra Nevada claim, and that the dip of the vein matter is more to the south than is claimed by the defendant. But the plaintiff also urges that, wherever the apex of this vein may be, or if it have no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side lines, the defendant has no right to follow it into the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in posses-

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sion. That is a proper construction of the law. The defendant's right to that ore, if he have such right, must be based solely upon the fact that the vein has its apex within its own side lines. The difficulty in determining this matter is greatly increased by the fact that no up-raises upon the vein are shown to have been made by the defendant to determine its apex, or to show its dip or trend. No shafts have been sunk on any of the ground in question, except it be the shaft in the Apex claim, which penetrated the workings of the defendant. Considerable evidence has been produced, mostly (unless we except the evidence of the Apex shaft, and diagrams and plats of defendant's workings) of a speculative character. There is in that evidence much conflict on material points. But, considering all of the witnesses of equal credibility, the circumstances under which their knowledge was obtained, and the probabilities of their correct understanding of the facts, throws light upon many of these apparent discrepancies; and the actual measurements and plats of skillful engineers show controlling facts, in view of which the oral evidence must be understood, and erroneous theories must be corrected. The courses of the surface lines of these several claims require careful attention. The fact that the Sierra Nevada claim has been relocated and swung around from its original location has little or no bearing upon what is here the main question. We are to consider the claim as it now is.

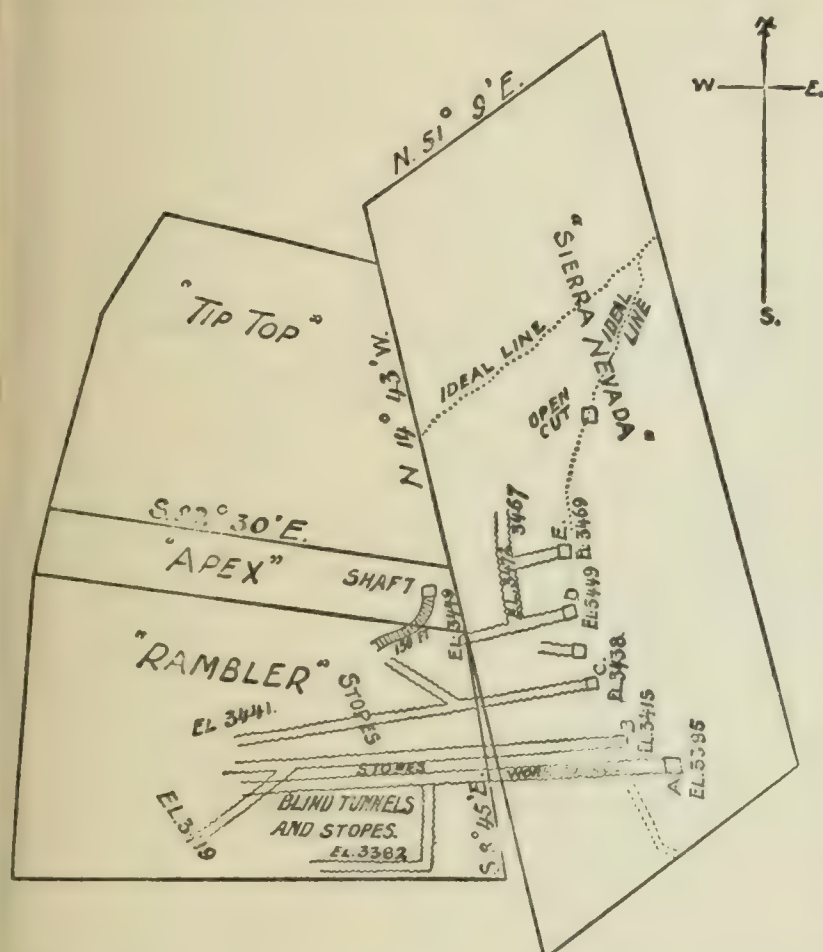
It is proved beyond a question that the plaintiff sunk a shaft from about midway between the side lines of the Apex claim, and near the eastern end line, in what is described as "ledge matter," consisting of quartzite, talc, and some ore, at a considerable deflection to the south from a vertical line, following the dip of this so-called "ledge matter" in its several variations, but always inclining to the south, a distance of about 150 feet, and was led thereby upon and into the under-ground workings of the defendant; that such shaft, in its descent, when the defendant's work was struck, had passed beyond the side line of the Apex claim, a considerable distance into the Rambler grounds; that in the descent the plaintiff found some ore before reaching the defendant's works,

and had put some in sacks before reaching the lagging over the defendant's tunnel. This so-called "ledge matter" is testified to as continuous. It is worthy of note that the ore which the defendant was tunneling and stoping out was, in character, carbonate and galena. "Witness Gibbons. Question. State from your observation as to the quality of the ore. Answer. It was carbonate, I said." This does not seem to be controverted, and the fact may bear upon the question of apex or dip; for it is a matter of common knowledge that carbonate ores are sometimes found in blanket veins without apices or dips. The extraordinary width of this mineral belt or zone—extending, as all concede, often to many hundreds of feet—is unusual, and hardly conceivable in a fissure vein; also its position, almost horizontal, at least in the claims in question. All, taken together, may raise strong doubts, in the absence of actual demonstration, of its being in its main breadth a fissure vein at all. If that were so, it would be an end to the controversy between the parties, and the injunction should, of course, issue. But the case is presented as concerning a fissure vein only, with the usual apices and dips; and so we must consider it, by the light given us by the evidence. In examining the maps and diagrams in the case, our attention is at once called to the fact, from the map of the defendant, (Exhibit X,) that the mean dip of the vein in the grounds claimed by the plaintiff, corresponding, also, mainly to the evidence of the witness, is south, 5 degrees west. The north side line of the Apex claim runs south, 82 degrees 30 minutes east. Hence such dip is only $2\frac{1}{2}$ degrees east of a right angle with that side line of the Apex claim, or nearly at right angles with it. The lead of the vein as claimed by the defendant on that map seems by inspection to be about north, from 5 to 10 degrees east; so that the average dip, as the defendant claims it, would deflect from the lead of the Sierra Nevada ledge something less than 5 degrees,—possibly not at all. It was stated on the argument, and not controverted, and as we think the rule is, that the true average dip of a vein is always at right angles to the lead; and, if the veins so being worked by the defendant are really dips from the Sierra Nevada claim or lead, it is difficult

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to harmonize these principles and facts. But they do all harmonize with the claim and theory of the plaintiff. To comply with the defendant's theory, the average true dip should be west, and perhaps some degrees north of west, or at least 90 degrees from what it is shown to be on the map, and also as stated by the witnesses.

The following diagram, drawn from the exhibits, mostly of the defendant, will tend still further to illustrate the facts in the case:



Tunnel A is a working tunnel, and some distance below the plane of the mineral and of the tunnels upon the ore. All the tunnels, B, C, D, E, are claimed by the defendant to enter on the outcrop of the ledge; but the elevations marked on Exhibit X show that such outcrop is not an apex or crest of a vein dipping laterally from it, but that it is an outcrop on the mountain side of a mineral deposit, nearly horizontal in position, but rising slightly as it recedes into the hill, and at right angles with a line formed by the mouths of these tunnels. All these tunnels run on the foot wall, or rather on the bed-rock or floor of the ore deposits. Here there can be no dispute as to the respective elevations of the mineral at the points named. The elevation of the bottom of the mouth of

tunnel B is 3,415 feet. At its face, in the Rambler claim, it is 3,419 feet,—a rise of 4 feet. The elevation at the mouth of tunnel C, distant from B about 150 feet, is 3,438 feet. At a point a little over 200 feet west, where the measurement was taken, its elevation is 3,441 feet,—a rise of 3 feet. Tunnel D, at its mouth, is 3,449 feet. At about 150 feet west, its elevation is 3,454 feet,—a rise of 5 feet. At a point near the southeast corner of the Apex claim, it falls to 3,448 feet,—a depression of 1 foot below its mouth, about 250 feet distant. The elevation of tunnel E at its mouth is 3,469 feet. In about 100 feet it descends to 3,467 feet, and in about 60 feet further rises to 3,472, or to a plane 3 feet above its mouth. It is admitted on the argument that the water from these workings of the defendant flows out at the mouths of these tunnels. When we consider that these tunnels are practically almost parallel with each other, and running nearly west, it seems impossible to conclude that these deposits of ores in any way dip from anything yet shown in the Nevada claim. They all rise upward from the entire Sierra Nevada system, whatever its formation may be.

But, further considering the tunnel developments, there is not one of them that does not leave the line of the Sierra Nevada outcrop, practically, at right angles to it,—each, as testified by the defendant's witnesses, upon a vein of mineral, and pursuing an almost due westerly course; tunnel B, at least, running over 600 feet,—and all ending among the stopes, uniting these tunnels at their westerly ends. Not one tunnel indicates a lead in the direction of what the defendant claims as the apex of its mining claim; but all of them do indicate an extension of the mineral belt or zone westerly, at almost right angles from the defendant's outcrops, longitudinally with the side lines of plaintiff's claims, through and westerly of the point reached by the plaintiff's shaft, from what is called the "discovery point" of the Apex claim, the bed-rock or floor of the whole system rising slightly from the outcrop on the Sierra Nevada as the system, zone, or mineral belt and the defendant's tunnels reach to the westward. Another fact, heretofore mentioned, has proof positive in

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the several elevations of these tunnels, namely, that the dip of the floor of this mineral belt or zone is from north to south. The elevation at the mouth of tunnel B is 3,415 feet. One hundred and fifty feet northerly, at the mouth of C, the rise is 23 feet. At D, 125 feet further, the rise is 11 feet. From D to C, 100 feet further north, it is 20 feet. So that the rise from B to C—a distance, by inspection of the map, of about 375 feet—crossing this mineral belt, is 54 feet; and as far west as these tunnels go along this belt the same relations in the elevations of the southern portions seem to be maintained. This also corroborates the evidence of some of the witnesses, and is consistent with plaintiff's claim.

From these and other like facts, it seems to us as plain that defendant shows no reason whatever to justify it in extending its works, and extracting the ore in this mineral ground west of its own side line of the Sierra Nevada claim, and within the boundary lines of the plaintiff's mining claim. The order denying the injunction should be overruled, and a temporary injunction should issue, as prayed in the complaint. It is so ordered.

BEATTY, C. J., (*specially concurring.*) Upon the record we have in this matter, were it a hearing upon the merits, I would hesitate to agree to a reversal; for, from the examinations I have been able to make of the testimony, I think its weight seems to be with the defendant. This, however, is not to settle the title to the ground in controversy, but only to preserve its value until that title can be settled upon full hearing. Admitting the defendant is right, the inconvenience to it from an injunction will be less than would be the damage to plaintiff should he prove to be right. Always, in questions of injunction on the working of mines, the doubt should be resolved in favor of granting the writ. There is evidence for and against plaintiff's claim of a ledge in his Apex ground, and in the shaft therein; but the undisputed fact, which with me is almost controlling, is that the various workings of the Sierra Nevada show a nearly flat vein, with a much more decided dip to the south than to the west, which so far sustains plaintiff's theory that the vein runs easterly and westerly, instead

of mere northerly and southerly, as defendant claims. At the same time it must be admitted that, from all the facts before us, the general course of the great principal vein through the country, for miles, is as defendant holds. Whether that dip to the south may be from some dislocation of the ledge, from neighboring dikes, or other causes,—may be a part of another cross-ledge,—I do not undertake to answer. The simple fact is, it is there; and, until clearly explained as only the result of some dislocation of the ledge, and not its true dip, I think plaintiff should be protected. I do not agree to any suggestion that these workings are a part of a wide vein, on the zone theory. While it may so prove, I do not think the facts before us so show; and I will not indulge in any theory. My concurrence in reversing the order refusing the plaintiff an injunction is based alone upon the reasons I have here stated.

SWEET, J., (*dissenting.*) The plaintiff is the owner of what is termed the "Apex Mining Property," situated in Yreka mining district, Shoshone county, Idaho. This property is composed of three claims, called the "Tip Top," "Apex," and "Rambler." The defendant, a corporation, is the owner of the Sierra Nevada mining claim. The properties of plaintiff and defendant join, the three first-named claims lying along the west side line of the Sierra Nevada. Plaintiff asks that a writ be issued, restraining the defendant from mining and extracting ore from within the grounds of the Rambler mining claim. Defendant admits that it is extracting ore from within the lines of the Rambler, but avers that it has a lawful right so to do, by reason of the alleged fact that in crossing the west side line of the Sierra Nevada, and entering the ground of the Rambler, it is following a vein upon its dip, the apex of which is within the boundary lines of the Sierra Nevada. Plaintiff admits that, if defendant is following a vein upon its dip, the apex of which lies within the defendant's lines, it has a perfect right so to do, but avers that defendant is not following the vein upon its dip, but upon its strike. It is conceded by counsel that the vein in controversy is situated on or is a part of the great mineral ledge

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or vein beginning with the Sullivan, in Milo gulch, and extending to the Eureka, in Government gulch, a distance of about two miles. Both sides appeal to the same authorities, the same cases, and, one may almost say, to the same facts. Maps have been filed and witnesses have been examined touching every phase of the controversy; but, after a careful consideration of the entire matter, partly from the evidence and partly from the maps, acknowledged by both parties to be correct, I find myself unable to assent to nearly all the conclusions presented in the opinion just rendered, and believe it to be my duty to dissent from the same at some length.

If the general strike or trend of the vein is in an easterly and westerly direction, it must necessarily cross the side lines of the Sierra Nevada on its strike; and, if it so crosses the Sierra Nevada on its strike, it must pass through the Apex property on its strike, and its true dip would, under the showing made, be to the south. If, on the other hand, the general strike or trend of the vein is north and south, and admitting that it crosses the Sierra Nevada in a north-westerly and south-easterly direction, then, as a matter of course and as a matter of fact, its true dip could not be either to the north or south. It must be either to the east or west, or to the south-west or north-east, depending upon the question as to whether there is considerable variation in the vein from a direct course of north and south. It is not necessary for me to deal extensively with the authorities cited, for the reason that no serious legal propositions are in dispute. As before stated, it is almost entirely a question of fact; certain legal propositions being, perhaps, more or less involved.

I cannot assent to the conclusion that it is the duty of the defendant to show that plaintiff is not the owner of the surface ground embraced within the lines of the Rambler. I believe the correct determination of this phase of the question to be as follows: Plaintiff must show, by a preponderance of evidence, that he is entitled to the writ asked for by reason of his ownership of the ground, and must also prove his ownership of the ground by a preponderance of testimony. Having established his title to the Rambler, (sufficiently, at least, for the purposes of this

action,) and thus becoming the legal owner, *prima facie*, of all ore found within its boundary lines, it would devolve upon defendant to show by a preponderance of testimony that it was authorized to cross its own side line into the ground of the Rambler. I am therefore disposed to consider the right of the defendant to enter the ground of the Rambler solely from two stand-points: *First*, and principally, as to whether defendant is following the Sierra Nevada vein upon its dip; and, *second*, the validity of the Rambler location,—the latter question being hereinafter discussed, from the stand-point raised by counsel for plaintiff, upon what must be termed a theory of the case, but a theory that has been implicitly accepted and relied upon in the decision just rendered.

The court in this instance would not, of course, try the title to the surface ground of either of the properties involved. It would devolve upon the plaintiff, however, to show, *prima facie*, a valid location; and this must depend, first, upon a valid discovery, otherwise plaintiff would simply appear on behalf of the United States to enjoin the defendant from mining in ground that did not belong to it, or from unlawfully following its vein beyond its side lines. Such a position is not assumed by plaintiff, but reliance is placed upon the *prima facie* discovery.

Plaintiff seems to rely upon two theories, as nearly, at least, as I am able to ascertain his exact claim. One is that his location is based upon the actual discovery of the Sierra Nevada vein, as the term "vein" is commonly understood, within the lines of the Apex; and that the Sierra Nevada location was made upon this same vein as it extended in an easterly and westerly direction through the ground covered by the Sierra Nevada location. It is also proposed to place this case within the rule laid down in *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, reprinted in 9 Morr. Min. R. 578. At least, whether plaintiff relies upon the *Eureka v. Richmond* decision or not, the opinion presented is based upon that theory. This may be due to the fact that counsel for plaintiff, during his very forcible presentation of the case, always referred to the vein as a zone or belt. In the opinion rendered, it seems to be treated as a zone or belt. The conclusion

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must be reached, not from the evidence submitted in the case, but from the declarations of counsel. This theory is that what has heretofore been called a "vein," extending from the Sullivan location in Milo gulch to the Eureka location in Government gulch, is a mineralized belt or zone, and that a location made on this belt is a location within the law; and that, therefore, a location within the boundary lines of the Apex was valid, whether any ore body located in or extending through this belt came to the surface at that point or not. In *Eureka Con. Min. Co. v. Richmond Min. Co.*, Justice FIELD, speaking for the court, defines the meaning of the word "lode," as used in the act of congress, as follows: "But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

Having defined a "lode," within the meaning of the act of congress, to be, under some circumstances, a zone or belt of mineral, Justice FIELD discusses the vein in controversy in the *Eureka-Richmond Case*, and says: "We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness, and on its north side, for a like extent, by a belt of clay or shale ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to

be separated by a bare seam less than an inch in width. From that point they diverge until, on the surface in the Eureka mine, they are about five hundred feet apart; and on the surface in the Richmond mine, about eight hundred feet. The quartzite had a general dip to the north at an angle of about 45 degrees, subject to some local variation. As the course changes, the clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart."

Thus, in the *Eureka Case*, we have a belt of mineralized limestone, lying between formations of quartzite and shale. The ore is found in pockets or bodies, regardless of any uniformity in course, except as to the general course of the entire belt. Justice FIELD also defines a "lead" to be a vein or seam or strata indicating mineral, and, followed by the miner, takes him to the body of ore he seeks. Of course, it is understood that this vein or seam or strata must be in place; and by being "in place" it means that the mineralized substance, whatever it may be, is presented in a separate and distinct form from that which lies upon either side of it; although, perhaps, it is not necessary for the discovery that both walls be perfectly defined, and the vein, as a fissure vein, be perfectly demonstrated.

Plaintiff does not pretend that he has a vein of pay ore from the surface in the Apex ground to the point where the workings of the Apex come in conflict with those of the Sierra Nevada. He claims a seam of mineralized talc, iron, and quartzite, considered by him as an indication of ore, and that, as a miner, he believed would lead him to ore. Starting on this seam at the surface, he followed it until he reached the workings of the Sierra Nevada, and he therefore claims that the finding of ore justified his theory in following the indications mentioned. To justify the location of material of this sort in the mind of a practical miner, and in the absence of knowledge on his part that he would find a body of ore by sinking the shaft, whether he had indications of mineral or not,

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it is doubtful if he would expend very much money in following such an indication, unless it lay between well-defined walls, and was, in fact, a fissure vein. Then he would spend a large or a small sum of money, depending upon how strong the indications were, and whether or not he might be an adventuresome or a very conservative miner. In this case the plaintiff was bound to discover the ore, because the defendant was already taking it from the ground beneath his shaft; and, as a matter of course, it was only a question of the depth of the shaft until the ore body would be reached. I am of the opinion that this position is not consistent with the other claim made by plaintiff,—that the Sierra Nevada is a well and clearly defined ledge, extending in an easterly and westerly direction, crossing the Sierra Nevada, and entering the ground of the Rambler upon the strike of the vein, instead of upon its dip. It is hardly possible that the two conditions can exist. If this entire quartzite belt is similar to the belt or zone described by Justice FIELD in *Eureka Con. Min. Co. v. Richmond Min. Co.*, then the Sierra Nevada can be but a pocket or chute of ore in that belt. Messrs. Burke, Clement, and Porter agree that, in examining the under-ground workings of the Sierra Nevada, whatever its course or dip may be, they found a perfect vein, with perfect walls, and in the judgment of each it was a complete and genuine fissure.

Again, the quartzite belt is not sufficiently defined by any of the witnesses to authorize a court in sending the question to a jury on that issue. There must be something more to this belt to make it a mineralized zone, within Justice FIELD's decision, than iron-stained quartzite. By the witnesses referred to, the Sierra Nevada vein is described as a very strong and powerful one. That it should stain the adjoining rock for a greater or less distance along its entire course is not at all remarkable, and would, perhaps, be expected. In defining the character of this fissure, the witnesses describe it as being incased within walls of quartzite, with a gangue between the ore body and the walls. The only thing to indicate that it is a part of a belt is that both walls are of quartzite, and this only demonstrates that it is not a contact vein.

To return to the theory that it is a belt or zone of mineral, composed of many veins and deposits, it must be borne in mind that no witness has defined it. In the *Eureka Case*, the mineral belt, which was held to be a zone, was confined within well-defined walls of quartzite and shale; and the only thing remarkable about the vein in that case was its extraordinary width and narrowness at different places. There is no evidence whatever as to the well-defined limits, or as to the lead in question being incased between walls of any character. Proceeding on this theory, the plaintiff followed a seam composed of talc, iron, and mineralized quartzite from the surface in the Apex to the point where he came in conflict with the workings of the Sierra Nevada, within the Rambler lines. Plaintiff had the lead, but where did it lead him? It led him to a body of ore. To what body of ore? To the Sierra Nevada, which had been followed from the surface, where the outcropping was plain and undisputed, to the point where plaintiff's workings came in contact with the ore. The defendant, to be sure, had crossed the side line of its claim; and this brings us to the second phase of the case. In crossing the side line, was it following the vein upon its dip, or upon its strike? And thus the two questions of fact in this very important case are before us.

In passing from the belt or zone theory of the plaintiff, (if it may be said that the plaintiff has any such theory,) which is, that a location anywhere on the belt, outside the lines of any other valid claim, is good, I can state that, if plaintiff had established a case sufficient to bring the issue at bar within the rule laid down in *Eureka Con. Min. Co. v. Richmond Min. Co.*, this investigation would assume more difficult proportions. Within the zone or belt theory, a location was made upon the Apex and Rambler. The examination of the witnesses shows that the discovery amounted to iron, manganese, and iron-stained quartzite. So far as any evidence has been introduced on the subject, such is the general character of the entire mountain. Again, I say, whether this mountain is in itself a vein, lying between distinct formations and containing different veins and

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pockets, as in the Eureka-Richmond Case, there is not sufficient evidence to show; and, unless it does come within that rule, it is clear that no valid discovery was made on these claims lying to the west of the Nevada, unless the course of the vein is east and west, and not north-west and south-east. Under the theory adopted in the opinion just submitted, the location of the Apex is valid, because, if I correctly understand it, it is higher on the surface of the mountain than the location in the Sierra Nevada. Carrying out this theory, if the entire mountain is a vein, the one who finally locates on the very summit has the apex of the vein. Three or four locations of this character, if such reasoning be correct, will secure all the ore in the Coeur d'Alene.

Defendant contends that the Sierra Nevada vein, as located, constitutes a vein, within the meaning of the law; not as contemplated in the Eureka-Richmond Case, but that it is a true and complete fissure, and in no sense a part or portion of such a belt as is defined in said case. Each and every witness testified that this vein was perfect in every particular. Its perfection and completeness were emphasized by witnesses supposed to be interested with, or in sympathy with, both plaintiff and defendant; and, as already stated, on all of the evidence presented, I am forced to the same conclusion, and think no court justified in accepting the zone or belt theory for any purpose whatever. What the future may develop I am not here to decide. Plaintiff and defendant agree that the Nevada vein, whether it be a mineralized zone or belt, or a distinct fissure vein, as commonly understood, is a part of the great vein of mineral extending from the Sullivan to the Eureka, a distance of about two miles. Both parties admit that the true dip of a vein is at right angles to its true strike; and, as a matter of course, the converse must be true. If, therefore, the dip can be obtained, there is no difficulty in settling the true strike or course of the vein; and, on the other hand, if we can obtain the true course of the vein, it would settle the true dip. The parties to this action agree up to this point.

Plaintiff, however, maintains that the true

dip can and should be ascertained from the workings within the Sierra Nevada. The defendant relies upon what the workings in the mine demonstrate, as well as upon the well-known course of the vein. I am of the opinion that the true dip of this vein may be more correctly ascertained by examining the map showing the general course of the vein along its entire known length, in connection with the workings, than by attempting to settle it from the dip in the comparatively few feet exposed in the workings of the Sierra Nevada.

It is claimed by plaintiff that the general course is easterly and westerly; and by the defendant, that it is north-west and south-east. Plaintiff urges, in vindication of his theory, that, while the vein dips to the south-west, it dips to the south more than to the south-west, and that this fact is demonstrated by the entire workings in the Nevada. Defendant admits that, at the place indicated, the dip is more to the south than to the south-west; but claims that, inasmuch as the course of the vein is in a north-westerly and a south-easterly direction, the dip to the south is but a wave in the vein, for the reason that it is impossible for a vein running north-westerly and south-easterly to dip to the south, because the dip, as both admit, must be at right angles to the true course. Mr. Clement testified that the course of the vein through the Nevada was north and south, by 40 deg. west. Mr. Gibbons testified that the vein crosses the west side line of the Sierra Nevada at right angles. If this be true, the position taken by plaintiff is correct. Without going into a consideration of the evidence upon this point, I must conclude, from the croppings, as they appear, without dispute, along the surface of the Sierra Nevada claim; from the fact that on a line drawn from the Sullivan to the Eureka the general course or trend of this vein would be north-west and south-east; from the fact that it dips to the south-west with as much uniformity as to the south,—that it cannot cross the west line of the Sierra Nevada at right angles, and that its true dip would not be to the south, notwithstanding it may thus appear from the tunnels now run upon the foot wall within the Nevada claim.

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Conceding that the true course of this vein is north-west and south-east, the true dip, at right angles with that course, would be south-west; which would certainly be parallel with the Nevada end lines, making said end lines practically at right angles with the true course of the vein, and the side lines substantially parallel therewith. This conclusion as to the dip and strike of the vein is based upon taking into consideration the entire course of the vein between the points indicated, the statements of witnesses, and the admissions of counsel. I do not believe the true dip of this vein can be ascertained from the underground workings in any one mine on its course, at the depth as yet attained by any of these properties. No doubt the entire vein runs in waves, as it crosses gulches and climbs mountains, until it straightens up under the mountains, or passes beyond the effect of surface disturbances.

My conclusions are: (1) If the vein in question does not come within the rule laid down in the Eureka-Richmond Case, the Rambler location is void. There is no proof whatever that the mineralized belt, or portion of the mountain upon which the Rambler is located, is incased within walls; or, in other words, that it constitutes a lead, lode, or vein, with the meaning of the rule laid down in the Eureka-Richmond Case. Indeed, the showing as to the completeness of the Sierra Nevada vein is overwhelming; and upon that question, as the evidence now stands, it would be impossible to send the issue to a jury. (2) The true course of the vein being, in my judgment, north-west and south-east, it is impossible that its true dip could be a little east of south; and, as it is conceded that the vein crosses the south end line of the Nevada, it is impossible that it should cross the west side line at right angles. Under the showing made, the true strike must be practically at right angles with the end lines of the Nevada. I have dissented at considerable length, because I deem the conclusions reached so far from the merits involved in the issue at bar as to be dangerous to the property interests of the community, in the absence of a demonstration of the theory set forth and adopted in the opinion just rendered.

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(March 5, 1890.)

ACTION ON NOTE—PAROL EVIDENCE—COMPETENCY.

In an action on a promissory note, it appeared that plaintiff wished defendant to manage a mine which he was about to purchase, and that defendant was unwilling to do so without an interest in it; that plaintiff paid for the mine, and had it conveyed to them jointly, and took defendant's note for half the purchase price,—*held*, that parol evidence of a contemporaneous agreement that defendant might examine the mine, and, if dissatisfied, convey his interest to plaintiff, and the note should be canceled, was inadmissible, as varying the terms of the note. BERRY, J., dissenting.

Appeal from district court, Shoshone county.

Action by H. Grafton Dulaney against John M. Burke on a promissory note. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Woods & Heyburn, for appellant.

The conveyance of the mining property to the defendant was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterwards to be conveyed back in the event of certain contingencies, and that the note was given at the time under an agreement that it was not to be paid. This fact was sought to be proven by the defendant, and the court below refused to admit the evidence. The answer raises this defense squarely, and in law it was a good defense, and the refusal to receive the evidence was error. *Schindler v. Muhlheiser*, 45 Conn. 153; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. Rep. 408; *Benton v. Martin*, 52 N. Y. 570; *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. Rep. 834; *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. Rep. 228; *Colman v. Post*, 10 Mich. 422; *Catlin v. Birchard*, 13 Mich. 110; *Bowker v. Johnson*, 17 Mich. 46; *Clarke v. Tappin*, 32 Conn. 66; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. Rep. 145.

Albert Hagan and Frank Ganahl, for respondent.

In an action upon a note which is absolute upon its face no evidence can be produced by parol that it should only be paid on a certain contingency. *Swank v. Nich-*

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ols, 24 Ind. 199; Schurmeier v. Johnson, 10 Minn. 319, (Gil. 250;); Foy v. Blackstone, 31 Ill. 538; Myers v. Sunderland, 4 G. Greene, 567; Cunningham v. Wardwell, 12 Me. 466; Boody v. McKenney, 23 Me. 517.

A verbal contract made at the time a promissory note is executed, varying the terms of the note, cannot be set up to defeat a suit on the note. Calhoun v. Davis, 2 Ind. 532; Fry v. Blackstone, 31 Ill. 538; Burge v. Dishman, 5 Blackf. 272; Mahan v. Sherman, 7 Blackf. 378; Columbia v. Amos, 5 Ind. 184; Tucker v. Talbott, 15 Ind. 115; Nill v. Comporet, Id. 243; Williams v. Beazley, 3 J. J. Marsh. 577; Cole v. Hundley, 8 Smedes & M. 473; Barton v. Wilkins, 1 Mo. 74; Anspach v. Bast, 52 Pa. St. 356; Daniel v. Ray, 1 Hill, (S. C.) 32.

SWEET, J. On August 10, 1883, at Salt Lake City, Utah, John M. Burke executed and delivered a certain promissory note in the sum of \$4,308.80, with interest at the rate of 6 per cent. per annum until paid, due one year after date, and payable to H. Grafton Dulaney, or order. Before the maturity of said note defendant, Burke, became a resident of Idaho territory, and on the 7th day of October, 1887, plaintiff commenced an action in the district court of Idaho territory, first judicial district, in and for Shoshone county, for the collection of said note. Defendant sets up as a defense in said action an oral agreement made at the time of, or prior to the execution of, said note, the substance of which is as follows: "That plaintiff was about to consummate the purchase of two mining claims, and desired the defendant to become the superintendent or manager thereof. To this proposition defendant replied that he did not care to enter into such an arrangement, unless there was something in it for him. Plaintiff thereupon offered to purchase the property, giving to defendant a one-half interest therein, the defendant to execute to plaintiff his promissory note for one-half the purchase price of said property, at the same time giving to defendant an opportunity to examine and test said mining property; and further agreeing that if, after such examination, defendant did not desire to pay the note, and retain his interest in the property, he

might surrender said interest to plaintiff, and that, upon surrendering this interest, plaintiff would cancel defendant's note given therefor. That, in accordance with this agreement, plaintiff purchased the property, taking a deed therefor in the names of plaintiff and defendant. That afterwards defendant did examine and test the mines thus purchased, and concluded that he did not care to retain his interest in the same, and notified plaintiff that he was ready to execute a deed in favor of plaintiff to his interest in said mines whenever plaintiff would cancel said note. Wherefore, he prays judgment against plaintiff for the cancellation of said note, and for his costs," etc.

At the trial defendant offered to prove said agreement, at the same time tendering a deed to the property, and plaintiff objected to the introduction of evidence to such effect, on the ground that it was an attempt to vary the terms of a written contract by parol evidence. The offer thus made was tendered in various forms, and always met by the same objection; and this objection, for the reason above set forth, was sustained by the court. The case was tried without a jury, and the court gave judgment for plaintiff in the sum of \$5,692.80. Defendant excepted to the ruling of the court in excluding the evidence by which it was proposed to prove the agreement before mentioned; and the ruling thus made is the error assigned upon which defendant and appellant relies to reverse the order of the court below, overruling defendant's motion for a new trial. Defendant cites Schindler v. Muhlheiser, 45 Conn. 153, as an authority in support of his interpretation of the law. Several other authorities are cited by appellant, more or less in line with the case just referred to; but unquestionably Schindler v. Muhlheiser is the strongest case presented by the appellant as tending to support his claim in the issue at bar. After stating the facts in this case, the court reaches three separate and distinct conclusions. They are as follows: "(1) The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. (2) That agreement shows that it was not given as evidence of any existing indebtedness, but as a means of accomplishing an ulterior object wholly in

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the interest and for the benefit of the plaintiff. (3) Consequently the note was an accommodation note, the collection of which would operate as a fraud upon the defendant." We need not quote authorities to establish the principle that fraud vitiates any contract. The quotation of authorities upon this proposition is wholly unnecessary; and we repeat what has already been decided over and over by every court that ever considered the question, and what has been declared to be the law by every text-writer discussing it, that any contract may be assailed upon the charge of fraud, mistake, or failure of consideration.

We will now consider whether the case at bar comes within any of these rules, or whether it comes within the rule laid down in the case first cited. Defendant offered to prove that the agreement was made prior to the execution of the note. To this extent, it bears some resemblance to the first conclusion reached by the court in *Schindler v. Muhlheiser*. But after all, no contract can be executed before it is discussed in all of its forms and phases, and thoroughly understood and agreed on between the parties; and the execution of a written agreement or contract, in accordance with such a discussion, would not be a fulfilling of an antecedent agreement. It is simply placing the agreement in writing, and thereafter the contents of the written agreement are to bear witness as to the intent of the parties. Beyond this first conclusion, however, the facts ascertained by the court in the case cited do not apply to the matter at bar. It was there found that the note was executed "wholly in the interest and for the benefit of the plaintiff." The note having been executed for the benefit of the plaintiff, it was further found to be an accommodation note, and that its collection would operate as a fraud upon the defendant. There is nothing in this case to indicate such a condition of affairs. Defendant desired "a show to make something for himself." By what course of reasoning are we to conclude that it was to the benefit of plaintiff to pay defendant's half of the purchase price of the property, and accept defendant's note therefor? How did that become an accommodation to the plaintiff? How could plaintiff perpetrate a fraud upon the defendant by advancing the latter's half

of the purchase price of this property, and carrying it for him during the time specified in the note? If we were to speculate outside the written conditions of the agreement, we might say that there was more danger of plaintiff giving defendant an opportunity to watch the development of the mine for a year, and then, if the progress of the work was such as to discourage its owners, permit him to repudiate the contract, then there would be danger of fraud upon the defendant by generously advancing the money to carry his portion of the purchase price.

Now let us consider the conditions under which parole evidence may be admitted to vary the terms of a promissory note. In *Schurmeier v. Johnson*, 10 Minn. 319, (Gil. 252,) the court, in discussing this question says: "It is a rule well settled that in the absence of fraud or mistake parole evidence is inadmissible at law or in equity to vary a written contract. Such a contract cannot be varied, explained away, or rendered ineffectual by parole proof of any conversation or stipulation prior to or contemporaneous with its execution. It is conclusively presumed to set forth the whole agreement of the parties, and the extent and manner of their agreement." Does defendant allege fraud as a reason why the plain terms and conditions of this note should not be executed? Does he aver a failure of consideration? Does he allege a mistake? These are the only grounds upon which the plain and specific utterances of a written agreement may be assailed and set aside. Not one of them comes within the proof tendered by defendant at the trial. He admits the execution, admits the consideration, admits the execution of the deed in his own name, admits that the note calls for the sum agreed to be paid for the property. Clearly, then, he is not within the rule which authorizes a court to set aside the provisions of a written contract upon the ground of fraud, mistake, or failure of consideration. What, then, does he plead? He sets up, in effect, that the agreement is not all in writing, and asks permission to add to the contract signed by him on August 10, 1883, by inserting a condition concerning which the contract is absolutely silent. It is vain to say that these offers do not tend to vary the terms of the written agreement. An agreement for an option to purchase this half

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interest would have been as different in substance and in effect from the agreement actually before us as it is possible to make one contract different from another. Contracts cannot be added to or taken from in this manner. In *Brown v. Spofford*, 95 U. S. 480, this question is directly passed upon by the court. We quote from the decision: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence. And that proposition is universally true where a promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument." The court then states the issue involved in *Brown v. Wiley*, 20 How. 442, and approves the same. Further on, in the same case, (481,) the court say: "Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the circuit court the evidence was admitted; but the court, when the case was brought here on a writ of error, reversed the judgment, holding that the evidence should have been excluded;" citing *Banks v. Dunn*, 6 Pet. 51. Continuing, and on the same page: "Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract." *Specht v. Howard*, 16 Wall. 564. In the same case the court indorses the quotation already made from 10 Minn., in the following language: "In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing a bill or note cannot be permitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract;" citing *Forsyth v. Kimball*, 91 U. S. 291.

Defendant contends that the payment of this note was dependent upon a condition, or that its delivery was dependent upon a condition, it matters not which. There is nothing conditional about the written agreement. It states clearly and specifically what the maker of the note promises to do. There is no condition about it; and if there was an agreement entered into at the time that defendant might do something else at his option, it would be a plain contradiction of the terms of the instrument itself. Quoting further from *Brown v. Spofford*, (482,) we find a declaration directly upon this point: "Parol evidence of an agreement made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition." Authorities in support of this principle might be continued indefinitely. Those cited have been referred to, not so much to establish the principle, because it is conceded by both parties in the matter at bar, as to show, from the similarity of questions involved in the cases referred to, the erroneous position taken by defendant. Therefore, as the evidence rejected by the court below tended to establish an oral agreement different in form, different in purpose, and different in effect from the written contract in issue, and as the effort to change those conditions is not based upon either a failure of consideration, fraud, or mistake, we hold that the court below did not err in refusing to admit the testimony, and that the judgment must be affirmed.

BEATTY, C. J., concurs.

BERRY, J., (*dissenting*.) This is an action upon a promissory note, made by the defendant to this plaintiff at Salt Lake City, Utah, August 10, 1883, payable one year after date. The action is between the original parties to the note. The complaint is in the usual form. The amended answer sets up that "the note mentioned and set forth in the complaint was given for the consideration and under the conditions following, to-

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wit: On the 10th day of August, 1883, the plaintiff had negotiated the purchase of the two mining properties at, etc., territory of Utah, being the undivided half of the properties known as the 'Live Yankee' lode claim, and the 'Mary Ellen' lode claim, of M. Cullen and Dennis Ryan, and orally agreed with this defendant that he would purchase the said properties, and give this defendant the option of becoming the owner of the undivided one-sixth of each of said claims, for the same price which plaintiff paid for said interests, to be paid by the defendant to the plaintiff one year after date, in the event the defendant should desire to become the owner and purchaser of said interests. The defendant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought the said property." That in the consummation of the purchase of said properties, at the instance solely of plaintiff, the conveyance therefor was taken in the joint names of plaintiff and defendant, and plaintiff requested defendant to give his note for his share of the purchase price, the same being the sum of \$4,308.80, as set forth in the note declared to be payable one year after date, and then and there agreed with defendant that defendant could explore, work, and develop said mining claim; and if at any time before the maturity of said note defendant desired to do so, he could relinquish said option of purchase, and the plaintiff would cancel said note, and accept a reconveyance of the interests so deeded to defendant in said mining claims in full discharge of said note, and cancellation thereof, and defendant accepted the conveyance of said claims, and executed said note upon the agreement aforesaid, and the consideration of said note was none other or different. That the defendant, pursuant to said agreement, entered upon and explored the property, and within the year notified the plaintiff that he was dissatisfied with, and declined to take, the property, relinquished his said option, and in March, 1884, notified the plaintiff of these facts, "and proffered his readiness and willingness to convey the interest so appearing in his name upon demand, at his own expense, and thereupon vacated the property to the plaintiff, who entered upon and worked the same." The defendant avers readiness to convey the

interest to the plaintiff, and tenders a deed thereof.

Upon these issues the case was brought to trial before the court, without a jury, December 18, 1888, and judgment was rendered for the plaintiff in the sum of \$5,692.80. Statement of a case for new trial was duly made, the motion was denied, and defendant appeals from both the judgment and order denying a new trial.

The assignments of error are, in substance: (1) The findings of fact made by the court are contrary to the evidence. (2) Errors of law arising on the trial, duly excepted to.

It is only necessary to consider this second ground of error, for, if this charge is sustained, the former follows of course. As stated above, this case is between the original parties to the transaction, stripped of all questions of the right of innocent holders of commercial paper. The agreement on which the defendant relies, aside from the note itself, is alleged in the answer to have been entirely by parol. This alleged parol contract is that, prior to the making of the note, the plaintiff was negotiating for certain mining property, and that the plaintiff agreed to purchase the property, and give to the defendant a year's option of becoming the owner of an undivided part of the same, at the same price the plaintiff was to pay for it; the defendant to have one year to explore and work the property, to determine whether he would become such owner; that in consummating the purchase the plaintiff, of his own motion solely, took the title in the name of both of these parties; that the defendant, with knowledge that the property had been so deeded, at the request of the plaintiff, gave the note in suit, but that, as a part of the transaction, it was further agreed that if at any time within the year the defendant chose to relinquish his option of purchase, the plaintiff would cancel the note, and accept a conveyance of the interest of the property so deeded to defendant, in full discharge of said note and cancellation thereof. The defendant accepted the conveyance, and made the note upon such agreement only.

The allegations of the answer must be taken together, and, if shown as stated, the plaintiff never became the owner of this note, and entitled to enforce the same against the

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defendant. The full consideration of it never passed to the defendant. He had not purchased the property, and some months before the expiration of the time which he had to explore and work the mine, and make up his mind whether he would take it, he determined not to take it; so notified the plaintiff, left the mine, and the plaintiff enjoyed possession of it. The contract of purchase was never consummated. As to that, the minds of the parties never met. This case results from the peculiar mode adopted by the plaintiff in giving an option upon this property. From the evidence it seems that the plaintiff had his own way in the peculiar manner in which the option was given. Instead of taking the title in his own name, the plaintiff, in taking it, of his own choice, took it to each of the parties jointly. It appears in the evidence that the motive of the plaintiff in desiring to associate the defendant with him in the mine was to have his services in its management and working. Even if he insisted on the note as security that the defendant, if he refused to buy, would reconvey the title, of which there is no pretense, that makes the plaintiff's position no better. The note would be only as security on the defendant's refusal to reconvey. It was still but the sale of an option. The note was not given for the land; the maker had not then agreed to take the land. But it was given for another, and a merely temporary, purpose. The simple and only question is, may the fact be shown that the note was only an incident to an incomplete contract by parol?

It is contended by the plaintiff that to allow such showing would be a violation of the rule that parol proof cannot be given to contradict or vary the terms of a written agreement. There is some conflict in the authorities as to what shall be deemed to change the terms of an instrument; but the plain words of the rule itself are as near an expression of its meaning as we can hope to have. Chancellor Kent (2 Kent, Comm. 556) says that "it is an inflexible rule that parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a contract in writing. That would be the substitution of parol for written evidence, under the hand of the party; and it would lead to uncertainty, error, and fraud. Parol evi-

dence is received when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal, for it then shows that the instrument never had any valid operation; and this rule is supported on grounds of policy and necessity." The contention is, in the case at bar, that the writing purporting to be a contract was in fact not a contract at all; that it was not made as a contract, but only as an incidental part of a transaction, mostly by parol, which might or might not become a contract; that, as it stood, it was without consideration; that the conditions on which it might become a contract never occurred. The defendant disavows any intention in any manner to vary the terms or words of this instrument. Many cases are cited, but none of them make the rule any plainer than it is as here stated. Few, if any, of these cases go the extent of denying that the consideration of a note in the hands of the original payee can be inquired into. In the hands of *bona fide* holders without notice, the case may be different; but that depends on other considerations. In *Kennedy v. Goodman*, 14 Neb. 588, 16 N. W. Rep. 834, the court say: "The law is now well settled that in an action against a party to a negotiable instrument, by his immediate promise, a want or failure of consideration is a good defense. It is unnecessary to cite authorities on this point, because there seems to be no conflict." We are especially cited to decisions of the supreme court of the United States, because of their controlling authority over this court; but on examination all of those cases presuppose a valid contract foundation for the instruments there in question. In *Brown v. Wiley*, 20 How. 444, the action was upon a bill of exchange, payable one year after its date; but by the laws of the state where it was made, and where it was sought to be enforced, it became due at once on its acceptance being refused. It was regularly presented, according to law, and, being dishonored, suit was at once begun. Defendants set up a different agreement as to the time of presentment than that prescribed by law, and deducible from the terms of the bill; and the court held that such parol agreement was inconsistent with those terms. In its decision the court say in reaching its conclusion: "It is admitted the

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bill was given for full value," and the question is presented, "whether parol evidence should have been received to vary, alter, or contradict that which appears on the face of the bill of exchange." The contract was perfect, the obligation to pay at some time conceded, and its own terms, construed by the law, fixed the time. This holding is consistent with the argument of this defendant, or at least it does not preclude his claim. To like effect *Banks v. Dunn*, 6 Pet. 56; also *Specht v. Howard*, 16 Wall. 564. So in *Brown v. Spofford*, 95 U. S. 474. So in *Isaacs v. Elkins*, 11 Vt. 679. The latter case was upon a note regular upon its face for money, but in defense to which the defendant offered to prove that it was in reality given as a chattel note, and not for money; and the court very properly held the evidence inadmissible. The reason is obvious, and the rule in that and in all similar cases must be conceded. Numerous authorities are cited from state courts, some of which would entirely exclude the defense in this case; but we do not find that the United States supreme court intended to go beyond the cases cited from it.

On the other hand, in many of the leading states of the Union, a doctrine admitting this defense is the settled law. The question involved is not one to be affected by mere numbers of adherents to either view. That side that has the more cogent reasons, which is most in harmony with natural right and justice, must ultimately prevail. Temporary or local considerations, founded on the nature of business transactions, in any particular time and place, cannot affect it. It is said that to admit this defense will open the door to false swearing and fraud. That may be a ground for legislative action, but we cannot indulge the presumption that to prevent perjury the laws must be so construed as to deny men the opportunity to commit it. If men will avail themselves of an opportunity to perjure themselves, opened by a rule of law for the necessary purpose of protecting the unwary and unsuspecting from impositions and frauds, the criminal laws will correct them. The civil law is not made to favor any class of contract breakers, but it is made to shield the honest, the unwary, and the oppressed in their enjoyment of right and justice. The case of *Schindler v.*

Muhlheiser, 45 Conn. 153, was in many respects like the case at bar, and nearly identical in principle. The note on which that action was brought was claimed by the defendant to be made for the accommodation of the plaintiff, and hence that it was not a debt of defendant to plaintiff. In the decision of that case the court say: "The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. * * * The plaintiff invokes the familiar rule of law that parol evidence is not admissible to contradict or vary a written instrument. * * * It has for its object the prevention of fraud and perjury, in those cases where the parties have put their contracts in writing, by excluding any other evidence of the terms of the contract than the writing itself. But that is not this case. The contract was not reduced to writing. It was a parol agreement, and provided for the use of the note in suit, and also of the deed, [to the defendant,] for a special purpose. * * * So far the contract has been performed. But this is not all of it. A further provision in it was that the defendant should reconvey the lands to the plaintiff, and the plaintiff should give up to the defendant his note. This part the plaintiff refuses to perform. He insists that the defendant, contrary to the intention and understanding of both parties, shall retain the land and pay the note. That makes the transaction simply a sale of real estate, when there was no sale in fact. It compels the defendant against his will to become the purchaser of this land. Instead of preventing fraud, such an application of the rule would perpetrate a fraud of the grossest character, and bring reproach upon the law, and the administration of justice;" citing *Brush v. Scribner*, 11 Conn. 388; *Case v. Spaulding*, 24 Conn. 578; *Daggett v. Whiting*, 35 Conn. 366; *Downer v. Chesebrough*, 36 Conn. 39; *Dale v. Gear*, 39 Conn. 89.

With slight change in verbiage, the words of the court in *Schindler v. Muhlheiser* would apply as well to the case at bar. So in *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. Rep. 228, Chief Justice COOLEY says: "It is always competent to show that a contract sued upon is without consideration; and no rule or policy of the law is violated by allowing proof to be made of the purpose for which

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negotiable paper was given; or that the purpose does not require that payment should be enforced." This case is parallel with one phase of the present case. Maltby sued Fletcher on promissory note, and Fletcher pleaded that it was understood when the notes were given that they were only to be paid if the logs for which they were given should be adjudged, in a certain action then proceeding to test the title to the logs, not to belong to Fletcher. So, in *Dicken v. Morgan*, 54 Iowa, 684, 7 N.W. Rep. 145, which was on a promissory note and mortgage, the answer alleged that a part of the consideration of the note was an agreement by parol that the plaintiff should procure a highway to be constructed, etc., which he had failed to do. This was demurred to, on the ground that it sets up a verbal agreement, by which defendant attempts to add to or change the terms of the note and mortgage. The court say: "The agreement alleged in the answer did not add to or change the terms of the contract contained in the note, which was to pay the sum expressed therein. That contract is that defendants will pay plaintiff the sum of money named in the notes at the time fixed, with interest. The contract pleaded by the defendants is a distinct and independent contract, which was a partial consideration for the note. It in no sense changes, or adds to the terms of the note, and was not intended so to do. Contracts of this kind, where one is the consideration of another, are common business transactions. It has never been thought by those who made them that the contract, which is the consideration, adds to or changes the other; surely the courts never so held." Citing *Trayer v. Reeder*, 45 Iowa, 272; *Putman v. Haltey*, 24 Iowa, 425. Such a plea goes to the consideration of the note, and behind the cases cited by the plaintiff. So, also, in *Benton v. Martin*, 52 N. Y. 570, which was an action on a duplicate draft by defendant to plaintiff, Judge FOLGER, in delivering the opinion, says: "Clearly, it was competent to show the terms upon which the duplicate was delivered, and for the defendant to restrict and limit his liability thereby, and to protect himself by them against any liability; * * * and the annexing of such conditions to the delivery is not an oral contradiction of the written obligations, though negotiable, as

between the parties to it, or others having notice." In speaking of this rule excluding oral evidence to vary the terms of a written agreement, Chancellor KENT, further says: "It is to be observed that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract than that which is furnished in the writing itself." In the case at bar there is no question as to the language used in the note. The question is only as to the conditions on which it was put in the plaintiff's hands. That the consideration of negotiable promissory notes, the same being concurrent parol agreements, may be inquired into, in an action on the notes, by the promisor against the maker, the authorities are numerous, and sustain the view that any other rule, or any other application of the rule, excluding evidence to vary the language of the contract, would, in the words of the court in *Schindler v. Muhlheiser*, supra, perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice;" at least, such result would be likely to follow.

I conclude (1) that the agreement set up in the answer in this case, and sought to be proved by the defendant upon the trial, was proper to be shown; and (2) that parol evidence was competent to show the same; that such evidence was admissible under the pleadings; and that the several rulings of the court below in excluding the same were erroneous. *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. Rep. 834; *Haynes v. Thom*, 28 N. H. 386. This judgment should be reversed, and a new trial ordered.

LEWISTON NAT. BANK v. MARTIN, Sheriff.

(March 5, 1890.)

CHATTEL MORTGAGE — POSSESSION BY MORTGAGOR — RIGHTS OF ATTACHING CREDITORS.

Rev. St. Idaho, § 3386, provides that, where the mortgagor retains possession of mortgaged chattels, the recording of the mortgage shall protect the mortgagee against attaching creditors. Held that, in the absence of further statutory enactment, a chattel mortgage providing that the mortgagor shall continue in possession, doing a retail business, is invalid as against attaching creditors, in the absence of a provision that the proceeds of the business shall be applied on the mortgagee's debt.

Lewiston Nat. Bank v. Martin.

Appeal from district court, Kootenai county.

Action by the Lewiston National Bank against William Martin, sheriff, for damages for defendant's failure to seize and sell certain goods under an execution. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Reversed.

Albert Hagan, for appellant.

A judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had. *Knight v. Roche*, 56 Cal. 15.

A chattel mortgage reserving the right to dispose of the goods in the usual course of trade is void, and taking possession thereafter by the mortgagee will not cure the fraud. *Wells v. Langbein*, 20 Fed. Rep. 183; *Chenery v. Palmer*, 6 Cal. 120; *Delaware v. Ensign*, 21 Barb. 85; *Parshall v. Eggert*, 54 N. Y. 18; *Blakeslee v. Rossman*, 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390.

A mortgage of a stock of goods, such as is usually kept for sale in the particular trade of the mortgagor, with provision that the mortgagor may retain possession, and use and enjoy the mortgaged property, is void on its face as to other creditors of the mortgagor; and where the mortgagee knowingly allows the mortgagor to sell the goods, and appropriate the proceeds to his own benefit, the mortgage will be void as to such other creditors, independent of any such provision. *Davenport v. Foulke*, 68 Ind. 382; *Peiser v. Peticolas*, 50 Tex. 638; *Lund v. Fletcher*, 39 Ark. 325.

Philip Tillinghast and Hawley & Reeves, for respondent.

When the mortgage on its face does not grant any power to the mortgagor to sell or dispose of the mortgaged property, its terms and conditions cannot be contradicted or varied by an unwritten agreement or understanding of the parties had at the time or contemporaneously with its execution. *Berthold v. Fox*, 13 Minn. 501, (Gil. 462;); *Chenery v. Palmer*, 6 Cal. 122; *Adair v. Adair*, 5 Mich. 204.

Statutes providing for the recording of mortgages of personal property are the substitute for possession by the mortgagee, and

repel all imputation of fraud which would arise from the want of it. *Jones, Chat. Mortg.* § 380; *Berson v. Nunan*, 63 Cal. 550; *Bullock v. Williams*, 16 Pick. 33; *Forbes v. Parker*, Id. 462; *Shurtleff v. Willard*, 19 Pick. 202; *Hughes v. Cory*, 20 Iowa, 399; *Torbert v. Hayden*, 11 Iowa, 435; *Smith v. Moore*, 11 N. H. 55.

The assignee of a mortgage takes it subject to the equities between the parties of which he had notice, either from the mortgage itself or from other sources. *Croft v. Bunster*, 9 Wis. 503; *James v. Morey*, 2 Cow. 296.

SWEET, J. On the 31st day of December, 1887, James McGrail executed and delivered to S. R. Smith a chattel mortgage, as security for three promissory notes, one note for \$319.71, and two for \$717.95 each,—the first note payable 60 days after date, and the two latter payable 7 months after date,—said notes bearing even date with the mortgage above mentioned. The mortgaged property consisted of the contents of a drug-store, including the fixtures thereof, and an apparatus for bottling soda. Among other provisions in said mortgage contained we find the following: "Until default be made in the payment of said sums of money, the said party of the first part, his administrators or assigns, may remain and continue in the quiet and peaceable possession of the said goods and chattels, and in the free and full use and enjoyment of the same." On January 15, 1888, the mortgagee, Smith, transferred said notes and mortgage to plaintiff herein, the Lewiston National Bank. On March 2, 1888, McGrail sold the entire stock of goods then on hand to the mortgagee, S. R. Smith, who immediately took possession of the same, and carried on a retail drug business from said stock of goods, together with such additional purchases as he may from time to time have added thereto, until the 26th day of May, 1888, when, in an action wherein Porter & Co. were plaintiffs and said mortgagor and mortgagee, McGrail and Smith, were defendants, a writ of attachment was issued, under and by virtue of which defendant and appellant, William Martin, as sheriff of Kootenai county, took possession of the goods, wares, and merchandise in said store. The

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action brought by Porter & Co. was prosecuted to a judgment in the probate court of said county; and thereupon an execution was issued under and by virtue of which, on the 20th day of August, 1888, defendant, as sheriff aforesaid, proceeded to sell the contents of said store seized by him under the said writ of attachment at the time said action was commenced. On the 11th of September, 1888, the Lewiston National Bank, in an action against said McGrail, obtained a judgment in the sum of \$1,623, and an order for the sale of the goods, wares, and merchandise described in said mortgage, adding, as a further description thereto, as follows: "Being the property that was in said store on December 31, 1887." Defendant returned said execution, with an indorsement thereon to the effect that, after due and diligent search, he was unable to find the goods and chattels described therein, save and except the said bottling apparatus, which he had seized and sold for the benefit of plaintiff. Thereupon plaintiff brought an action against the defendant herein, the said sheriff, for the sum of \$1,623.31, the alleged value of the goods described in said mortgage. In its complaint plaintiff avers that, by reason of defendant's failure to seize and sell said goods, or, in other words, that by reason of defendant's seizure and sale of said goods under and by virtue of the attachment and judgment above set forth, the plaintiff was damaged in the amount specified, and asked judgment therefor. Defendant, answering the complaint, sets forth the facts already detailed herein, and asks that plaintiff's action be dismissed. Plaintiff obtained judgment in the lower court for the sum above set forth, and defendant forthwith appealed to this court.

The question presented to this court is as follows: Is a mortgage on the goods, wares, and merchandise of a store, under the terms of which the mortgagor continues in possession of said goods, doing a retail business from day to day, valid, as against the attaching creditors of the mortgagor, in the absence of a provision in said mortgage to the effect that the proceeds of said business shall be applied to the payment of the debt due from the mortgagor to the mortgagee? The appellant contends that such a mortgage is not valid as against attaching creditors, and that,

in the absence of a statutory provision on the subject, it is fraudulent *per se*. Under the common law, a chattel mortgage of personal property was void, unless the possession of said property was retained by the mortgagee. In many instances, this provision of the law served to prevent the use of many kinds of personal property as security; hence it was that the recording statutes were enacted, and under those provisions the mortgagor was enabled to pledge personal property as security for a debt, and retain possession thereof, provided the mortgage thereon be duly recorded. In common with very many of the states, the legislature of Idaho adopted the recording statute; and under its provisions the mortgagor may give a chattel mortgage upon his property and retain possession thereof, and said mortgage will protect the mortgagee against the attaching creditors of the mortgagor, in the event it is executed in accordance with the provisions of that statute, and recorded as by said act provided. Rev. St. Idaho, § 3386. If, under our own statute, however, the mortgagor removes the property mortgaged from the county wherein the mortgage is recorded, or destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of said mortgage, he is guilty of larceny, and such sale or transfer is void. Id. § 3397.

It is fair to infer that, while our statute contemplates the act of recording the mortgage as a substitute for the possession of the property by the mortgagee, it also contemplates that the mortgagor shall retain that property in his possession, except the mortgagee permit him to remove or sell the same. That is as far as our statute goes, and to this extent only do the laws of our territory cover the case at bar. By the decisions of various states, and by a large majority of them, whenever the mortgagee agrees with the mortgagor that the latter may sell and dispose of the goods mortgaged, without a further agreement to the effect that the proceeds of the sale shall be applied to the payment of the debt due from the mortgagor to the mortgagee, then the recording of said mortgage ceases to protect the mortgagee from the attaching creditors of the mortgagor. In some of the states, a provision in the mortgage to

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the effect that the mortgagor may dispose of the goods in the usual course of trade is held to be *prima facie* evidence of fraud. In this state the fraudulent intent must be proven. In the absence of a statute of that character, the best authorities are to the effect that such a mortgage is utterly void with respect to the creditors of the mortgagor. The recording act was simply intended to serve as a substitute for possession on the part of the mortgagee. It was formulated in response to the necessities of the commercial world, and to extend and multiply the sources of security for business purposes. Being simply a substitute for possession, (and it was never claimed to be anything more,) it will not cover any stipulation that might, and doubtless would, in many instances, be resorted to as a shield to protect fraudulent transactions or defeat honest creditors. In *Robinson v. Elliott*, 22 Wall. 524, the court, in discussing precisely the question now at bar, and under a statute very much the same as our own,—practically the same,—uses the following language: "We are not prepared to say that a mortgage, under the Indiana statute, would not be sustained, which allows a stock of goods to be retained by the mortgagor and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors; but there are features ingrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged." This case is directly in point.

Dr. McGrail was a witness in this case,
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and, without objection, explained what was meant by the free use of the goods, given him by the terms of the mortgage. That use was to carry on a retail drug business, and, no doubt, his position with the bank, or the position of Smith with the bank, would have been secure so long as the business seemed to be well conducted, and interest on the notes was promptly paid. In *Lyon v. Bank*, 29 Fed. Rep. 578, after an exhaustive review of the question now under consideration, the court held that the inference of fraud is an inference of law. The decision from 22 Wall., before referred to, is binding upon this court, and has, we think, been followed by a majority of the United States courts, although the United States courts have been very largely influenced by the practice prevailing in the state wherein the question happened to arise. In the absence of a statute on the subject, we are heartily in sympathy with the line of authorities holding that possession of a stock of merchandise by the mortgagor, with power to sell and retail the same, without requiring that the profits shall be applied to the payment of the debt due to the mortgagee, is absolutely void as to the attaching creditors of the mortgagor. The rule laid down in *Robinson v. Elliott*, which we follow in this case, is a healthful doctrine for any state engaged in rapidly developing its resources, and necessarily establishing its credit. It closes one of the most dangerous avenues to fraudulent practices, and, what follows, injurious effects upon the business character of the state and the honest efforts of *bona fide* business men. The judgment of the lower court is reversed and vacated, and a new trial ordered.

BARNETT v. KINNEY, Sheriff.

(March 5, 1890.)

CONFLICT OF LAWS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment by a non-resident, made in accordance with the laws of his domicile, and providing for preferences, is invalid, as to property situate in Idaho, as against attaching creditors, under Rev. St. Idaho, §§ 5875-5932.

SAME.

2. It is immaterial that the attaching creditor is also a non-resident.

BERRY, J., dissenting.

Barnett v. Kinney.

Appeal from district court, Alturas county.

Action by Josiah Barnett, assignee of M. H. Lipman, against P. H. Kinney, to recover the possession of certain goods seized by said defendant as sheriff under a writ of attachment against plaintiff's assignor, or the value of the same. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Angel & Sullivan, for appellant.

Before the judgment could be attacked, the findings must be set aside, because not justified by the evidence, and this could only be done on motion for a new trial. *Reed v. Bernal*, 40 Cal. 628.

When a court draws erroneous conclusions of law from its finding of facts, it is a decision against law, for which a new trial should be granted. *Simmons v. Hamilton*, 56 Cal. 493; *Martin v. Matfield*, 49 Cal. 42; *Knight v. Roche*, 56 Cal. 15.

Kingsbury & McGowan and C. S. Varian, for respondent.

There being no issue of facts, the facts being all conceded, the court could commit no error as to them, nor could there be a re-examination of what was never examined or even in issue. *People v. Mullins*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 662.

A motion for a new trial was not the proper way to inform the court as to the law, and that there can be no new trial granted where no issue of fact has been tried. St. §§ 4438, 4439; 3 *Estee*, Pl. & Pr. § 4847; *Knight v. Roche*, 56 Cal. 17; *Martin v. Matfield*, 49 Cal. 43; *Quinn v. Smith*, Id. 166.

A voluntary assignment, valid under the law of the domicile of the assignor, will convey personal property situate in another state, especially if there are no home creditors, and always if the assignee has taken possession. *Hanford v. Paine*, 32 Vt. 442; *Speed v. May*, 17 Pa. St. 91; *Law v. Mills*, 18 Pa. St. 185; *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136, 16 N. W. Rep. 700; *Richardson v. Leavitt*, 1 La. Ann. 430; *Johnson v. Sharp*, 31 Ohio St. 611; *Forbes v. Scannell*, 13 Cal. 242; *Askew v. Bank*, 83 Mo. 366; *Einer v. Beste*, 32 Mo. 240; *Whipple v. Thayer*, 16 Pick. 25; *Burlock v. Taylor*, Id.

335; *Daniels v. Willard*, Id. 36; *Todd v. Bucknam*, 11 Me. 41-44; *Smith v. Railroad Co.*, 23 Wis. 267; *Frazier v. Fredericks*, 24 N. J. Law, 162; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Atherton v. Ives*, 20 Fed. Rep. 894; *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460; *Farrington v. Allen*, 6 R. I. 449; *Walters v. Whitlock*, 9 Fla. 87; *Miller v. Kernaghan*, 56 Ga. 155; *Gregg v. Sloan*, 76 Va. 497; *Sanderson v. Bradford*, 10 N. H. 260; *Atwood v. Insurance Co.*, 14 Conn. 555; *Moore v. Willett*, 35 Barb. 663; *Hoyt v. Thompson*, 19 N. Y. 207; *Ockerman v. Cross*, 54 N. Y. 29; *Wilson v. Carson*, 12 Md. 54; *Railroad v. Glenn*, 28 Md. 287; *Harrison's Ex'r v. Farmers' Bank*, 9 W. Va. 424; *Dundas v. Bowler*, 3 McLean, 397.

SWEET, J. On the 23d day of November, 1887, M. H. Lipman, a citizen of Utah, doing business at Salt Lake City, made an assignment to plaintiff herein in trust for all his creditors. The deed of assignment carried with it certain personal property situated in Hailey, Alturas county, Idaho territory, to-wit, a stock of goods and merchandise. It is admitted that at the time the assignment was made said Lipman was insolvent; that in all respects the assignment was made in conformity with the laws of Utah territory; and that, under said deed of assignment, the creditors of said assignor were divided into classes, certain classes being designated as preferred creditors, and said assignee being instructed by said deed of assignment to observe said preferences in settling the liabilities of the assignor as fast as the sale of said merchandise enabled him to do so. On the 25th day of November, 1887, plaintiff, as said assignee, took possession of the said stock of goods situated in Hailey, in said Alturas county and Idaho territory, having first caused to be duly recorded in said county the said deed of assignment. On the following day, to-wit, the 26th day of November, 1887, defendant herein, then the duly qualified and acting sheriff of said Alturas county, levied upon and took possession of said goods under and by virtue of a writ of attachment issued out of the district court of the second judicial district of Idaho territory, in and for said Alturas county, in an action wherein the St. Paul Knitting-Works Company, a cor-

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poration, was plaintiff, and the said M. H. Lipman was defendant. On the 12th day of December, 1889, plaintiff commenced an action in said court against the defendant herein for the recovery of the possession of said goods and chattels, or for the sum of \$5,000, the value thereof, in case a delivery of the same could not be had. Plaintiff obtained judgment in the lower court, took possession of said goods, and thereupon proceeded to sell the same, realizing therefrom the sum of \$4,000. Defendant appealed from said judgment, and the assignee now holds said sum of money subject to the final determination of this litigation. By a careful examination of the findings of the lower court, we find that the issues here presented are clearly and distinctly set forth. They are, in brief, to recapitulate, as follows: The assignor, at the time of making said assignment, was a non-resident of this territory. The assignment was made in strict conformity with the laws of Utah territory, of which he was a citizen. The attaching creditor was also a non-resident of Idaho, and it is conceded that said Lipman was justly indebted to said corporation in the sum of \$1,992; that at the time the writ of attachment was levied the assignee was in possession of the goods; and that the deed of assignment had been duly recorded in said county; also that the defendant was the duly qualified and acting sheriff of said Alturas county.

The legal question involved is as follows: May a non-resident make an assignment, with preferences, of personal property situated in this territory, that will be valid as against a non-resident attaching creditor? And this question further involves the effect—*First*, of possession by the assignee when the attachment is levied; *second*, the rule of comity between the states; and, *third*, the effect of the attaching creditor being a resident or a non-resident of the territory. We premise a discussion of these questions with the remark that a decision by the United States supreme court is binding upon us, and that whenever any issue presented here has been clearly and distinctly settled by said court, we need look no further.

We will first take up the question of citizenship, and we submit it in this form: Will the courts of this territory concede to any of

its citizens any rights or privileges under its attachment laws not extended to any citizen of the United States who is a non-resident of the territory? The attachment laws of this territory give no preferences as between resident and non-resident attaching creditors. Therefore, under the rule laid down in *Green v. Van Buskirk*, 7 Wall. 151, we must consider the matter settled. It is there held that the rights of the attaching creditor are not at all affected by the question of citizenship. In *Sheldon v. Blanvelt*, a case recently decided by the supreme court of South Carolina, reported in 7 S. E. Rep. 593, the same conclusion is reached. The statute of South Carolina with reference to assignments by insolvent debtors is the same, in effect, as are the provisions of our own statute, and the facts involved in the case just cited are precisely the same as those presented in the case at bar. Section 2, art. 4, of the constitution reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." We think that the decision before alluded to, in 7 Wall., in which this article is construed as affecting the rights of non-resident citizens in cases similar to this, applies to the facts as they are here presented; and under that decision, as well as under *Sheldon v. Blanvelt* and the authorities therein cited, we must conclude that the non-residence of the attaching creditor in this case could not in any manner prejudice his rights, and that he was entitled to the same privileges that, under the same circumstances, would be accorded to any citizen of Idaho.

In reaching this conclusion we are following what we conceive to be the rule laid down by the supreme court of the United States; and the wisdom of the principle thus enunciated by our highest court is as unquestionable as its authority. When once a citizen has been accepted by any court of the United States as a suitor, it does not seem to be in accordance either with the principles of justice, or with common fairness, or with common honesty between man and man, to question him as to the particular state in which he may reside, and then give or refuse him what the court would deem to be justice if the suitor were a citizen of our own state, but deny him this supreme right if the fact

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is developed that he is a citizen of another state. In *Atherton v. Ives*, 20 Fed. Rep. 897, the court follows this doctrine, and concludes a vigorous indorsement of the principle in these words: "We think such a distinction should never be drawn by a court, unless compelled to do so by legislative will clearly expressed. It may be that the legislature of a state has the power to exercise such a 'patriarchal and provident sovereignty,' but this court will not assume such as the legislative will." In concluding our discussion of this principle, we will say that the pointed declaration just quoted meets with the hearty approval of this court, and in the absence of a positive statutory enactment, we do not think the court justified in asking the citizen who seeks the beneficial protection of its laws whence he came, with a view of administering the law accordingly.

The principle of comity between states, or to what extent laws governing the transfer of property in one state will be respected by a sister state, is the next question to be considered. The courts of the country have differed very much on this proposition. Nevertheless it is conceded by all that one state is not bound to accept the transfer laws of another state affecting property located within its borders. It is useless for us to discuss the question. The rule is laid down for our guidance by the supreme court of the United States in *Green v. Van Buskirk*, 7 Wall. 151. The language of the court is as follows: "And this principle of comity always yields when the laws and policy of the state where the property is located has prescribed a different rule of transfer with that of the state where the owner lives." In *Atherton Co. v. Ives*, 20 Fed. Rep. 895, 896, the court also indorses this rule.

The only question remaining in this connection is, was the assignment made by Lipman, under the laws of Utah territory, contrary to a clearly expressed statute or to the settled policy of this territory? We think it was contrary to both. Commencing with section 5875, the statute designates how an insolvent debtor may proceed in this territory in proving his insolvency, and the necessary steps to be taken to complete the transfer and sale of his property for the benefit of his creditors. Under this act, an assignee, chosen

by the creditors, (and let us remark that these creditors may be residents or non-residents,) is appointed by the court. The assignee thus appointed must dispose of the property of the insolvent for the benefit of all the creditors, share and share alike, preferences or priority being strictly forbidden. Section 5932 is as follows: "No assignment of any insolvent debtor otherwise than as provided in this title is legal or binding on creditors." The assignment made by Lipman was in direct conflict with the provisions of this statute, and one of its most important provisions, to-wit, that which prohibits preferences. It was urged by the respondent that, if this rule were applied to the case at bar, a non-resident of Idaho doing business in the territory could not make an assignment of property within the jurisdiction of the territory. This may be true, but the resident insolvent is not permitted under this law to prefer any creditor in this territory over any creditor out of the territory; and we do not think a non-resident insolvent, doing business in Idaho, ought to be permitted to make an assignment giving preferences to non-residents of the territory over residents of the territory in which he is doing business, and the laws of which he invokes to protect his property, and maintain for him the same rights and privileges that are extended to any citizen of the territory. A non-resident, being entitled to the same right under our law as a citizen of the territory, may invoke the same principles. While this point was urged by the respondent, we think it was carried a little too far. The courts of this territory would, we believe, respect the assignment of a non-resident doing business in Idaho, if made in accordance with its laws. In other words, if Mr. Lipman's assignment had been made for the benefit of all his creditors, share and share alike, we believe, under the principle of comity, it would have been respected, as it would not have been contrary to the laws or the policy of this territory. In holding that this assignment was invalid as against attaching creditors, we are following the rule already quoted, and feel bound so to do; yet we do not hesitate to say that the rule meets with our approval. Persons doing business with residents of this territory should know what laws govern the transfer of property.

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By having one uniform principle applicable alike to all property situated in this territory, whether of residents or non-residents, every person doing business within the territory, and every non-resident doing business with persons residing in the territory, may know, before extending credit or locating property within the jurisdiction of our laws, what laws will govern the transfer of that property, whose rights may attach, and how they may attach; and it gives to our business community a stability and character that we believe to be not only desirable, but almost necessary, to free and advantageous commercial intercourse with distant states lying to the east and to the west of us.

Before passing to a consideration of the next principle involved, we add the further suggestion that sheriffs and other officers of like character in the territory have a right to understand whether or not, in proceeding under our laws, and in accordance therewith, they are protected by them. In this case the sheriff proceeded regularly and in accordance with the laws of Idaho; yet he is subjected to a suit for damages, because he did not understand and proceed in accordance with the laws of Utah, or in pursuance of transactions executed in harmony with those laws, but in direct violation of our own.

Counsel for respondent urged with a great deal of strength and persistency the fact that plaintiff was in possession of the goods at the time of the seizure by defendant under the writ of attachment. It is also averred by counsel for respondent that defendant had actual notice of the contents of the deed of assignment, and the possession thereunder by plaintiff. This point was urged with a great deal of ability, and numerous authorities cited relating, perhaps indirectly, thereto. It does not seem to be a serious question. It is entirely regulated by the statute. If we do not recognize the principle of comity, for the reasons before stated, we must proceed under our own statute. This statute declares in the most positive terms that any assignment made with preferences shall not be legal or binding as against creditors. This being true, of what effect was this possession under and by virtue of an assignment that was clearly invalid? The attaching creditor was under no obligations to re-

spect it. Indeed, the law distinctly declares that it was not valid as to him, and hence the mere fact of his possession under an invalid instrument is not material. May a person violate the positive mandates of a statute, and then claim protection as against the complainant, because the latter knew of the former's violation of the law? Nor do we see that the question of a voluntary or an involuntary assignment is entitled to consideration in passing upon the merits of the issue involved. No general assignment can be made in this territory, voluntary or otherwise, giving preferences. Therefore we do not see that the fact of this assignment having been voluntary on the part of Lipman has any bearing whatever on this case. We must conclude, therefore, that the court below erred in holding such assignment to be valid as against attaching creditors of the assignor, and the possession of the defendant under said writ of attachment to have been unlawful. Let the judgment be reversed, and the cause remanded to the lower court, with instructions to enter judgment for the defendant in accordance herewith.

BEATTY, C. J., (*concurring.*) Having been of counsel between the same above-named parties in a cause, in the same lower court, but with a different attaching creditor, I desired to take no part herein further than to sit at the hearing. I have not participated with my associates in the discussion, but, they having reached opposite conclusions, the disagreeable duty rests upon me of breaking the dead-lock, which, in following my convictions and what seems to me the weight of authority, I do, by concurring in the able opinion of Mr. Justice SWEET.

BERRY, J., (*dissenting.*) A part of the subject of the assignment in question was personal property in the territory of Idaho. The assignor lived at the time of its execution in Utah territory, where the assignment was made. It was a voluntary assignment in trust for the benefit of creditors, and is conceded to be valid under the laws of Utah territory. The assignee had gone into possession, and was in possession as such assignee, when the property was seized and taken from his possession by the sheriff of

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Alturas county by virtue of a writ of attachment in favor of a creditor of the assignor, residing in the state of Minnesota, where the debt was contracted. The assignee brought replevin against the sheriff, and on the trial in the court below had judgment for the property. This appellant seeks to reverse that judgment. There is but one controlling question in the case, viz., whether that assignment, valid where it was made, should, under the statutes of this territory, be held to be operative here. Under our statute I think it is clearly valid and operative. The appellant rests upon section 5932 of the Revised Statutes of Idaho, which provides that "no assignment of any insolvent debtor other than as provided in this title is legal or binding on creditors." This is the closing section of title 12, p. 677, of the statutes of Idaho. The act is headed "Proceedings in Insolvency." The general scope and apparent purpose of the whole title of 58 sections is shown in its first section, (5875,) as follows: "Every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities." No stronger terms are needed to show that the parties thus to be favored are the citizens of Idaho; and certainly it was not designed to compel all persons contemplating assignment to reside here six months before doing so, or to compel, into our courts, citizens of other states and territories to get a discharge from their debts through insolvency proceedings. I do not believe that the revisers of our law, in 1887, had any design that Idaho should take upon her a task of that magnitude. Nor do I think there was any design to preclude parties out of this territory, who might have property in it, from making any assignment whatever for the benefit of their creditors without going through our courts in insolvency proceedings. Of course, to hold that this act has any extraterritorial scope and meaning is practically to deny to a non-resident the right to make any assignment whatever of his property here for the benefit of creditors. The statement of the proposition seems to me to carry with it a most forcible denial of any such intent. It is not claimed but that a state or territorial legislature may do so if it desires; but the pre-

cedents are that it will not be presumed to have so intended unless its enactments to that effect shall be clear and unequivocal. *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460; *Ockerman v. Cross*, 54 N. Y. 29.

In 1860 a statute was enacted in New York entitled "An act to secure to creditors just division of the estates of debtors who convey to assignees for the benefit of creditors." Such act forbade preferences. It provided how the assignment must be executed; that an inventory should be filed of the property assigned; assignee should give bonds, etc.,—all substantially as provided in our act, but with a prohibition as to other assignments as strong as our own. An assignment was made by a debtor in Canada, valid according to the laws of Canada, but in no way complying with the requirements of the New York statute. Possession in New York had been taken by the assignee, whereupon a New York creditor (not, as in this case, a foreign creditor) attached it; but the court held the act to apply to domestic assignments only, and held the foreign assignment good. *Ockerman v. Cross*, 54 N. Y. 29. So in *Butler v. Wendell*, 57 Mich. 62, 23 N. W. Rep. 460. So in *Train v. Kendall*, 137 Mass. 366. So, also, in *Rice v. Curtis*, 32 Vt. 460. But we need go, I think, no further than to the internal evidences of the act to be convinced that it was not intended to apply to foreign assignments. In fact the title provides, expressly, that the assignor must be a resident of the territory. The judgment in the court below should be affirmed.

DRAKE *et al.* v. EARHART.

(March 5, 1890.)

RIPARIAN RIGHTS—PRIOR APPROPRIATION.

1. Act Cong. July 26, 1866, § 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Act Cong. July 9, 1870, § 17, provided that "all patents granted * * * shall be subject to any vested and accrued water-rights." In Idaho, the superior rights of prior appropriators were acknowledged by statute and decisions of courts. *Held*, that a prior appropriator of the water of a

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stream, all of which he claimed, had used, and needed for irrigation, was entitled to the whole as against a patentee of land through which the stream flowed, though no custom to that effect was shown. BERRY, J., dissenting.

SAME—FINDINGS—PRESSURE.

2. Where plaintiffs claim 600 inches of water in a stream by prior appropriation, and it appears that there were but 150 inches therein failure to find under what pressure the water is measured is not prejudicial to defendant, who claims as riparian owner.

SAME—SALE OF PART OF WATER.

3. Sale by plaintiffs of a part of the water claimed by prior appropriation does not show that they attempted to appropriate more than they needed, where it appears that all the water of the streams was not sufficient to irrigate their land.

Appeal from district court, Alturas county; WEIR, Judge.

Action by Frank Drake and others against David Earhart and others to determine the right to the use of the waters of a certain creek, and for an injunction to restrain defendants from using said waters. From a judgment for plaintiffs, defendant Earhart appeals. Affirmed.

L. Vinyard, for appellant.

Where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on the respondent to see that the record discloses the fact that the appellant has not been so prejudiced. *Norwood v. Kenfield*, 30 Cal. 393; *Jackson v. Water Co.*, 14 Cal. 18.

F. E. Ensign and *Lyttleton Price*, for respondents.

The right of a prior appropriator to water appropriated for a beneficial use is superior to that of a riparian owner of land, who became the owner after the appropriation. *Osgood v. Water, etc., Co.*, 56 Cal. 571; *Farley v. Mining, etc., Co.*, 58 Cal. 142; *Himes v. Johnson*, 61 Cal. 259; *Barney v. Sabron*, 10 Nev. 217; *Lux v. Haggin*, (Cal.) 4 Pac. Rep. 924; *Water Co. v. Perdew*, (Cal.) 4 Pac. Rep. 426; *Judkins v. Elliott*, (Cal.) 12 Pac. Rep. 116; *Kaler v. Campbell*, 13 Or. 596, 11 Pac. Rep. 301; *Ware v. Walker*, 70 Cal. 591, 12 Pac. Rep. 475; *Hill v. Lenormand*, (Ariz.) 16 Pac. Rep. 266; *Clough v. Wing*, (Ariz.) 17 Pac. Rep. 453; *Elles v. Improvement Co.*, 1 Wash. St. 572, 21 Pac. Rep. 27; *Geddis v. Parrish*, 1 Wash. St. 587, 21 Pac. Rep. 314.

If a judgment is irregular, the proper practice is to move to correct it in the court

below. *Fox v. West*, 1 Idaho, 784; *Anderson v. Parker*, 6 Cal. 201; *Leviston v. Swan*, 33 Cal. 480.

Defects in form or explicitness in findings should be objected to in the court below. *Parke v. Hinds*, 14 Cal. 415.

A judgment will not be reversed for any error therein which the records will enable the appellate court to fully correct. The judgment will be modified and affirmed. *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Persse v. Cole*, 1 Cal. 369; *Gahan v. Neville*, 2 Cal. 81.

BEATTY, C. J. In the year 1879, respondent Quigley took possession of a tract of unsurveyed land at the mouth of what has since been known as "Quigley Gulch," near the town of Hailey, in Alturas county, and at the same time appropriated for the irrigation of said land the water of the stream flowing down said gulch; and the other respondents, Drake and Covert, subsequently became owners in a part of said land and water. At later dates the several defendants in this action became possessed of certain lands lying upon said stream further up the gulch, and commenced the use of the said water. To perpetually restrain them from such use, this action was commenced; and, upon the trial before the court, the right to the water was adjudged to respondents, and defendants were restrained and enjoined from using any thereof. From this judgment the appellant Earhart alone has appealed to this court.

From the findings of the court it appears that in 1879 said Quigley located the land referred to, and afterwards he and said Drake, who had purchased a part, obtained patents therefor, and, so far as the findings show, still own it; that "in said year 1879, said Quigley took out of said Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land;" that, "at the time of appropriation of said water as aforesaid, said Quigley posted a notice * * * claiming 600 inches of the water of said stream;" and the court also found "that said stream carries 150 inches of water;" that afterwards said Drake and Covert succeeded to all the water, and the three respondents "continued

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* * * to use said water of said stream for agricultural purposes upon the land before mentioned;" that they have at all times asserted title to all of said water; that none of the defendants had ever made any appropriation of any of said water in pursuance of the laws of this territory; that "irrigation is necessary to the proper cultivation of the lands of all the parties, and all the waters of said stream are required for the irrigation of the lands of plaintiffs." It appears from Earhart's answer that he purchased his land in 1885, and that it had been occupied by his grantor since May, 1883. The appellant suggests the insufficiency of the findings. While they are not explicit, if they will support the judgment, they must not be disturbed. They show the respondents together own the land and water, the latter by prior appropriation; that they use it to irrigate this land, for which all the stream is used. They do not specify under what pressure the water is measured; but, as all in the stream is required by them, and as there are but 150 inches therein, being 450 less than was claimed by the act of appropriation, it cannot be discovered how, in this case, the failure to specify the pressure can result in injury to the appellant.

It is also found by the court "that some time in the year 188-, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway for a water supply at its station at Hailey." From the fact that respondent so sold a portion of said water, it is argued that they had attempted the appropriation of more than they needed for a "useful or beneficial purpose." It is, unquestionably, the law that more than is required for such purpose cannot be taken; that, when legally appropriated, it may be sold for some other useful purpose; and that its use for railroad necessities is such a purpose. Did respondents sell what they did not need? It appearing that in 1879 all the water of this stream was sufficient to irrigate but a part of the land now owned by respondents, it follows that the sale of the water was not from an unneeded surplus, but from that which they had actual use for. It is their privilege to dispose of what they need, if they desire. Its sale did not damage appellant,

nor could its retention by them have benefited him. How the conveyances of this land and water were made, or by what arrangements the respondents together use them, does not appear, and, it not appearing to have been a matter of contest below, is immaterial here. The findings support the judgment.

The important question, for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of that water as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his land; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky mountains, as well as by the supreme court of the United States. But for the fact that it has elsewhere repeatedly appeared in the same court, it would seem surprising that it should now be seeking another solution in this. While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, "first in time, first in right," should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for

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their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation. As far back as 1855, the supreme court of California, in *Irwin v. Phillips*, 5 Cal. 145, and in *Tartar v. Mining Co.*, Id. 397, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and, also, that in all branches of industry the prior appropriator of land, water, and easements would be protected. Not only had such become the law by custom, by the legislative will, and the decisions of the courts, without dissent, but the general government, for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put the question beyond uncertainty, to approve and adopt what already existed as the common law of the west, the congress, by its act of July 26, 1866, § 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." It

will be observed that the act is based upon the existence of local customs, laws, and decisions of courts. It is not necessary that all these conditions shall exist for the protection of the right; but, as held in *Basey v. Gallagher*, 20 Wall. 684, the existence of either condition is sufficient.

It has been said that in the case at bar no custom has been shown. It is not necessary it should be; for, prior to the beginning of appellant's claim, the superior rights of prior appropriation were acknowledged by our territorial law of 1881, and by the decisions of our courts. By a practically unbroken line of decisions the rule of the cases above referred to in 5 Cal. has been followed, and is now established by so many and such high authorities that it would seem this theme of discussion is exhausted. Brief reference, however, may be made to some of the leading cases. *Basey v. Gallagher*, 20 Wall. 681, 682, clearly indorses the superior right of prior appropriation between agricultural claimants in the following explicit language: "In the late case of *Atchison v. Peterson*, [Id. 507,] we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that, by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance, for mining purposes, to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated, and open to general exploration, did, in natural justice, acquire a better right to

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its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states and territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts of those states and territories, and was finally approved by the legislation of congress in 1866. The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those states and territories, by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In this case it is said: "The right of the first appropriator, exercised within reasonable limits, is respected;" that it "is not unrestricted. It must be exercised with reference to the general condition of the country, and the necessities of the people." This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified, and would make the decision inconsistent with itself, as well as with the other decisions of the same court. *Jennison v. Kirk*, 98 U. S. 461; *Broder v. Water Co.*, 101 U. S. 276. It is evident that all the court means by this language is that the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for. In 98 U. S. 461, *supra*, the court says: "The owners of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation,—the first in time being the first in right; but, where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed." It clearly follows, as the courts have certainly held, that when all cannot use the water without injury to the prior appropriator the other must yield to his superior right. The claim having been asserted that, when a party procured a patent for land, he would be entitled to the

use of all waters flowing through the same, this was put at rest by the act of congress of July 9, 1870, as follows: "Sec. 17. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights or rights to ditches," etc. Since this act the rulings have been uniform that the patentee of land has no claim upon the water flowing through the same as against a prior appropriator. *Barnes v. Sabron*, 10 Nev. 230; *Hill v. Lenormand*, (Ariz.) 16 Pac. Rep. 267, 268; *Geddis v. Parrish*, (Wash.) 21 Pac. Rep. 314; *Reduction Works v. Stevenson*, (Nev.) Id. 318; *Hammond v. Rose*, (Colo.) 19 Pac. Rep. 466; *De Necochea v. Curtis*, (Cal.) 20 Pac. Rep. 563; *Irrigation Co. v. Campbell*, ante, 378, 18 Pac. Rep. 52; *Mining Co. v. Rosa*, 80 Cal. 334, 22 Pac. Rep. 222.

While there are numerous questions growing out of the water law, we have aimed to confine this discussion to that involved in this case, which is simply a contest between a prior appropriator of the water of a stream, all of which he claims, has used, and needs for a useful purpose, and a party who, since such appropriation, has entered and patented some of the land through which such water, by its natural channel, flows, and who claims its use as a riparian proprietor. In accord with the authorities, as well as with our local law on this subject, it must be held that the judgment of the lower court should be affirmed; and it is so ordered.

BERRY, J., (*dissenting.*) This action was brought in the court below to restrain the defendants from the use of any of the waters of a stream in Quigley gulch, on the east side of Wood river, and near the city of Hailey. The plaintiffs sue jointly, as prior appropriators of the water of that stream for agricultural purposes. The defendants are occupants of lands lying above the plaintiffs' on that stream, and through which lands of the defendants the stream runs. Judgment was given for the plaintiffs, declaring them jointly to be the absolute "owners of, and entitled to the use of, all the waters flowing in Quigley gulch," without reference to its amount, or to the purposes for which it was diverted, or owned by them, or is to be used; and the defendants

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are, and each of them is, enjoined from diverting or using any of the waters of said stream; and for costs against the defendants, in the sum of \$270. There was no motion for a new trial, and no statement of the case made, and the case comes up upon the judgment roll alone. It is claimed that the judgment roll discloses errors for which the judgment should be reversed, and that the judgment in itself is erroneous, in declaring the plaintiffs the exclusive owners of all the waters of the stream, and restraining the defendants from any use thereof, "notwithstanding it discloses that the water flows through the lands of the defendant Earhart."

I shall attend, firstly, to the first point made, namely, that the judgment roll discloses errors for which the judgment should be reversed. A liberal construction of the complaint may, perhaps, warrant the findings of fact made by the court, though it goes no further than that. It claims that the stream carries 114 inches of water. The findings of fact are as follows: "(1) In the autumn of the year 1879, William G. Quigley located a piece of government land near the mouth of Quigley gulch, in the Wood River valley, in the county of Alturas and territory of Idaho. The land being then unsurveyed public domain, he was at that time unable to purchase the same from the United States, but afterwards, upon the same being surveyed and coming in the market, he and the plaintiff Drake, to whom Quigley had sold a part of the lands originally claimed by him, entered the same at the United States land-office at Hailey and afterwards took patents therefor. In said year 1879, said Quigley took out of Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land, and in the same year built a house, and continued to reside on said land from that time until the commencement of this action. At the time of appropriation of said water as aforesaid, said Quigley posted a notice at the point of diversion of said water in which he claimed 600 inches of the water of said stream for agricultural purposes; that said stream carries 150 inches of water. (2) Afterwards, and before the commencement of this action, the plaintiff

Drake succeeded to one-half of all the waters claimed and owned by said Quigley, and the plaintiff Covert succeeded to the other half thereof; and said plaintiffs Drake and Covert and said Quigley continued, except for the trespass and unlawful diversions of said water by the defendants hereinafter mentioned, to uninterruptedly use the waters of said stream for agricultural purposes upon the land before mentioned. (3) That some time in the year 188-, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway Company for a water supply at its station at Hailey. (4) At several times since the year 1881, parties not connected with this suit have, for the purpose of supplying certain brick-yards situate near said stream, taken small quantities of the water thereof to supply brick-yards for short periods of time, in some instances with the consent of Quigley, while he was an owner thereof, and at other times without the consent of any one of the plaintiffs. (5) The defendant occupies a several and distinct piece of land above the point of diversion by plaintiffs, and the lands owned by them, through which lands of defendants said stream flows in its natural channel. (6) That defendants, and each of them, have taken out of said stream, at various times, quantities of water in ditches constructed by them and their predecessors, and used the same for irrigating their lands, to which use the plaintiffs have objected, and defendants have at all times been informed of and have known that plaintiffs asserted title to all the water flowing in said stream; and plaintiffs have many times torn out the dams constructed by defendants, and turned the water from their ditches back into the stream, and caused the water to flow down into the plaintiffs' ditches, and upon their lands. (7) None of the defendants have been in the actual adverse possession of the water of said stream, nor of any part thereof, for the period of five years next before the commencement of this suit. (8) None of the defendants at any time ever posted any notice claiming any of the waters of said stream, nor did they, or any of them, comply, or attempt to comply, with any of the provisions of the act of the Idaho legis-

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lature of February 10, 1881, in relation to water-rights, with a view to acquire the right to the use of any of the waters of said stream. (9) Irrigation is necessary to the proper cultivation and the raising of crops upon the lands of all the parties to this action, and all the waters of said stream are required for the irrigation of the lands of the plaintiffs."

These are all of the findings of fact. No custom as to the use of water is alleged or found, and the appellant contends that these facts are insufficient to sustain a judgment for the plaintiffs. He says that custom, and custom alone, where right exists to use water for irrigating purposes on the public domain, must be shown as the basis of that right; that it must be alleged and shown, and, of course, must be found. That is the law. Custom is indispensable to the plaintiffs' right. Such right is founded on custom and user. 14 U. S. St. at Large, p. 253, § 9; *Basey v. Gallagher*, 20 Wall. 683. But nothing of the kind exists here. We might go no further, and, resting on this, the judgment is not sustained. But the counsel goes further. He insists that the respondents, and each of them, fails to show that he has, or ever had, lands to irrigate requiring 600 inches of water, or any other amount. The court seems to have properly assumed that the right to divert water for agricultural purposes depends upon having some parcel of land to irrigate. Such is, unquestionably, the law. The decisions of the court are uniform on that point; also the statutes of Idaho. Chapter 1, tit. 9. Covert does not seem to have had any land at any time. Quigley in 1879 is found to have occupied "a piece" somewhere at or near the mouth of the gulch, but there is no intimation as to how much,—whether one acre or one hundred acres; nor is there any definite location or description of it. Water was conducted onto "a part" of this "piece;" but whether upon that part which Quigley sold to Drake, and which Drake got a patent for, or upon that which Quigley retained, does not appear. At the same time, Drake and Quigley appear to have held their lands in severalty. Drake entered his land, whatever it was, at the land-office after 1879, presumably after the act of February 10, 1881; but, whenever it was, he is

not shown to have been in the use of any waters at that time. After such purchase from the United States, the lands were not government domain, but any considerable appropriation of water by him must have been under the statute of Idaho. He did nothing, under that statute or otherwise, at any time, tending to constitute an appropriation by him. Neither did Covert.

In the second finding it is said that at some time not specified "Drake succeeded to 'one-half' of all the waters claimed and owned by Quigley, and the plaintiff Covert succeeded to the other half." By what means they "succeeded," whether by abandonment by Quigley and reappropriation by Drake and Covert, or by sale by Quigley to them, of the lands on which the water was used, or by sale of the water alone, does not appear. Presumably, if such be the fact, it should have been by lawful claim by them for irrigating agricultural lands; and no such act of appropriation was done by either. But, whether Quigley divested himself of his assumed right by abandonment or otherwise, it is certain that Quigley had nothing remaining from the time Drake and Covert succeeded, one to "one-half" and the other "to the other half," of his rights. His interest was ended. He is out of the case, and yet the judgment is in his favor. As neither Drake nor Covert are in any way shown to have had at any time any interest whatever in, or right to use, this water, or any part of it, for agricultural or for any other purpose, all of the plaintiffs are out of court; and yet the judgment is in favor of all of them jointly. It is therefore impossible, in this case, to reach what might otherwise be the principal and more important question involved in the judgment, namely, whether such a claim as the plaintiffs made to absolute ownership for agricultural purposes of the waters of a natural stream of the country, to the entire exclusion of all other settlers on the same stream, whose lands require irrigation, and to whom water is one of the necessities of life, and through whose lands that stream may run, can, under our laws, be maintained. The facts found not being sufficient to sustain the conclusions of law or judgment, it follows that the judgment as to the appellant should be reversed.

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There is no room for any presumption that other prerequisites to a valid judgment existed. Indeed, it is shown affirmatively that the necessary grounds did not exist. Here, then, I think this case should end. What may be further said on the question of rights of parties diverting water upon lands for purposes of irrigation can have no binding force. There is no case before the court warranting a discussion of the subject. Such discussion may be taken as *obiter*, merely. But the majority opinion goes into it, and I may be excused for following its example, so far as the little time allowed me will permit.

1. The assumptions, in the majority opinion, of facts as drawn from the findings, or as properly deducible from those findings, I, for the most part, controvert. The findings of fact are hereinbefore stated in full, and they speak for themselves.

2. Nor do I admit that posting a notice on a stream, prior to 1881, claiming 600 inches of water, was "an act of appropriation." It had nothing to do with "an act of appropriation on the public domain." That could only be done on the public domain by having lands to irrigate; *second*, by actually diverting waters upon it, by means sufficient to conduct all the water actually appropriated. There is nothing of that kind in this case, and the court is not warranted in assuming that there is.

3. The majority opinion pronounces the claim of a person whose lands lie upon a stream as resting on the "phantom of riparian rights." I deny that under the laws of this territory "riparian rights" are a "phantom," unless unlawfully and unjustly made so. The doctrine of riparian rights is a part of the common law; and the common law is the law of this territory, except as the statute steps in, and repeals or changes it. Section 18 of the Revised Statutes so declares. It provides that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts in this territory." The United States statutes have in some respects modified the common-law rule of riparian rights on the public domain where customs are shown to exist, and not otherwise.

No customs are pretended here. Indeed, all customs are studiously ignored. The statutes of the territory previous to 1881 had no provision whatever on the subject of water-rights. But in 1881 what are equivalent to common-law water-rights were in some respects expressly affirmed, only those rights were enlarged. Section 3180, Rev. St., provides that "all persons, companies, and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." In the preceding chapter of the statutes it is provided that by complying with certain conditions (not one of which is pretended to be complied with in this case) a party may entitle himself to superior rights in the use of water. No one denies this fact. But it nowhere provides that any one may entitle himself to ownership of a stream, or to entirely exclude others "on the banks or in the vicinity of a stream" from some use of the water, as provided in section 3180, above quoted. Our statute is a little more comprehensive—a little stronger, in some respects, in favor of those needing water—than the common law of riparian rights; but it leaves many of those rights intact. It is wrong, then, to designate these common-law rights as a "phantom." They are real, and the interests of our territory demand that they should be recognized.

4. By the common law, running water is not the subject of ownership. No statute of Idaho, nor of congress, either, makes it such. By custom, when that is shown, a person in its prior use may not be disturbed in its use, providing, as Mr. Justice FIELD says in *Basey v. Gallagher*, the custom and claim under it are reasonable. But that is as far as it goes,—as far as any statute of the United States or of this territory goes. Our own statutes are in accord with that view. Rev. St. Idaho, § 3188. In *Basey v. Gallagher*, 20 Wall. 683, Mr. Justice FIELD says that "in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits; for this right to water, like the right by prior occupancy to mining ground, * * * is not unrestricted. It must be exercised with reference to the gen-

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eral condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and to vest an absolute monopoly in a single individual."

What does this judgment do, but to violate every provision of the foregoing, severally and as a whole? Is it reasonable to appropriate all the waters of a stream, even if it contains 1,000 inches, or whatever it may be, to irrigate "a piece" of land, with no intimation of its description or amount? Is it reasonable to allow absolute and "unrestricted" ownership in water diverted for purposes of irrigation, only, to be used, as in this case, for sale to railroads and brick-yards, or other purposes than irrigation, and still deny to others their natural, lawful, statutory rights in any of it? Where are the "reasonable limits" of such a claim? Is such a claim in accord with "the conditions of the country and necessities of the people," when those people are famishing for water, and precluded from using a drop, though an abundance runs past their doors? Does not this judgment establish "an absolute monopoly" of the waters of this stream? Every one of these questions carries with it its own answer. I do not propose to pursue this argument, and show that a great majority of the cases relied on to establish this doctrine of absolute ownership and exclusive monopoly in streams do not relate to the use of water for agricultural purposes at all, but that those cases relate to diversions or use for mining purposes only. That fact may be easily shown, or else that the cases where they relate to irrigation are based upon mining cases. There are few of them that are not so founded, even of those cited in the majority opinion. The doctrine of those cases would prevent the settlement upon lands depending on our natural streams, and, as in the case at bar, would drive away half or more of the settlers who have already settled there. This is not for the interest of the territory, and to allow the example of this case to obtain will prove detrimental in other ways than in decreasing our population. The suffering settlers will very soon resort to the demoralizing aid of the ever present "Winchester" or revolver. People will not tolerate such unlaw-

ful claims; and the sooner they are abandoned, or reduced within reasonable bounds, the better will it be for all. This judgment should be reversed.

HARVEY v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(March 5, 1890.)

JUDGMENT BY CONSENT—RIGHT OF APPEAL.

Where, in a suit before a justice for \$150, being above the amount of which justices have exclusive original jurisdiction, all the allegations of the complaint were denied, but, to expedite an appeal, defendant, by agreement of both parties, consented to a "*pro forma* judgment" against him, "reserving all his rights under an appeal," this consent does not deprive him of his right to be heard in the circuit court, and his appeal was improperly dismissed.

Appeal from circuit court, Shoshone county; LOGAN, Judge.

Action by Robert S. Harvey against the Bunker Hill & Sullivan Mining & Concentrating Company for professional services. By consent of defendant, a judgment *pro forma* for plaintiff was rendered in the justice's court in which the action was commenced. Defendant thereupon appealed to the district court. From an order of the district court granting plaintiff's motion to dismiss the appeal, defendant appeals. Reversed.

William H. Clagett, for appellant.

The judgment rendered in the justice's court is not a judgment by default, an answer being in, and issue of fact pending. Neither was it a judgment by confession, which must be in writing, admitting some sum to be due, and concisely stating the facts out of which the debt confessed arose. Rev. St. §§ 5061, 4777, 4725.

Neither is it a judgment by consent on the theory that by consenting thereto the party waives all objection to the judgment, and will not be allowed to question the same on appeal. The consent was not real, but *pro forma* only, and the party does not waive or lose any of his rights thereby. *Mecham v. McKay*, 37 Cal. 158, 159; *Haynes*, New Trials & App. § 282.

To make a good complaint in a justice's court, the facts constituting the plaintiff's cause of action must be concisely stated. Rev. St. § 4668.

Charles W. O'Neil, for respondent.

No appeal lies from a judgment by consent. *Campbell v. Randolph*, 13 Ill. 314;

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Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. Rep. 864; Brick v. Brick, 65 Mich. 230, 31 N. W. Rep. 907, and 33 N. W. Rep. 761.

An appeal from a judgment by default can only be upon questions of law. Haynes, New Trials & App. § 343.

There can be no trial *de novo* where there was no trial originally. Southern Pac. R. Co. v. Superior Court, 59 Cal. 475.

SWEET, J. On March 25, 1889, plaintiff filed his complaint before J. S. LANGUISHE, a justice of the peace in and for Wardner precinct, Shoshone county, Idaho territory, in which he alleged that the defendant was indebted to him in the sum of \$150 for professional services rendered at defendant's instance and request. On that day a summons was issued, and was returned on the 29th of the same month. On the 29th, also, defendant appeared and filed its answer, denying each and every allegation contained in plaintiff's complaint. At the same time defendant consented to what is termed in this written consent the entering of a *pro forma* judgment, and judgment was thereupon entered for plaintiff. The paper under which the judgment was entered is as follows: "This case having been called for trial, the defendant consents that judgment may be entered *pro forma* in favor of plaintiff and against defendant, as prayed for in the complaint herein, reserving all of its rights under an appeal from said judgment. WILLIAM H. CLAGETT, Attorney for Defendant." Immediately after the rendition of judgment, to-wit, on the said 29th day of March, 1889, defendant filed its notice of appeal, together with the undertaking thereon, and the said appeal was perfected by defendant's causing a transcript of the docket of said justice to be verified and forwarded to the clerk of the district court. The cause came on for trial in the district court, whereupon plaintiff moved that the appeal be dismissed. The motion was granted by the district court on the ground that, inasmuch as there had been no trial in the lower court upon questions of fact, and that, as no statement had been made, there was nothing to try. The court, in dismissing the case, used the following language: "As before stated, the case cannot be tried in this court for the first time. There must have been an actual trial before the justice before that can be done here. Manifestly, this case can only be affirmed or reversed by this court, or the appeal dismissed. The appeal must be dis-

missed, for the reason that there are no issues presented to this court which can be tried."

We do not understand why the issues were not clearly presented in the district court. The complaint was there, alleging the debt. The answer was there, denying it. The issues were as fully presented in the district court as they could be presented after a trial had in the justice's court. No trial in the justice's court would have presented the issues any differently from the manner in which they were presented at that time. We take it that this objection is not a valid one.

The next inquiry suggested is far more serious in its character. It is this: May the defendant consent to a judgment in the justice's court, and then appeal from the judgment to which he has consented? If the amount were \$100, or less, the defendant would unquestionably be bound by the judgment to which he consented, unless a new hearing were granted in the justice's court for cause shown; and we doubt if his declaration that he consented only to a *pro forma* judgment would save him. We do not think the appeal could be saved by declining to enter into a trial before the justice involving an amount confined to the original jurisdiction of the lower court. Counsel for defendant treats his written consent to the entry of said judgment as a stipulation, and cites *Mecham v. McKay*, 37 Cal. 159, as an authority in support of his position. After stating that the court has repeatedly refused to review judgments and orders entered by consent, the court discuss the question further, and say: "We are not inclined to retract or modify this proposition, but it is to be limited to cases wherein it does not appear from the record that the consent was given only *pro forma* to facilitate the appeal, and with the understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition to the judgment. * * * If it appears from the record that it was intended by the parties to be only a *pro forma* judgment or order entered, by consent, for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid rule to give the stipulation a conclusive effect not contemplated by the parties. * * * The stipulation in this case, on which the order denying a new trial is entered, is not free from doubt; but, taking it altogether, and

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construing it as a whole, in connection with the other facts disclosed in the record, we conclude it was intended by the parties that the motion for a new trial should be denied *pro forma* only to hasten the appeal." But the plaintiff contends that this paper is in no sense a stipulation. Taken alone, it could not be considered as such. But the amount involved was and is within the original jurisdiction of the district court. Both parties were before the justice. An answer had been filed denying the indebtedness, and on the same day the notice of appeal was given, the undertaking filed, and the transcript promptly forwarded to the district court. Counsel for defendant contends that after said answer was filed it was agreed between counsel for plaintiff and defendant that this judgment should be entered, and that defendant should forthwith appeal the case. Counsel for defendant further insists that this agreement was reached between the parties by reason of the fact that it was then and there understood that neither party would accept the judgment of the justice's court as final, and that, no matter which way it might be decided, the appeal would follow; and that therefore they would save costs and trouble by simply consenting to the *pro forma* judgment, (whatever that may mean,) and the appeal should go forward. The counsel who represented plaintiff and respondent in this court did not appear in the justice's court, nor in the court below; hence makes no denial of all these assertions made by counsel for defendant, except that the paper in itself is not a stipulation, and that, therefore, the rule just quoted from *Mecham v. McKay* does not apply.

Taking all the facts together, we are inclined to believe that the agreement was fairly made. The defendant was there ready to try its case. So was the plaintiff. They agreed that the judgment rendered by the justice, no matter which way it went, would be forthwith appealed from by the losing side. There can be no question but that defendant would have tried the case then and there had not such an understanding been arrived at. As shown by the record, also, no evidence was taken by the justice; and he gave judgment for the plaintiff without requiring a syllable of evidence, and in the face of a denial averring that defendant was not indebted to plaintiff in any sum whatever. This simply tends to show that the justice also understood the real stipulation between the par-

ties, and that immediately upon its consummation the judgment was entered in accordance therewith. It would, of course, be an absurdity to say that the defendant intended to consent to a *bona fide* judgment, in the face of the peculiar written consent given, and in the face of the answer, filed at the same time, denying that the plaintiff was entitled to the judgment. We do not understand that the court below entertained any such view of the case. The court below simply intimated that the case should go back for trial in the justice's court. That means simply that the parties should introduce their evidence in the justice's court, and then appeal again to the district court, where they would occupy precisely the same position in which they found themselves when they were dismissed in the first instance; for even had evidence been introduced, they would still go to trial *de novo* in the district court on the pleadings as they now stand, and as they have stood from the beginning. As before stated, if it were not a case in which the jurisdiction of the district court were concurrent with the jurisdiction of the justice's court, an appeal of the kind would not be allowed, for the reason that, unless the amount exceed \$100, the intention of the statute is that the higher court shall not be burdened with the consideration of the case until, after a trial, the party appeals as prescribed by law.

Defendant cites *Brick v. Brick*, (Mich.) 31 N.W. Rep. 907. The language of the court in that case is as follows: "It appears from the printed record that the decree below was entered, by the consent of defendant, by his solicitor. Such a decree is binding upon the parties unless impeached for fraud or mistake, and no such claim is advanced on this appeal." The facts already stated show most conclusively that, to say the least, if the consent entered in the justice's court resulted in a judgment from which no appeal could be legally had, a mistake was made. This view urged by the defendant is not seriously denied. Counsel for respondent cites *Campbell v. Randolph*, 13 Ill. 314. The Illinois statute provides that "appeals from judgments of justices of the peace to the circuit court shall be granted in all cases except on judgments confessed." Rev. St. 1845, c. 59, § 58. The entry in the case discussed was as follows: "This day being set for trial, and the parties appeared, and the defendant filed his set-off. But, no proof being before the court, and the de-

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fendant by his counsel admitting the plaintiff's account, judgment is therefore rendered in favor of the plaintiff and against the defendant for the sum of \$17.20 principal and interest, and costs of suit." The court held this not to be a judgment by confession. Under our statute a judgment by confession may be made, but section 5061 contains the following requirements: "It must be made, signed by the defendant, and verified by his oath to the following effect: (1) It must authorize the entry of judgment for a specified sum; (2) if it be for money due or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due; (3) if it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same." It is unnecessary to say that the judgment in this case was not, under this

statute, a judgment by confession; nor was it a judgment by default, because the defendant was in court with an answer denying the allegations contained in the complaint. We think there can be no question of the agreement between the parties as to what should be done in the premises; nor do we think it possible for the judgment to stand, having been rendered, without evidence, notwithstanding defendant's answer denying the averment set forth in the complaint. *Curtis v. Superior Court*, 63 Cal. 435.

We will not pass this case without expressing our disapproval of proceeding in this manner; for it, at best, incumbers the practice with proceedings of a doubtful character, and throws into the court many perplexing questions involving both time and expense. The judgment is reversed, and a trial ordered in the district court.

BEATTY, C. J., and BERRY, J., concur.

STATE DECISIONS.

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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

FEBRUARY TERM, 1891

TOOTLE et al. v. FRENCH et al.

(February Term, 1891.)

APPEAL—RECORD—SERVICE OF NOTICE.

1. The record of a case on appeal must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney, within the time required by the statute.

SAME—APPELLATE JURISDICTION—SERVICE OF NOTICE.

2. Without these requirements of the statute are complied with, this court has no jurisdiction.

COURTS—OBJECTIONS TO JURISDICTION—WHEN RAISED.

3. Objections for want of jurisdiction may be made at any time.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county.

Action of claim and delivery by Thomas E. Tootle and others against Q. A. French and another. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiffs appeal. Appeal dismissed.

Bruner & Parsons, for appellants.

The engine and iron pipe, attached, as they were, to the quartz mill of plaintiffs, and on the premises of plaintiffs, became fixtures and part of the realty as soon as they were attached. Tied. Real Prop. § 6; 2 Tayl. Landl. & Ten. §§ 544, 549; Merritt v. Judd, 14 Cal. 60.

Fixtures cannot be removed by vendee of lessee, or levied upon by creditors of lessee, unless removed or levied upon before termination of lease. 2 Tayl. Landl. & Ten. § 549; Thropp's Appeal, 70 Pa. St.

396; 2 Smith, Lead Cas. (5 Amer. Ed.) 257; Merritt v. Judd, 14 Cal. 69.

If the tenant surrenders the premises without removing the fixtures, and the landlord takes possession, they become the property of the landlord. 2 Tayl. Landl. & Ten. §§ 551, 553; Thropp's Appeal, 70 Pa. St. 396; Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362.

The right of removal exists only during the original term, and such further time as the lessee shall hold the premises under a right to consider himself a tenant. 2 Tayl. Landl. & Ten. § 551; Mason v. Fenn, 13 Ill. 525-527; Merritt v. Judd, 14 Cal. 59; Davis v. Moss, 38 Pa. St. 346-353; Overton v. Williston, 31 Pa. St. 155; Antoni v. Belknap, 102 Mass. 193; Cromie v. Hoover, 40 Ind. 49; Allen v. Kennedy, Id. 142.

Texas Angel, for respondents.

Unless the notice of appeal is filed, and served upon the adverse party or his attorney, there is no appeal made. Both are essential to the taking of the appeal. Code Civil Proc. §§ 4807, 4808; Bryan v. Berry, 8 Cal. 133; Franklin v. Reiner, Id. 340; Whippley v. Mills, 9 Cal. 641.

MORGAN, J. This appeal is taken from the judgment and from the order overruling the motion for a new trial. The respondents ask the court to dismiss the appeal for the reason that the record does not show that there has ever been a notice of appeal filed in this case. The constitution gives this court jurisdiction to review upon appeal any decision of the district court, etc. Section 9, art. 5 Const.

Gilbert v. Moody.

The statute points out the method by which an appeal to the supreme court is taken, as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney." Section 4808, Rev. St. Idaho. The record must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party, or his attorney, within the time required by statute. *Franklin v. Reiner*, 8 Cal. 340; *Whipley v. Mills*, 9 Cal. 641; *Hayne*, New Trials & App. § 210, and other authorities there cited; *Brewing Co. v. Gillman*, (Idaho,) 10 Pac. Rep. 32.¹ Judgment in this cause was rendered in the district court on May 31, 1889, and placed on file June 1, 1889. Order overruling motion for new trial was filed January 8, 1890. Notice of appeal from said order and from the judgment was served on counsel for respondents March 10, 1890. This service was not within the 60 days given by the statute within which an appeal may be taken from an order overruling a motion for a new trial. The record does not show that the notice of appeal was ever filed with the clerk. That which is required by the statute cannot be dispensed with by the court. Failure of service of notice of appeal within the 60 days is fatal to the appeal from the order overruling the motion for a new trial. Failure to file the notice with the clerk of the court below is fatal to both appeals. Without these requirements of the statute are complied with, this court has no jurisdiction. Objection for want of jurisdiction may be made at any time. Both appeals are dismissed.

HUSTON, J., concurring.

SULLIVAN, J., having been of counsel in the court below, took no part in the hearing of this cause.

GILBERT v. MOODY, State Auditor.

(February Term, 1891.)

COURT REPORTERS—RIGHT TO COMPENSATION.

1. Stenographic reporters, appointed by district judges under an act of the fifteenth legislative assembly, are entitled to the compensation fixed by said act.

¹ Ante, 180.

CONSTITUTIONAL LAW — JUDICIAL POWERS — APPOINTMENT OF STENOGRAPHER.

2. Said act is not repugnant to the constitution.

STATUTES — CONSTRUCTION — APPOINTMENT OF STENOGRAPHER.

3. Said act creates the office of court reporter and makes the appropriation for the payment of his salary.

MANDAMUS — TO STATE AUDITOR — PAYMENT OF STENOGRAPHER.

4. *Mandamus* will issue to compel the state auditor to issue a warrant for the payment of the court reporter's salary as required by said act.

CONSTITUTIONAL LAW — AMENDMENT OF STATUTE.

5. The act of the first legislative assembly of the state of Idaho, amending the Revised Statutes of Idaho territory, and the Fifteenth Session Laws, changing the word "territory" to "state," and "comptroller" to "auditor," is not in conflict with the constitution.

(*Syllabus by Sullivan, C. J.*)

Application by Justin Gilbert for a writ of mandate to compel Silas W. Moody, state auditor, to issue a warrant in favor of plaintiff in payment of certain services performed by plaintiff as stenographic court reporter. Peremptory writ granted.

Cahalan & Budyer, for plaintiff. *George H. Roberts*, Atty. Gen., for defendant.

SULLIVAN, C. J. The plaintiff, Justin Gilbert, applied to this court for a writ of mandate to compel the defendant, Hon. Silas W. Moody, auditor of the state of Idaho, to issue his warrant in favor of the plaintiff, in payment for certain services claimed to have been performed by said plaintiff as stenographic court reporter. The material facts set forth in said application are substantially as follows: On the 3d day of April, 1889, the plaintiff was duly appointed stenographic court reporter of the second judicial district of Idaho territory, by Chief Justice WIER, sitting as a district judge of said judicial district. That said plaintiff entered upon and performed the duties of said office, and performed the same under said appointment, to and including the 2d day of November, 1890, for which services he received the compensation provided by law. That from and after said 2d day of November, 1890, to the 18th day of November, 1890, he continued to perform the duties of said office under and by virtue of said appointment made as aforesaid. That on the 18th day of November, 1890, the plaintiff was duly appointed stenographic reporter of the third judicial district of the state of Idaho by the Hon.

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E. NUGENT, judge of said third district. That on said 18th day of November he entered upon his duties as such stenographic reporter under said appointment, and continued to perform the duties of such position up to the close of the 11th day of January, 1891, and still continues to perform said duties under said last appointment. That on the 9th day of January, 1891, the plaintiff presented his claim against the state of Idaho, for his services as official reporter, from the 3d day of November, 1890, to the 11th day of January, 1891; both mentioned days included, amounting in all to the sum of \$374.98. That on the 9th day of January, 1891, the defendant was, ever since has been, and now is, the duly-qualified and acting auditor of the state of Idaho. That the defendant, as such auditor, refused to allow plaintiff's said claim, and refused to issue to the plaintiff his warrant in payment of said claim, and asks that a writ of mandate be issued out of this court commanding the said auditor to draw his warrant on the state treasurer of Idaho, in favor of the plaintiff, for the amount of said claim. The defendant admits all of the material facts set forth in plaintiff's application, but denies that the Hon. E. NUGENT, as judge of the third judicial district of the state of Idaho, had any authority to appoint the plaintiff stenographic reporter of said third district court. And further alleges that no appropriation has been made by law for the payment of compensation to the stenographic court reporter of said district court; and, further, that there is no money or funds in the hands of the treasurer of the state of Idaho applicable to the payment of plaintiff's said claim.

This case involves the validity of an act passed by the fifteenth legislative assembly of Idaho, entitled "An act to provide for the appointment of a court stenographic reporter in each judicial district of Idaho territory," which act was approved February 4, 1889, (15th Sess. Laws, p. 25.) The plaintiff, in said application for a writ of mandate, alleges that he was appointed official reporter of the second judicial district of the territory of Idaho, and performed the duties of that position until the 18th day of November, 1890, on which date he was appointed official reporter of the district court of the third judicial district of the state of Idaho, and performed the duties of such position

to and including the 11th day of January, 1891. The defendant contends that the appointment of the plaintiff, made by the Hon. E. NUGENT, judge of the third judicial district of the state of Idaho, on the 18th day of November, 1890, was made without authority of law. The first point to be determined, then, is whether the Hon. E. NUGENT, judge of the district court of the third judicial district of the state of Idaho, had the authority to appoint the plaintiff official reporter of said court on the 18th day of November, 1890. In other words, was the act above referred to in force on the 18th day of November, 1890, and continued in force to and including the 11th day of January, 1891? Idaho was admitted as a state on the 3d day of July, A. D. 1890, under a constitution theretofore adopted by the people of the state. Section 2 of article 21 of said constitution is as follows: "All laws now in force in the territory of Idaho, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." It is not claimed that said act has expired by its own limitation, or has been repealed or altered by the legislature. Said act in no manner conflicts with the provisions of the constitution, and is not repugnant thereto; hence said act was in force at the date of said appointment, and has been in force since its approval, February 4, 1889. Said act authorized the judges of each district court, in the then territory of Idaho, to appoint a competent official reporter; defines his duties; fixes the tenure of his office, and his yearly compensation; directs that it be paid quarterly out of the general fund of the territorial treasury; and authorizes the comptroller to draw his warrants, to make such payments, when they shall become due. Gen. Laws Idaho, 15th Sess., 1888-89, p. 25. The defendant also contends that no appropriation has been made for the payment of this claim, as require by section 13 of article 7 of the constitution. The act in question makes the appropriation. It fixes the compensation, the time of payment, and authorizes the comptroller to draw his warrant to pay the same when due. No further appropriation is required. The defendant further contends that the act of the present session of the legislature, amending the Revised Statutes of Idaho, and the General Laws of Idaho of the Fifteenth Session,

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by changing the word "territory" to "state," and "comptroller" to "auditor," is in conflict with section 18, art. 3, of the constitution, which section is as follows: "No act shall be revised or amended by mere reference to its title; but the section as amended shall be set forth and published at length." The object of this provision is to prevent obscurity, confusion, and uncertainty in the laws. This section deals with such amendments of existing legislation as change the application, force, or effect of an act, or a portion thereof. The amendments referred to do not change the application, force, or effect of the sections amended, but merely change the words "territory" to "state," and "comptroller" to "auditor." These amendments cannot result in any ambiguity or uncertainty, nor can any one be misled as to the purpose of these amendments. To hold that each section, so amended, should be published at length would be an unreasonable construction of said provision, and entail needless expense upon the people. The office of comptroller has not been abolished by the constitution,—the name only has been changed to "auditor." The fact that there are no funds in the hands of the treasurer of the state with which to pay said claim will not excuse the auditor from issuing his warrant. We are of the opinion that a peremptory writ should issue, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

GOODNIGHT v. MOODY, State Auditor.

(February Term, 1891.)

ADOPTION OF CONSTITUTION—STATE LEGISLATURE—SESSIONS.

1. Section 8, art. 3, of the constitution, designates the different sessions of the state legislature, as follows: *First*, the first session; *second*, sessions to be held biennially after the first session, commencing on the first Monday after the 1st day of January, and every second year thereafter; *third*, sessions convened by the governor.

SAME — STATE LEGISLATURE — COMPENSATION OF MEMBERS.

2. The first paragraph of section 23, art. 3, of the constitution, applies to the regular or biennial sessions only as to the *per diem* compensation of members, and the aggregate of *per diem* allowances.

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3. The second paragraph of said section 23 fixes the *per diem* of each member, except the presiding officers, for the first session of said legislature and for sessions convened by the governor, and does not limit the aggregate *per diem* allowances for said first session.

MANDAMUS — TO STATE AUDITOR — PAYMENT OF SALARY TO MEMBER OF LEGISLATURE.

4. A writ of mandate will issue to compel the state auditor to issue his warrant to pay the *per diem* of each member for each day's attendance upon the first session of said legislature, regardless of whether such member has already received, in the aggregate, \$300 for *per diem* allowances for said first session or not. HUSTON, J., dissenting.

(Syllabus by the Court.)

Application by J. L. Goodnight for a writ of mandate to compel Silas W. Moody, state auditor, to issue a warrant to plaintiff upon the state treasurer in payment of the *per diem* for plaintiff's attendance as a member of the state legislature. Peremptory writ granted.

Lyttleton Price and T. J. Jones, for applicant. George H. Roberts, Atty. Gen., for defendant.

SULLIVAN, C. J. On the 23d day of February, 1891, J. L. Goodnight, the plaintiff, made his application to this court for a writ of mandate to the Hon. Silas W. Moody, auditor of the state of Idaho, commanding said auditor to issue his warrant upon the state treasurer for the sum of five dollars, in payment of the *per diem* for the applicant's attendance as a member of the house of representatives of the state of Idaho for the 21st day of February, 1891. The facts stated in said application are substantially as follows: That said applicant was, on the 1st day of October, 1890, duly elected as a member of the house of representatives of the legislature of the state of Idaho from the county of Nez Perces, state aforesaid, for the term of two years; that on the 8th day of December, 1890, he duly qualified as such representative, and that ever since said 8th day of December he has been, and now is, a duly-qualified and acting member of the house of representatives of said Idaho legislature for the county aforesaid; that on said 8th day of December the legislature of the state of Idaho was convened in its first session by a proclamation of the governor, and began its duties under and by virtue of said proclamation and the constitution of the state of Idaho, and

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remained in continuous session from said 8th day of December, 1890, to the 20th day of December, 1890, at which last-mentioned date said legislature adjourned to the 5th day of January, 1891, and on said 5th day of January reconvened, and remained in continuous session since said 5th day of January; that on the 21st day of February, A. D. 1891, the said legislature was in lawful session at the capitol of the state, and that the applicant, as a member thereof, as aforesaid, was present and attended the session on that day, and performed all duties required to be performed by him as such member by the laws and constitution of the state of Idaho: that there was due and payable to said applicant from the state of Idaho for said day's services the sum of five dollars; that on said 21st day of February, Hon. Frank A. Fenn was the duly elected, qualified, and acting speaker of said house of representatives, and as such speaker made out and delivered to the applicant his certificate, in due form of law, showing and certifying that the applicant had attended said day's session of the house of representatives aforesaid, and was entitled to the sum of five dollars for said day's services; that the defendant, Silas W. Moody, is the duly elected, qualified, and acting auditor of the state of Idaho, and that it is the duty of the said auditor to issue warrants to all members of the said legislature for their *per diem* for attendance for each day that the members of said legislature are legally entitled thereto; that there is a lawful appropriation of funds in the state treasury for the payment of the *per diem* of all members of the legislature for said day; that on the 21st day of February, 1891, the applicant presented to said auditor, at his office in Boise City, Idaho, the said certificate of the said speaker of the house of representatives, issued to the applicant as aforesaid, and the applicant then and there requested and demanded that he, the said state auditor, issue to the applicant a state warrant on the state treasury of the state of Idaho for the sum of five dollars, the amount due the applicant for the services rendered by him, as aforesaid, on the 21st day of February, A. D. 1891; that the said Hon. Silas W. Moody refused without any just cause to issue and deliver to the applicant his warrant on the treasury of the state of Idaho, as by law it was his duty to do, and that said auditor still refuses, al-

though often requested so to do, to issue and deliver to the applicant an Idaho state warrant for said sum of five dollars; that said Hon. Silas W. Moody, auditor, as aforesaid, stated as his reason for refusing to issue the warrant aforesaid that the applicant, J. L. Goodnight, had heretofore been paid the sum of three hundred dollars as *per diem*, in state warrants, as representative in the first session of the legislature of the state of Idaho, the same being the sum limited by the constitution of the state of Idaho. The applicant prays that a writ of mandate issue to compel the said auditor to issue to the applicant his warrant, in due form of law, upon the state treasurer, for the sum of five dollars, in payment of the *per diem* provided by law for his attendance as a member of the house of representatives of the state of Idaho for the 21st day of February, A. D. 1891. The defendant, Hon. Silas W. Moody, interposes his demurrer to said application, and alleges as the ground thereof that said application does not state facts sufficient to constitute a cause of action against him. This cause came on for hearing upon said demurrer. The defendant, by his demurrer, admits the facts set up in the application to be true. It is therefore admitted that the defendant refused to issue his warrant to the plaintiff, for the reason that said plaintiff had theretofore been paid the sum of \$300 for *per diem* allowances as a member of the state legislature of Idaho for the first session thereof; that being the sum to which each member is limited for *per diem* allowances by the constitution. If it be true that the constitution limits the *per diem* of each member of the legislature to \$300 for the first session thereof, then the writ of mandate should not issue; but if the constitution does not limit the aggregate amount which each member shall receive at this session for *per diem* allowances, the writ should issue.

To determine the question involved we must turn to the constitution. Section 8, art. 3, of the constitution is as follows: "The sessions of the legislature shall, after the first session thereof, be held biennially at the capitol of the state, commencing on the first Monday after the first day of January, and every second year thereafter, unless a different day shall have been appointed by law, and at other times when convened by the governor." This section mentions the first

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session of the legislature, the sessions to be held biennially after the first session, and sessions convened by the governor. The first session of the legislature is the session provided for by section 14, art. 21, of the constitution. This section directs the governor of the state, immediately upon his qualifying and entering upon the duties of his office, to issue a proclamation convening the legislature of the state at the seat of government on a day to be named in said proclamation, which shall not be less than 30 nor more than 60 days after the date of said proclamation. The biennial sessions are those fixed by said eighth section of the constitution to be held at the capitol of the state, commencing on the first Monday after the 1st day of January, biennially, after the first session, and every second year thereafter. The other sessions of the legislature referred to in section 8 are those convened by the governor. The last-mentioned sessions are those referred to in section 9, art. 4, of the constitution, which section empowers the governor, on extraordinary occasions, to convene the legislature by proclamation. The present session of the legislature is the session designated in said section 8 of the constitution as the "first session." Section 23, art. 3, of the constitution, among other things, fixes the pay of the members of the legislature, and is, upon that point, as follows: "Each member of the legislature shall receive for his services a sum not exceeding five dollars per day from the commencement of the session, but such pay shall not exceed for each member, except the presiding officers, in the aggregate three hundred dollars for *per diem* allowances for any one session; and shall receive each the sum of ten cents per mile each way by the usual traveled route." "When convened in extra session by the governor they shall each receive five dollars per day; but no extra session shall continue for a longer period than twenty days, except in case of the first session of the legislature;" and also provides that they shall receive such mileage as is allowed for regular sessions. This section is divided into two paragraphs. In the first paragraph it is declared that no member, except the presiding officers, shall receive for his services a sum exceeding five dollars per day, and in the aggregate, for *per diem* allowances, not more than three hundred dollars for any one session, and shall receive the sum

of ten cents per mile each way by the usual traveled route. The second paragraph fixes absolutely the *per diem* which each member shall receive when convened in extra session by the governor, and what each member shall receive at the first session, and declares that no extra session shall continue for a longer period than 20 days, except in case of the first session; and further declares that each member shall receive such mileage as is allowed for regular sessions. There is no provision of the constitution fixing the mileage for regular sessions, except said first paragraph of section 23, and that part of said paragraph referring to mileage is separated from the remaining part of said paragraph by a semicolon, as shown by the original enrolled copy of the constitution, filed in the office of the secretary of state, and not by a period, as shown by the printed (pamphlet) copy of the constitution. As the second paragraph of said section clearly refers to the first paragraph thereof as fixing the mileage of members for regular sessions, and as that part of said first paragraph fixing such mileage is separated from the remaining part by a semicolon only, we are of the opinion that that part of said first paragraph which declares that no member except the presiding officers shall receive more than \$300 for *per diem* allowances for any one session applies to biennial or regular sessions,—sessions directed by section 8, art. 3, of the constitution to be held biennially after the first session, commencing on the first Monday after the 1st day of January,—and every second year thereafter, and does not apply to the first session of the legislature. The framers of the constitution, and the people who adopted it, certainly recognized the fact that the first session of the legislature would necessarily, from the amount of legislation required, be a prolonged one. United States senators were to be elected; laws passed to carry into effect the provisions of the constitution; the laws amended so as to conform to the conditions of statehood; and much other needed legislation. In view of these facts, and, as we think, the clear intent of the provisions of the constitution, we are of the opinion that the members of the legislature at the present session (this being the first session) are not limited in the aggregate to three hundred dollars for *per diem* allowances, but that each member, except

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the presiding officers, is entitled to the sum of five dollars per day for each day's attendance during the present session. The demurrer is therefore overruled, and it is ordered that a peremptory writ of mandate issue as prayed for by the plaintiff.

MORGAN, J., concurs.

HUSTON, J., (*dissenting*.) I find myself unable to agree with the majority of the court in the conclusion they have reached in this case. Whether the first session of the legislature be called a regular or an extra session or a session *sui generis*, it seems to me that the provision in the first subdivision of section 23 of the constitution, limiting the *per diem* compensation of members to \$300 "for any one session," is so clear, distinct, and unequivocal, as not to necessitate the invocation of any rule of construction. My view is strengthened when I consider the consequences involved in the construction given by the majority of the court to section 23. I am unwilling to believe that the framers of the constitution intended to place no other limit upon the amount of *per diem* compensation to members of the legislature than that of their full term of two years, at five dollars per day.

WALKER v. CAMPBELL.

(February Term, 1891.)

FINDINGS OF REFEREE—SETTING ASIDE.

Where a cause has been submitted by agreement of parties, and on order of the court to a referee to hear the testimony and report his findings of fact thereon, it is error for the court, upon its own motion, to set aside such findings, make findings of fact of its own, and enter judgment thereon.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

Action by Frederick K. Walker against James S. Campbell for the dissolution of a copartnership between plaintiff and defendant, and for the adjustment of the accounts of the firm. From a judgment for defendant, plaintiff appeals. Reversed.

J. T. Morgan and *T. M. Stewart*, for appellant.

The findings of a referee have the effect of a special verdict. *Kerr v. McGuire*, 28 N. Y. 449; *Brainerd v. Dunning*, 30 N. Y.

216; *Peabody v. Phelps*, 9 Cal. 213-225; *Brady v. Brown*, 20 Cal. 521; *Harris v. Railroad Co.*, 41 Cal. 394, 405; *Lyons v. Harris*, 73 Iowa, 292, 34 N. W. Rep. 864.

Findings of a referee are equivalent to findings of court. *Thompson v. Patterson*, 54 Cal. 542-546.

Findings of a referee cannot be amended or added to. *Headley v. Read*, 2 Cal. 325.

A finding of a referee cannot be set aside by mere volition of the judge. *Goodrich v. Mayor, etc.*, 5 Cal. 430; *Bassett v. Mining Co.*, 15 Nev. 298.

Judgment must conform to report of referee. *Sloan v. Smith*, 3 Cal. 406; *Grayson v. Guild*, 4 Cal. 122; *Phelps v. Peabody*, 9 Cal. 213; *Calderwood v. Peyser*, 31 Cal. 337.

J. Ed. Smith and *Hawley & Reeves*, for respondent.

If there is any evidence to support the findings, they will not be disturbed.

HUSTON, J. This is an action for the dissolution of a copartnership between plaintiff and defendant, and for the adjustment of the accounts of the firm. The pleadings in the case are various, multitudinous, and voluminous, too much so in fact to be inserted; nor is it necessary they should be, in the view we take of the case. The record, aside from the copies of the pleadings, is incomplete and unsatisfactory. Suffice to say that on the 10th day of December, 1887, the case was, upon agreement of parties, by order of the court, referred to a referee "to hear the testimony and report his findings of fact thereon." On the 14th day of February, 1888, the referee filed his findings of fact, and on the 20th day of July, 1888, the referee, by leave of the court, made and filed additional findings. It does not appear from the record that any exceptions were taken to the findings of the referee, or that any motion for a judgment was made. The next entry upon the record is a motion by the attorney for the plaintiff to modify and set aside the findings of the court made and filed on the 2d day of August, 1889. We next have the amended and supplemental "findings by the court," from which it appears that the court had previously made findings of fact in the case, but that, "the attention of the court having been called to the necessity of a review of its previous action, such review has been had," etc. These last findings by the court were filed on February 6, 1890, and

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judgment entered thereon in favor of the defendant, from which judgment this appeal is taken. The record does not show any motion to amend or set aside the report of the referee, nor does it appear that any motion was made for a resubmission. The record simply shows that the court, upon its own motion, or of its own volition, assumed to set aside the findings of the referee, and make findings of its own, and enter judgment thereon. This action of the district court, we think, was error. In the making up of the record there may have been omissions; but of this we cannot, of course, take cognizance. We must deal with the case as it is presented to us by the record. We can find no warrant, either in the statutes of the state or the decisions of the courts, for the action of the district court in this case in setting aside the findings of the referee. The judgment of the district court is reversed, and the cause remanded with directions to the district court, to make conclusions of law, and enter judgment upon the findings of the referee.

MORGAN, J., having been of counsel, took no part in the hearing or decision of this case.

SULLIVAN, C. J., concurs.

TERRITORY v. MCKERN.

(February Term, 1891.)

ROBBERY—EVIDENCE—OPINIONS OF WITNESS.

1. Defendant was indicted for robbery. H., a witness for prosecution, testified that he saw defendant scuffling with Miles, (the party alleged to have been robbed;) saw defendant hand something to McLouthlin, co-respondent, and alleged accomplice of defendant. Witness said "he thought" defendant took what he handed to McLouthlin from the person of Miles; did not see him take it, but "thought he did, because he thought he did." Motion to strike out latter part of testimony, as to what witness "thought," denied. *Held*, such denial was error, as it was not a matter upon which the opinion of witness was permissible.

SAME—INSTRUCTIONS—FORCE NECESSARY.

2. The statutes of Idaho define "robbery" as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Under an indictment upon this statute, the trial court charges the jury as follows: "As to the force, the court instructs you that, if a man stealthily filch from

the pocket of another, the force necessary to remove the property is all the force that the statute requires." *Held* error.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county.

V. McKern was convicted of robbery, and appeals. Reversed.

T. M. Stewart, for appellant.

Opinions as to the main point in issue invade the province of the jury, and are therefore inadmissible. *Conner v. Stanley*, 67 Cal. 315, 7 Pac. Rep. 723.

No confession made under the influence of hope or fear is admissible. *People v. Jim Ti*, 32 Cal. 60; *People v. Ramirez*, 56 Cal. 533; *People v. Brown*, 59 Cal. 353; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481.

A confession made to a person apparently acting by authority, making the defendant believe that he will get off easier, is inadmissible. *People v. Wolcott*, 51 Mich. 612, 17 N. W. Rep. 78.

If there is reasonable ground for presuming that the disclosure was made under the influence of a promise, it ought to be excluded. *State v. Day*, 55 Vt. 510; *People v. McGloin*, 91 N. Y. 241; *Ellis v. State*, 65 Miss. 44, 3 South. Rep. 188; *Simmons v. State*, 61 Miss. 243.

George H. Roberts, Atty. Gen., for the Territory.

There being no evidence presented by the record, an instruction is presumed to be applicable to the evidence.

Confidential communications to clerks, confidential agents, etc., are admissible. *Rap. Wit.* § 278.

HUSTON, J. The defendant was indicted and convicted at the May term, 1890, of the district court for the county of Bingham of the crime of robbery. "Robbery," as defined by the statutes of Idaho, "is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The evidence in this case, as shown by the record, is as follows: "One W. D. Hood testified that he was in Pocatello on or about the 28th day of January last. Knows the defendant. Saw him there about that time. Started to go into a saloon, when witness met this man and one McLouthlin. Afterwards saw them get into a scuffle. While they were scuffling, saw defendant hand McLouthlin some-

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thing. He took this something, and dodged into next room. Didn't see what it was that he handed him. He got it from an old man that he was scuffling with. Didn't see him get it from him. Wouldn't swear that he got it from him. Thought he got it from him, because I thought so." On cross-examination this witness testified, in response to the question what he saw: "I think he got it from this man, and I saw him pass it to McLouthlin. Didn't think he would get into a scuffle without some object. The old man was very drunk. Think the defendant was sober." James Criswell, a witness on the part of the prosecution, testified, as appears by the record, in substance as follows: "Was in Gundecker's saloon at five o'clock on the morning of that day, [January 28, 1890.] Saw this man and a man by the name of Miles standing close together, and defendant had his right arm over his shoulder, and while he was standing there he took something from Miles' pocket, and it was handed to this man McLouthlin, and he left the room. Witness was not more than two or three feet away when defendant took, and saw him take it from his pocket." On cross-examination, this witness testified, as appears by the record: "That there was no scuffle at all. That there were in the saloon only witness, Hood, and the bar-tender. This occurred about five minutes after witness entered the saloon. Don't know what the parties were doing before. Defendant and Miles stood in position described some time. When witness entered they were standing close to the window. McLouthlin's whereabouts, when he saw the defendant put his arm around the old man, unknown to the witness. They were not standing in that position when witness entered. The old man was drunk,—very drunk. Didn't seem to know what was going on. Don't think he realized what was going on. Question. You say you saw no scuffling? Answer. Yes, sir; that is what I say. McLouthlin took what the defendant handed him, and left the room." Samuel Gundecker, a witness for the prosecution, testified: "That he was a machinist residing at Pocatello, Idaho. Was there on the 28th day of January last. Was keeping the People's saloon. Saw the defendant on that day, after the occurrence in the saloon, in the jail at Pocatello. Witness, having learned what had occurred, thought he would look up the case, and

found the man, and he acknowledged to him that he got the money, and when witness asked him what he did it for he said that it was to get out of town. Didn't state what he did with the money, or what was the amount." On cross-examination, this witness testified that when he called on this man in jail he asked him what he did with what he took, and what he took the money for; and he said he didn't take any money; and after witness made him believe that he was going on his bond, and told him that it was no use to deny it, for that he knew that he was the man,—after that, he said he was the fellow who done it, and that he didn't know what he was doing. Witness is sure that he said this. It was previous that witness made him believe that he would go on his bond. This witness, proceeding, testified that he took the man McLouthlin with him to the jail, and that he was present at the conversation already related. "Witness is a detective, and so told the defendant. Has no interest in securing the conviction of the defendant. Hope to be a partner of the district attorney." There was no testimony offered by defendant.

The above is the substance of all the evidence in the case. There were several requests to charge on the part of the defendant, which were refused by the court, to which exceptions were taken. The first error assigned by the defendant is the refusal of the court to strike out so much of the testimony of the witness Hood as states "what he thought." It is not proper to permit a witness, except in the case of an expert, to testify as to his opinion in regard to a fact, or the occurrence of a fact. The witness had already stated what he saw. He had detailed the facts and circumstances upon which his opinion, or his "thought," as he expresses it, was based; but we cannot say what weight the opinion or "thought" of the witness may have had with the jury. The rule as given by Prof. Best, in his work on Evidence, (page 494, note 1,) is as follows: "The opinion of a witness is not in general to be received. Facts should be stated, and not inferences made." In the same note he says: "Where, therefore, it is both desirable and possible that the jury should draw an inference from the facts upon which the witness must necessarily base his opinion, and these facts can be placed before the jury, the opinion of the witness is not to be received." Best, Ev.

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p. 495, and cases cited in note 1. This would seem to exclude the statement of an opinion in such a case as that under consideration. The witness had already stated all the facts within his knowledge, and we think the inference to be drawn from these facts should have been left to the jury, unaided by the "thought" or opinion of the witness. Defendant's motion to strike out so much of the testimony of the witness Hood as stated what he thought defendant did, should have been allowed. *Abbott v. People*, 86 N. Y. 471. We do not think the second assignment of error is well taken. The confessions of the defendant to the witness Gundecker were not made to a person or under circumstances that would exclude them as evidence. Gundecker was not, nor did he pretend to be, acting under authority at the time the confession was made. The fourth assignment of error is as to the oral charge of the court, in the following words: "As to the force, the court instructs you that, if a man stealthily filch from the pocket of another, the force necessary to remove the property is all the force that the statute requires." We think this was error. Subdivision 6, § 7855, Rev. St. Idaho, provides that, in criminal cases, the charge of the court "must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally." It does not appear that any such consent was given. Again, the charge does not correctly state the law. It virtually abolishes all distinction between robbery and larceny from the person. Larceny from the person is made grand larceny by our statute Rev. St. Idaho, § 7048, subd. 2. There are other assignments of error which we do not deem it important to consider. The judgment of the court below is reversed, and it is ordered that said defendant be discharged.

SULLIVAN, C. J., and MORGAN, J., concur.

STUFFLEBEAM *et ux.* v. MONTGOMERY *et ux.*

(February Term, 1891.)

APPEAL — REVIEW — SETTLEMENT OF BILL OF EXCEPTIONS.

1. If a bill of exceptions is presented for settlement after the trial of the cause, and is certified to as correct by respondent's attorneys, and such bill is thereafter settled by the judge and used on the hearing of the motion for a new trial,

it is too late for the respondents to raise the objection for the first time in this court that such bill was not settled in time.

PUBLIC NUISANCE — ACTION FOR SPECIAL DAMAGES — PLEADING.

2. To maintain an action for special damages caused by an obstruction of a public street constituting a public nuisance, a plaintiff must allege in his complaint and establish facts showing that he has sustained special damages,—damages of a different kind and character than the damages sustained by the public.

(Syllabus by the Court.)

Appeal from district court, Bingham county; C. H. BERRY, Judge.

Action by W. G. Stufflebeam and wife against John Montgomery and wife to abate a public nuisance. There was judgment for plaintiffs. From an order overruling a motion for a new trial, defendants appeal. Reversed.

John T. Morgan and *T. M. Stewart*, for appellants.

To authorize plaintiffs to sue, they must have suffered an injury different in kind from that sustained by the public at large. *Bigley v. Nunan*, 53 Cal. 403; *Jarvis v. Railroad Co.*, 52 Cal. 438; *Marini v. Graham*, 67 Cal. 130, 7 Pac. Rep. 442; *Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. Rep. 250; *Mehrhof Bros. Brick Manuf'g Co. v. Delaware, L. & W. R. Co.*, 51 N. J. Law, 56, 16 Atl. Rep. 12; *Innis v. Railway Co.*, 76 Iowa, 165, 40 N. W. Rep. 701.

To authorize plaintiffs to sue, there must be injury actual, present, special, and peculiar to plaintiffs. *Wood, Nuis.* 646, 659; *Clark v. Railway Co.*, 70 Wis. 593, 36 N. W. Rep. 328; *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. Rep. 258.

Injunction will not be issued on application of an individual to prevent perpetration of an act prohibited by a public statute merely because it might diminish profits of a trade or business. *Smith v. Lockwood*, 13 Barb. 209; *Brainard v. Railroad Co.*, 7 Cush. 506; *Hughes v. Railroad Co.*, 2 R. I. 494; *Ang. Highw.* 284.

In an action by a private party, based on acts constituting public nuisances, depreciation of value of property can never be considered. *Hopkins v. Railroad Co.*, 50 Cal. 194; *Severy v. Railroad Co.*, 51 Cal. 195; *Bigley v. Nunan*, 53 Cal. 404.

When a party has been admitted as a witness he is a witness for all purposes, and may testify as to any question of fact material to the issue, and therefore as to his own intent in any act done by him. *Seymour v. Wilson*, 14 N. Y. 567; *Forbes*

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v. Waller, 25 N. Y. 439; *McKown v. Hunter*, 30 N. Y. 628; *Kerrains v. People*, 60 N. Y. 229; *Bank v. Koch*, 105 N. Y. 630, 12 N. E. Rep. 9; *Ross v. State*, 116 Ind. 495, 19 N. E. Rep. 451.

To constitute a dedication of public highways, an intention on the part of the owner to dedicate is absolutely essential, and it must be clearly and unequivocally manifested. *Ang. Highw.* 142; *Indianapolis v. Kingsbury*, 101 Ind. 200, 213; *Gage v. Railroad Co.*, 84 Ala. 224, 4 South. Rep. 415; *City of Shreveport v. Drouin*, 41 La. Ann. 867, 6 South. Rep. 656; *Holdane v. Village of Cold Spring*, 21 N. Y. 474.

Silent acquiescence in use is not sufficient to show dedication. 3 Kent, Comm. 451; *Bigelow v. Hillman*, 37 Me. 52; *Hoole v. Attorney General*, 22 Ala. 190; *Noyes v. Ward*, 19 Conn. 250; *Cyr v. Madore*, 73 Me. 53.

Hawley & Reeves, for respondents.

That which is a public nuisance may also be a private nuisance to a particular individual by inflicting upon him special and peculiar damages, and in such case the individual can maintain his action. *Wood, Nuis.* § 16 et seq.; *Powers v. Irish*, 23 Mich. 429; *Cooper v. Randall*, 59 Ill. 318; *Grisby v. Water Co.*, 40 Cal. 396; *Aram v. Schallenberger*, 41 Cal. 449; *Payne v. McKinley*, 54 Cal. 532; *Schultze v. North Pac. Trans. Co.*, 50 Cal. 592; *Severy v. Railroad Co.*, 51 Cal. 194; *Venard v. Cross*, 8 Kan. 248; *Brown v. Watson*, 47 Me. 161.

The owner of a public house can maintain an action for a nuisance by which the public are deterred from visiting the house. *Bonner v. Welborn*, 7 Ga. 296; *Cooper v. Randall*, 59 Ill. 318; *Railroad Co. v. Knapp*, 42 Ala. 480.

Where the injury complained of is a constantly recurring grievance, or where the nuisance is not susceptible of adequate compensation in damages, injunction is the proper remedy. *Story, Eq. Jur.* 925; *High, Inj.* § 761 et seq.; 4 Field, Lawy. Briefs, 647; *Corning v. Nail Factory*, 40 N. Y. 191; *Arnold v. Klepper*, 24 Mo. 273; *McCord v. Iker*, 12 Ohio, 387; *Porter v. Witham*, 17 Me. 292.

The use of the land by the public, with the knowledge and consent of the owner, will be considered proof of dedication, and, if such use extend over a term of years, the *animus dedicandi* is presumed, and the owner is estopped to deny his prior dedication. *State v. Catlin*, 23 Amer. Dec. 230; *Wilson v. Sexon*, 27 Iowa,

15; *City of Chicago v. Wright*, 69 Ill. 318; *Cemetery Ass'n v. Meninger*, 14 Kan. 312; *Hall v. McLeod*, 74 Amer. Dec. 400; *Heirs of David v. City of New Orleans*, 79 Amer. Dec. 586; *Morrison v. Marquet*, 92 Amer. Dec. 444.

User by the public is a sufficient acceptance. *San Francisco v. Canavan*, 42 Cal. 543; *Buchannen v. Curtis*, 25 Wis. 99.

SULLIVAN, C. J. This action was brought by the respondents to abate a public nuisance, which it is claimed plaintiffs had created by the erection of a certain building on certain lands lying between the west side of West Main street and the Utah & Northern Railway track, in the town of Blackfoot, Bingham county, state of Idaho. The plaintiffs allege in their complaint and amendment thereto substantially as follows: That plaintiffs are husband and wife, and have been such during all the times mentioned in said complaint, and are living together as such; that they are the owners and in the possession of lots 1 and 20 in block 28 in said town of Blackfoot; that there are situated upon said lots certain buildings owned by and in the possession of plaintiffs, and used by them for hotel and restaurant purposes; that said property is situated on the west side of West Main street in said town; that said street extends in a northerly direction through said town, and is 100 feet in width throughout its entire length, and was and has been for more than 12 years prior to the commencement of this suit used, appropriated, and dedicated as a public street; that the Utah & Northern Railway Company own a strip of land 200 feet wide, extending through said town, and bordering on the easterly side of said West Main street, on which strip of land are situated the road-bed, track, depot, and other buildings of said company; that said corporation is a common carrier, and its trains stop at the depot in said town of Blackfoot, to receive and discharge mail and passengers; that said depot and other buildings of said railroad company are situated easterly of the above-described lots, and that there are no obstructions or impediments to travel or to the sight between said points, except those placed there by the defendants; that in the year 1890 the defendants commenced the erection of a frame building easterly and southerly from said lots and buildings of plaintiffs and the said depot and place

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where passengers leave and enter the cars running upon said railroad, and continued to erect said building, and have maintained the same thereon; that by reason of said building so erected by the defendants travel in and upon and across said street has been impeded and obstructed, and communication made more difficult between said railroad depot and grounds and that part of said town situated west of said West Main street; that all the people of said Bingham county residing in and about said town of Blackfoot have been delayed and damaged by reason of the erection and maintenance of said building by the defendants as aforesaid; that, beside being injured and damaged thereby, and in common with other people and residents of said town of Blackfoot, the plaintiffs have been specially injured and damaged by reason that travelers visiting said town are unable to readily see and determine the location of plaintiffs' said hotel and restaurant, and in consequence thereof such travelers have become the guests of other hotels, to plaintiffs' damage in the sum of \$100; that in consequence of said building erected and maintained as aforesaid, the said property of plaintiffs has become lessened and depreciated in value, to their damage in the sum of \$100, and that the erection and maintenance of said building is a nuisance to the people of said town of Blackfoot and vicinity; that plaintiffs have requested defendants to remove said buildings, and they have refused to do so; that plaintiffs are without adequate remedy at law; that no pecuniary damages would be adequate compensation to plaintiffs, and that defendants are insolvent. Plaintiffs demand judgment for \$200 damages and costs of suit, and that defendants be perpetually restrained from maintaining said building, and that the same be declared a nuisance, and that an order for its abatement be made. The defendants deny that West Main street in said town of Blackfoot is 100 feet wide, or is, or ever was, of any greater width than 66 feet. They aver that the store building and warehouse of W. H. Danilson is 10 feet and 5 inches upon the 34 feet which plaintiffs aver to be a part of said street; that said store has been so located during 11 years last past; and denied each and every allegation in said complaint; and aver that said building, erected as aforesaid, is situated on defendants' private property, and that said ground on which said building is situated

was never claimed as a part of said West Main street to their knowledge, and that plats of said town, made for W. C. Lewis, W. N. Shilling, and W. H. Danilson, (each for portions of said town,) show the streets of said town to be but 66 feet wide; and that the stock-pen of said Utah & Northern Railway Company has stood for 18 months immediately prior to the commencement of this suit 22 feet upon the 34 feet claimed by plaintiffs as a part of said West Main street. This cause was tried by the court without a jury on the 19th day of July, 1890. Judgment was entered in the court below in favor of the plaintiffs on the 29th day of July, 1890. Thereupon the defendants moved for a new trial, which motion was overruled, and from the order overruling said motion this appeal was taken. The appeal is presented on a bill of exceptions and statement.

The first assignment of error contained in appellants' brief is as follows: "*First.* The order of the court overruling defendants' objections to the introduction of any evidence, for the following reasons, to-wit: (1) That the complaint does not state any cause of action in favor of the plaintiffs and against the defendants. (2) That the plaintiffs have no suit for the town of Blackfoot at large, and no right to introduce evidence for damages to it, and have no action for special damages to themselves." The respondents contend that said assignment of error cannot be considered by this court, for the following three reasons: "(1) That this is an appeal from the order refusing a new trial alone; (2) that no reference is made to such alleged error in the notice of motion for a new trial; (3) that the bill of exceptions herein cannot be entertained here, and is not before the court, as it was not filed in time, and no extension of time was granted for said bill of exceptions." It appears from the record that the bill of exceptions was served on the attorneys for the respondents on November 14, 1890, and on the 3d day of December, 1890, was certified to by said attorneys as correct, and was on said date settled by the district judge. The record further shows that said district judge made the following order overruling appellants' motion for a new trial, to-wit: "Now, upon this 3d day of December, 1890, the motion of the defendants for vacation of decision and granting of new trial herein coming regularly on to be heard before the judge at chambers upon their statement and

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bill of exceptions heretofore settled and on file herein, said motion being submitted for decision, and the judge being fully advised thereon, it is hereby ordered that said motion for vacation of decision and for new trial be, and the same is hereby, overruled. D. W. STANROD, Judge. Filed December 3, 1890." It is thus shown that the respondents had full knowledge of the contents of said bill of exceptions, and certified to it as correct on the 3d day of December, 1890, and on that date said bill was settled and signed by the district judge. On the same date the motion for new trial was submitted for hearing on said bill of exceptions and statement. The record contains no objection or exception by respondents to the settlement of said bill of exceptions, nor to its being submitted to the judge at the hearing of the motion for new trial. The respondents had knowledge of the fact that appellants would apply to the judge to have said bill of exceptions settled. Respondents' attorneys certified to the correctness of said bill of exceptions, and permitted it to be used on the hearing of appellants' motion for new trial, without objection. The respondents, by said acts, waived their right to said objection. Hayne, New Trial & App. §§ 27, 145; Higgins v. Mahoney, 50 Cal. 444. We think that section 4443 of the Revised Statutes is conclusive in this matter. Said section enumerates the papers that constitute the record on appeal, to-wit, the judgment roll and affidavits, or the records and files in the action, or bill of exceptions, or statement used on hearing of the motion for new trial. The order overruling the motion for a new trial recites the fact that said bill of exceptions was used on said hearing, and is therefore properly before this court for consideration.

The first error assigned by the appellants is the order of the court overruling the objection to the introduction of any evidence whatever, for the reason that the complaint does not show any cause of action in favor of the plaintiffs and against the defendants. To entitle plaintiffs to recover for injuries sustained from a public nuisance they must first allege in their complaint facts clearly showing that they have sustained special or peculiar damages, damages different in kind and character from the rest of the public, so that such damage cannot fairly be said to be a part of the common injury resulting from such nuisance. Wood, Nuis. § 646;

Bigley v. Nunan, 53 Cal. 403. Will the complaint in this action, when measured by the rule above indicated, bear the test? The only allegation of special damage or injury contained in said complaint is as follows, to-wit: "That, besides being injured and damaged thereby and in common with other people and residents of said town of Blackfoot, these plaintiffs herein have been specially injured and damaged by reason thereof in this: that on account thereof travelers visiting said town of Blackfoot are unable to readily and easily see and determine the location of said hotel and restaurant of the plaintiff, and in consequence thereof such travelers have still continued to become the guests of other hotels and restaurants in said town of Blackfoot situate and being, instead of the guests and patrons of the plaintiff, and that in consequence thereof the plaintiffs have been damaged in the sum of one hundred dollars; that, in consequence of said building being erected and maintained, the said property has become lessened and depreciated in value, to their damage in the sum of one hundred dollars; that the erection and maintenance of said building aforesaid is a nuisance to the people in the said town of Blackfoot and vicinity generally, in this: that it is an obstruction to the free passage and use in the customary manner of said West Main street." This allegation shows that said obstruction is a public nuisance, but does not show that respondents have sustained an injury different in kind or character from that sustained by the public or other business men located in the vicinity of respondents' hotel. The allegation of special damages would equally apply to other business men situated in said vicinity,—that by reason of the erection of said building the merchants and other dealers have sustained special damages because passengers leaving the trains could not as readily and easily see their places of business, and by reason thereof go to other places of business. We are of the opinion that, if said allegations of special damage were fully established by the evidence, the respondents would not be entitled to any relief in this action. In cases of this kind the authorities are very numerous which hold that no person can maintain an action for damage from a common nuisance, where the injury and damage are common to all. The reason for this rule is that, if private persons were permitted to maintain suits to abate

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a public nuisance, it would lead to a multiplicity of suits. Wood, in his excellent work on the Law of Nuisances, (section 646,) says: "Therefore the courts very wisely have unswervingly adhered to the rule that an individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot be fairly said to be a part of the common injury resulting therefrom. It is not enough that he sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." The respondents allege that said building is in a public street, and is a public nuisance. If this allegation be true, the Revised Statutes, § 960 et seq., provide the method and manner for the removal of such obstructions. Section 961 provides the manner of giving notice to the person causing such obstruction to remove the same. Section 962 fixes the penalty for failure to remove such obstruction; and, in case that the encroachment upon such street is denied, section 963 directs the road overseer to commence an action in the proper court to abate the same as a nuisance. This statute was enacted for the purpose of removing obstructions from highways, and such obstructions as are public nuisances, and was intended to prevent a multiplicity of suits. We are of the opinion that the complaint does not state a cause of action in favor of the plaintiffs. With this view of the case it is not necessary for this court to consider any other questions raised on this appeal. The cause is reversed, and remanded for dismissal.

MORGAN, J., having been of counsel for the defendants in the court below, took no part in the hearing or decision of this case.

HUSTON, J., concurs.

SNYDER v. VIOLA MINING & SMELTING CO.
(February Term, 1891.)

INJURY TO EMPLOYEE—NEGLIGENCE OF FELLOW-SERVANT—LIABILITY OF EMPLOYER.

1. S. was a miner engaged in under-ground work. G. was a blacksmith engaged in same

mine, in sharpening tools for use of miners, and whose duty it was to deliver such tools, after being sharpened, to miners at work in mine. *Held*, that S. and G. were fellow-servants; and *held, further*, that for carelessness in delivering such tools to miners by G., whereby S. was injured, defendant was not liable, defendant not being shown to be in fault.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

2. Where the evidence shows that the defendant had furnished safe and convenient machinery and appliances for the performance of the required labor, and either the plaintiff or his fellow-servant, or both, for their own convenience, had seen fit to use other means or appliances than those furnished by defendant, and injury results therefrom, the defendant is not liable, and in such case plaintiff is guilty of contributory negligence.

(*Syllabus by the Court.*)

Appeal from district court, Lemhi county.

Action by G. W. Snyder against the Viola Mining & Smelting Company for personal injuries received by plaintiff while in defendant's employ. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Reversed.

Stewart & Morgan, for appellant.

A master is not, in general, bound to indemnify his servant against the negligence of a fellow-servant when acting in discharge of his duty as servant of the common master. *Priestley v. Fowler*, 3 Mees. & W. 1; *Smith, Mast. & Serv.* 237; *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49; *Hutchinson v. Railroad Co.*, 5 Exch. 343; *Coon v. Railroad Co.*, 5 N. Y. 492; *White v. Kennon*, 83 Ga. 343, 9 S. E. Rep. 1082.

The rule exempting the master is the same though the workmen are not of the same grade. *Hayes v. Railroad Co.*, 3 Cush. 270; *Albro v. Canal Co.*, 6 Cush. 75; *Crispin v. Babbitt*, 81 N. Y. 520.

Hawley, Reeves & Quarles, for respondent.

Violation of rules of a company is no defense where the servant never had his attention called to them. *Fay v. Railway Co.*, 30 Minn. 231, 15 N. W. Rep. 241.

Where an employe is injured partly through the contributory negligence of his co-servant, but mainly by the unsafe condition of the track on which he was running, the contributory negligence of the co-servant does not relieve the company from liability. *Stetlar v. Railroad Co.*, 46 Wis. 497, 1 N. W. Rep. 118; *Paulmier v. Railway Co.*, 34 N. J. Law, 151; *Stetlar v. Railway Co.*, 49 Wis. 609, 6 N. W. Rep. 303;

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Wood. Mast. & Serv. § 405; Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493.

A motion of nonsuit is waived by the subsequent introduction of testimony by defendant. Chamberlain v. Woodin, ante, 609, 23 Pac. Rep. 128; Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493; Insurance Co. v. Crandall, 120 U. S. 530, 7 Sup. Ct. Rep. 685.

The rule which exempts the master from liability for injuries caused by one fellow-servant to another does not extend to the case of servants serving in distinct departments of the master's general business. Kielley v. Mining Co., 3 Sawy. 437.

HUSTON, J. This is an action brought by plaintiff against defendant corporation to recover damages for injuries alleged to have been received by the plaintiff while in the employ of the defendant, as a miner, working in the Viola mine, owned and operated by defendant, in Lemhi county, in this state, which injuries plaintiff charges were the result of and attributable to the negligence of defendant. We are called upon *in limine* to pass upon the motion of respondent to strike out the statement and dismiss the appeal in this case, first, because it does not appear by the record that the judge of the district court, in allowing an extension of the time for defendant to prepare and serve its statement, made such allowance upon good cause shown, as provided in section 4932, Rev. St. Idaho. We do not think it necessary that the record should contain the evidence upon which the action of the district judge was predicated. The presumption of law is that good cause was shown, and such presumption can only be overcome by proof. No attempt at such proof is shown.

The next objection by the respondent is that this court cannot review the exception of defendant to the charge of the court, for the reason that such exception was not taken in time, and is too general to entitle it to consideration on appeal. We do not think this case comes within the purview of the rule laid down in Black v. City of Lewiston, (Idaho,) 13 Pac. Rep. 80.¹ The following language by Mr. Justice MILLER in the case of Railroad Co. v. Reeves, 10 Wall. 189, seems to us to be more applicable in this case: "As to the charge given by the court, the language of

the exception is more general than we could desire; and if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God on the contract, so different from our views of the law on that subject that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case. We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination." So, in this case, we think the exposition of the law of negligence, as applicable to the evidence in this case, given by the district court in its charge to the jury, was so erroneous as to bring it clearly within the rule laid down by the supreme court of the United States in Railroad Co. v. Reeves, above cited. No point is sought to be made by the respondent against the exceptions of defendant to the refusal of the court to give instructions 1 and 2, asked by defendant. We will consider those instructions further on.

The facts in this case, as shown by the evidence,—and there is but little conflict in the testimony,—are briefly as follows: The appellant defendant below, was on the 15th February, 1889, the owner of and engaged in working and operating the Viola mine, in Lemhi county, Idaho; that on that date the respondent, plaintiff below, was in the employ of defendant as a miner in said mine; that on the date last aforesaid the plaintiff was at work in a drift about 110 feet below the surface of the ground; that he had been thus employed for some months, and on this day it became necessary for him to ascend to the surface for some purpose. There was a shaft some four or five feet square, sided up with lumber, extending from the surface to the level where plaintiff was at work, and below. Through and up this shaft, ore, etc., was hoisted to the surface from below by means of a steam-hoist, located on the surface, and near the mouth or entrance of the shaft. As is usual in such cases, there was a ladder at the side of the shaft, presumably for use in ascending or descending the shaft, whenever the exigencies of the work or

¹Ante, 254.

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the convenience of the workmen required. Extending from the surface to the level below, there was at the time last mentioned a large rope. The evidence shows that the steam-hoist had not been used regularly for a period of several months. There was also a wire attached to a bell on the surface, and extending down the shaft, which was used as a signal, by those working below to those above, of the presence of some person in the shaft. The blacksmith, one Goodall, employed by the defendant in sharpening the picks, drills, and other tools used by the miners, had been in the habit, as he testifies, and he is undisputed on this point, for a long time, when the steam-hoist was not being run, of lowering the drills, picks, etc., sharpened by him, to the level below, by attaching them to the large rope above referred to by means of a smaller rope, the end of which he held in his hand, and allowing them to slide down the large rope to the level, while descending himself by the ladder, and delivering the said tools to the miners in the drift where they were at work. This was the condition of things on the 15th day of February, 1889, when the plaintiff attempted to ascend the shaft from the level by means of the ladder aforementioned. He had proceeded but a short distance up the ladder when he was, as he testified, struck upon the head and arm by a drill then being lowered by the blacksmith down the rope as above described, and received thereby the injuries complained of, and for which he seeks to recover damages of the defendant.

The first question for our consideration is, was there negligence on the part of the defendant in a failure to furnish sufficient and safe appliances and machinery for the performance of the labor upon which the plaintiff was engaged? It is nowhere assumed, or attempted to be proven, that there was any defect in any of the machinery or appliances in or about the mine, nor that the injury of plaintiff resulted from or was in any way attributable to a want of proper machinery or appliances, or to any defect in the machinery or appliances provided by defendant. In fact, the case seems to have been tried wholly upon the theory that the accident which resulted in the injury to the plaintiff resulted entirely from the negligence or want of care of the blacksmith Goodall, and that, Goodall not being a fellow-servant of plaintiff, defendant is liable for any injury resulting from such negligence

or want of care on his part. The plaintiff alleges in his complaint "that at the time plaintiff entered into the employment of the defendant, and from then up to the time said injury occurred, the regular and usual mode of letting all tools used in said mine down into the same was by means of a hoist and buckets." It is further shown by the testimony of the plaintiff himself that there was another shaft located about 700 or 800 feet, on the surface, from the shaft in question; that said shafts were connected under-ground; and that at the other shaft there was a hoist which was running at the time. It was as easy for Goodall to let the tools down by one shaft as by the other, except that in one case a walk of some 700 or 800 feet on the surface, and a corresponding distance below, was involved. Every means necessary or requisite for the safe transmission of tools from the surface to the miners at work below, as well as for their safe entry to and exit from the mine, had been provided by the defendant. How, then, could the defendant be said to be guilty of negligence? We think the evidence in this case entirely fails to establish negligence on the part of the defendant. Mr. Beach, in his work entitled *Contributory Negligence*, says: "It is the common law in every state and territory of the Union, and in the federal courts, that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of negligence, carelessness, or misconduct of other servants in his employ, engaged in the same common or general service or employment, denominated 'fellow-servants' or 'co-employees,' unless the employer himself has been at fault;" and he adds: "This rule is so undisputed that it is sufficient to cite one leading or recent decision in point in each jurisdiction;" and he cites innumerable cases in support of the text. We think the district court erred when it assumed that the defendant had provided the means used by Goodall for getting the tools into the mine for any such purpose. On the contrary, we think the evidence clearly shows that the means employed by Goodall for getting the tools into the mine, to-wit, by tying or fastening them to the large rope, was not the means provided by the defendant for that purpose. There was a bucket attached to another large rope, which, had it been used by Goodall, would doubtless have prevented any accident. If it is claimed that

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the hoist to which this rope was attached was not then running, we answer that there was another shaft easy of access, in which there was a rope and bucket, and which was running at the time, and the neglect of either the plaintiff or Goodall to avail themselves of such safe appliance cannot be attributed or charged as negligence on the part of defendant. We think the district court erred in its statement of the law as to what constitutes a fellow-servant. Says Mr. Beach, in his work above referred to on Contributory Negligence: "In the present state of the law, the essence of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments or grades of it, are co-employees, who are held in law to assume the risk of one another's negligence." Beach, Cont. Neg. § 109, and cases cited in note 4. If this is the correct rule, and we so accept it, can there be any doubt that plaintiff and Goodall were fellow-servants? The plaintiff having failed to show negligence on the part of defendant, it seems to us that the defendant's motion for a nonsuit should have been granted. Under the rule of law applicable thereto, as quoted by us above from Beach on Contributory Negligence, which seems to have been very generally, if not uniformly, recognized by the courts of this country, we think that the fourth instruction asked by the defendant, and refused by the court, should have been granted. It seems to us that the plaintiff, in not availing himself of any of the precautions usual, and which in the exercise of ordinary care would have been adopted by a prudent person in his situation, to-wit, by signaling to those at the surface, either by ringing the bell, calling up the shaft, or carrying a light, was guilty of contributory negligence; and his only excuse for not so doing is that "there was not supposed to be anybody there, and nobody was supposed to be around there;" and yet it seems from the evidence that there were at least two persons there at that time, *i. e.*, Goodall and Ruhl. The plaintiff cannot act upon his suppositions, and then, when he is injured by reason of their being unfounded, make it the predi-

cate of a charge of negligence on the part of either the defendant or his fellow-servant. The judgment in this case is reversed, and the cause remanded for a new trial.

MORGAN, J., having been of counsel in this case, took no part in the hearing or decision thereof.

SULLIVAN, C. J., concurs.

TERRITORY v. STAPLES.

(February Term, 1891.)

GRAND JURY—PRESENCE BEFORE—CONSTRUCTION OF STATUTE.

1. The last clause of section 7640, Rev. St. Idaho, which reads, "and no other person must be permitted to be present during the expressions of their opinion or giving their votes upon any matter before them," means no person except members of the grand jury, and does not refer to any member of the panel.

SAME—CHALLENGE—PRESENCE OF JUROR DURING CONSIDERATION OF CHARGE.

2. In case a challenge to an individual grand juror is allowed, he should not be present during the consideration of the charge as to which he is challenged.

SAME—CONTEMPT OF JUROR—PUNISHMENT.

3. If, notwithstanding the injunction, he is present, he is liable to punishment for contempt; but the indictment should not be set aside for that cause.

(Syllabus by the Court.)

Appeal from district court, Custer county.

Samuel Staples was convicted of making an "assault upon the person of another with a deadly weapon," and appeals. Affirmed.

J. W. Daniels, for appellant. George H. Roberts, Atty. Gen., for the Territory.

MORGAN, J. The defendant was indicted by the grand jury of the third judicial district in and for the county of Custer, and charged with the crime of assault with intent to murder. He had not been examined before a committing magistrate before indictment, and was not in custody. Upon being arraigned upon the indictment on the 10th day of May, 1890, the defendant moved the court to set aside the indictment for the reasons: (1) That Parley Gould, a member of the grand jury which found the indictment, was also a witness against him before the grand jury; (2) that said Gould had ex-

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pressed the opinion that said defendant was guilty of the crime charged; (3) that J. G. Finnell and Enos Watson, also members of the grand jury, had such prejudice against him (the defendant) that they could not act impartially. As evidence of these facts defendant filed his affidavit, stating that said Parley Gould had on the 6th day of May, 1890, used the following language to the defendant, to-wit: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night,"—and filed the affidavit of Henry Edward Miller, showing that said Gould acted with the grand jury, cross-examined witnesses in the jury-room, and manifested his interest in the case in other ways. On the 13th day of May the said motion to set aside the indictment was heard by the court, and denied, to which ruling the defendant excepted. Thereafter, on the said 13th day of May, 1890, the defendant was placed upon trial for the offense charged, and, under the instructions of the court, was convicted of the crime of "assault upon the person of another with a deadly weapon," and judgment of the court entered thereon. From the said judgment the defendant takes an appeal to this court, and assigns for error, substantially as follows: (1) That the court erred in refusing to set aside the indictment because members of the said grand jury—J. G. Finnell, Enos Watson, and Parley Gould—were in such a state of mind in reference to this case and this defendant as would satisfy the court that they could not and did not act impartially and without prejudice to the substantial rights of the defendant. (2) That the said Parley Gould expressed the unqualified opinion that the defendant was guilty of the crime charged, in the following language, used on the 6th day of May, 1890, to defendant: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night." It is claimed by counsel that the court should have set aside the indictment under clauses 3 and 4 of section 7730, Rev. St. Idaho. Clause 3 is: "The indictment must be set aside when a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in chapter 3, tit. 4." Clause 4 is: "When the defendant had not been held to answer before the finding of the in-

dictment on any ground which would have been good ground for challenge either to the panel or to any individual grand juror." The reference to chapter 3, tit. 4, refers to the latter clause of section 7640, which reads: "The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury, except the members and witnesses actually under examination, and an interpreter, when necessary; and no other person must be permitted to be present during the expressions of their opinions, or giving their votes upon any matter before them." This clause means no person except members of the grand jury, and does not refer to members of the panel. *People v. Colby*, 54 Cal. 38. It does not appear whether the three grand jurors to whom objection is made were present during the expressions of their opinions by the grand jury, nor when giving their votes, and therefore we have no evidence that there was any violation of the statute to which the defendant could object. Upon examination of the words spoken by the juror Gould, it will be seen that they do not constitute an expression of an opinion that the defendant is guilty of the crime charged. He says: "I want you to stay away from my premises, and from around my house. You were down here, doing a lot of shooting, last night." This is not an opinion that defendant was guilty of the offense of "assault with intent to murder," even if the same occurrence was meant, of which there is no evidence. Section 7613 indicates what must be done in case a challenge to an individual juror is allowed on the ground that he is a witness, and has been served with process, or bound by undertaking as such, if he has formed or expressed an unqualified opinion or belief that defendant is guilty or not guilty of the offense charged, or if a state of mind exists on his part which satisfies the court that he cannot act impartially. Then the juror cannot be present, or take part in the consideration of such charge or the deliberations of the grand jury thereon, but he still remains a member of the grand jury. If, notwithstanding the injunction of the court, he does take part, he is to be pun-

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ished for contempt; but the indictment is not set aside for that cause. *Id.*; *People v. Hunter*, 54 Cal. 65. Much of the argument in this case was had on the ground that the court erred in refusing a change of venue, but this point is not saved in the bill of exceptions, and is therefore not before the court. Judgment affirmed.

SULLIVAN, C. J., and HUSTON, J., concur.

DOAN *et al.* v. BOARD OF COM'RS OF LOGAN COUNTY.

(February Term, 1891.)

COUNTY-SEAT—ACTION TO RESTRAIN REMOVAL—BY WHOM MAINTAINABLE.

1. Citizens who are residents, electors, and tax-payers of a county may bring a suit for injunction to prohibit the removal of the county records from a place alleged to be the county-seat to a place claiming to be legally selected as the county-seat of the county, and to test the legality of such selection, when there is no speedy and adequate remedy at law.

CREATION OF COUNTY—CONSTRUCTION OF STATUTE.

2. Section 6 of the act creating the counties of Elmore and Logan, approved February 7, 1889, was not repealed or abrogated by section 2 of article 18 of the constitution.

SAME.

3. Said section 2, art. 18, was not intended to apply to the location of a county-seat, consequent upon the organization of a new county.

STATUTES AND CONSTITUTION—CONSTRUCTION—DUTY OF COURTS.

4. A strained construction of the constitution is not required nor permitted, in order to work the repeal of statutes not clearly repugnant thereto. It is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction.

COUNTY-SEAT—ELECTION—POWERS OF COMMISSIONERS.

5. The election held in the state on October 1, 1890, was the general election for that year, and the county commissioners of Logan county were authorized to submit the question of the permanent location of the county-seat for said county to the voters at said election.

(*Syllabus by the Court.*)

Appeal from district court, Logan county.

Action by Charles S. Doan and others against the board of county commissioners of Logan county to restrain the removal of the county-seat. From an order dissolving the temporary injunction, plaintiffs appeal. Affirmed.

P. L. Williams and *J. Bierbower*, for appellants.

The appellants, being residents, tax-payers, property owners, and qualified electors, are proper plaintiffs, and are entitled to the relief sought, if the case presented by the complaint is otherwise sufficient. *High, Inj.* (2d Ed.) §§ 1269, 1321; *Bradley v. Commissioners*, 2 *Humph.* 428; *Pom. Rem.* (2d Ed.) § 142.

The wrong shown in the complaint is such an irreparable injury as entitles the plaintiffs to relief by injunction. *Com. v. Railroad Co.*, 24 *Pa. St.* 159; *Hamilton v. Whitridge*, 11 *Md.* 128; *Gause v. Perkins*, 3 *Jones, Eq.* 177.

Every election must be authorized by law, and in the authorization of elections the legislature invariably provides what officers shall be elected thereat, and what question shall be submitted to the voters. *Cooley, Const. Lim.* star page 598; *Brewer v. Davis*, 9 *Humph.* 208; *McCrary, Elect.* (2d Ed.) §§ 109, 120, 121; *Paine, Elect.* §§ 5, 284, 285, 301, 307; *McKune v. Weller*, 11 *Cal.* 49; *Kenfield v. Irwin*, 52 *Cal.* 164; *People v. Hoge*, 55 *Cal.* 612; *Sawyer v. Haydon*, 1 *Nev.* 75; *Nevada v. Collins*, 2 *Nev.* 351.

Arthur Brown and *S. B. Kingsbury*, for respondent.

To maintain an action on behalf of the public, it must be by somebody who is authorized to bind the public. The plaintiffs bring suit to prevent a change of the county-seat, and to determine the constitutionality of the question. This is beyond the power of a private individual. Such rights can only be determined by public authority. *Demarest v. Wickham*, 63 *N. Y.* 320; *Doolittle v. Supervisors*, 18 *N. Y.* 155; *Osterhoudt v. Rigney*, 98 *N. Y.* 229; *McMillen v. Butler*, 15 *Kan.* 62; *Starin v. Edson*, 112 *N. Y.* 215, 19 *N. E. Rep.* 670; 2 *High, Inj.* 1258, 1259; *Paine, Elect.* § 268.

Within the general grant of legislative power is the grant to submit to the people certain local questions, such as fixing a county-seat. *McWhirter v. Brainard*, 5 *Or.* 427; *Wells v. Taylor*, 5 *Mont.* 202, 3 *Pac. Rep.* 255; *People v. Reynolds*, 5 *Gilman*, 1; *Cass v. Dillon*, 2 *Ohio St.* 614; *Thomson v. Lee Co.*, 3 *Wall.* 330; *Com. v. Painter*, 10 *Pa. St.* 609.

No statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool v. Smith*, 1 *Black*, 459; *Bowen v. Lease*, 5 *Hill*, (*N. Y.*) 221; *Ex parte Yerger*, 8 *Wall.* 85, 105; *Furman*

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v. Nichol, Id. 44; *U. S. v. 67 Packages*, 17 How. 85; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434.

MORGAN, J. Appellants, who were plaintiffs below, are residents, tax-payers, and qualified electors of the county of Logan, in this state. John Hailey, H. T. Smith, and J. S. Whitton, defendants, are members of the board of county commissioners of the said county of Logan. By authority of section 8, art. 21, of the constitution, the governor, on the 18th day of July, 1890, "ordered an election to be held by the qualified electors of the state of Idaho at the usual voting places, or in such places as may be provided in each precinct, on the 1st day of October, 1890, for the purpose of electing the following officers, namely: A representative in congress, a governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, superintendent of public instruction, and three justices of the supreme court; a district judge and district attorney for each of the five judicial districts of the state; for each county in the state, three county commissioners, a sheriff, county treasurer, a probate judge, a county assessor, a clerk of the district court, a county surveyor, and coroner; a justice of the peace and constable for each precinct in the state; eighteen senators and thirty-six representatives for the legislature,"—directing the board of county commissioners of each county to assemble at the county-seat on the 28th day of July, 1890, and proceed to order an election to be held on the said 1st day of October, for the election of all officers, state, district, and precinct; members of the legislature; a member of congress; and directing that notices be given of such election, in the manner, and for the length of time, provided by the laws of the territory in cases of general elections for delegate to congress, county and other officers; and directing that said election be conducted in all respects in the same manner as provided by the laws of the territory for general elections, including the registration of voters as provided by law. The board of county commissioners for Logan county, at the meeting held on the 28th day of July, 1890, made an order submitting to the voters of said county, at the election to be held therein on the 1st day of October, 1890, the question of the permanent location of the county-seat of said county, alleging that said action was

provided for in section 6 of an act of the Idaho legislature entitled "An act creating and organizing the counties of Elmore and Logan, and defining the boundaries of Bingham and Alturas counties," approved February 7, 1889. Said special meeting was held pursuant to a notice published in the *Shoshone Journal*, a newspaper published in said county of Logan, and in accordance with the proclamation of the governor. The notice calling the said meeting of the board of commissioners contained no statement that the matter of the selection of a permanent location of the county-seat of said county would be acted upon. At said meeting the board of commissioners ordered that the question of the permanent location of the county-seat of Logan county be submitted to the voters of said county at the election to be held October 1, 1890. At said election a majority of all the votes cast for the permanent location of the county-seat of said county were in favor of the town of Bellevue, as appears by the canvass of votes made by the said board on the 10th day of October, 1890. On the 7th day of October, 1890, the plaintiffs filed their complaint in this cause, and alleged, among other things, that the defendants were about to remove the county archives, records, and property from the county offices in said town of Shoshone to the said town of Bellevue, and threaten that they will make such removal; and further allege that, unless restrained by the injunction of the court, they will take and remove the books, archives, etc., from said town of Shoshone to the town of Bellevue, to the damage of the plaintiffs and other tax-payers, electors, and residents of said county; that said removal will be of great and permanent injury to all of the said residents, in that it will cost a large amount of the public revenue and moneys of said county to pay the expenses of the said removal, and will be of great and permanent disadvantage to the plaintiffs and other residents. Plaintiffs further allege that there was no petition whatever of a majority, or of any, of the qualified voters of said county ever made or presented at any time; allege that plaintiffs have no remedy at law; pray for temporary injunction until further hearing, and that it be made permanent on final hearing. To this complaint defendants demur upon the ground that the complaint does not state facts sufficient to constitute a cause of action; that the

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complaint does not state facts sufficient to entitle plaintiffs to any injunction, nor to entitle the plaintiffs to the interference of a court of equity. Filed October 21, 1890. On the same date the defendants filed their motion to dissolve the temporary injunction, and their answer; and deny that the county-seat was ever permanently located at Shoshone; deny that the vote was taken for changing the county-seat, but allege that the said vote taken on the 1st day of October, 1890, was for the permanent location of the county-seat, in accordance with the provisions of an act of the fifteenth session of the territorial legislature, entitled "An act creating and organizing the counties of Elmore and Logan, and defining the boundaries of Bingham and Alturas counties," approved February 7, 1889; deny that the removal of the books, records, etc., would be of any damage to plaintiffs; and allege that Bellevue received a majority of all the votes cast at said election, and thereupon Bellevue was, by said board of county commissioners, declared to be the permanent county-seat of Logan county. Various other matters were alleged, not deemed necessary to rehearse. On the 23d day of October, 1890, the hearing upon the motion to dissolve the injunction was had before the judge of the district court, which resulted in the dissolution of the injunction. From the order dissolving the said injunction this appeal was taken.

The first question necessary to be considered by this court is, can these parties bring an action of this kind? They allege that they are residents and electors of Logan county, and tax-payers therein. They also allege that the board of county commissioners, defendants herein, had no right to submit this question to the voters of Logan county at the election held October 1, 1890; that the constitution of the state required an affirmative vote of two-thirds of all the votes cast at said election to take the county-seat to Bellevue; that two-thirds of said voters did not vote in favor of said proposition; that said defendants threatened to remove the books, records, etc., of said county to Bellevue without authority of law; that said plaintiffs would be greatly damaged thereby; that they had no adequate remedy at law. Pomeroy on Remedies has the following: "Actions brought by a citizen and tax-payer or freeholder are permitted in many, and perhaps most, of the states,

and are common forms of judicial proceedings to restrain the abuse of local legislative and administrative power by municipal officers." Pom. Rem. § 142. And when an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and tax-payers, a court of equity is warranted in interfering by injunction for the prevention of such act. In such case a more prompt and efficacious remedy is demanded than is afforded by the tardy action of courts of law, and equity alone can administer the necessary relief by the exercise of its extraordinary power by injunction. 2 High, Inj. §§ 1236, 1247. The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to act for the public as is not susceptible of reparation in the ordinary course of proceedings at law. Id. § 1308. To the same effect is the following: "To allow the taxable inhabitant to maintain a bill for an injunction to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure, or apparent departure, from technical principles, has the quite general, but not uniform, approval of the courts of this country; and practically this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially determined, in effect settles the question in controversy." 2 Dill. Mun. Corp. § 921. To warrant the relief, however, in any case, it must appear that the acts complained of are of such a character that full and adequate redress cannot be had at law. 2 High, Inj. § 1243. The record in this case does not show that there was any order entered upon the records of the county commissioners of Logan county directing the removal of the records or other property to the town of Bellevue, from which an appeal could have been taken to the court to test the legality of the election, or the threatened removal, nor does it appear that there was any other means for bringing the action of the county commissioners before the court for consideration and decision. We are of the opinion, therefore, that the plaintiffs had no adequate remedy at law, and that they were entitled to relief in equity. We do not understand the

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appellants to now seriously contend that the law passed by the fifteenth session of the legislature is void. We assume that the decisions of the courts have finally settled this question in favor of its validity. Section 6 of the act creating the county of Elmore is as follows: "The county-seat of said Elmore county is temporarily located at the town of Rocky Bar; the county-seat of Logan county is located temporarily at the city of Shoshone; and, at the regular election to be held in the year 1890, the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat, for their respective counties, to the voters of their said counties, and the places in each county receiving the highest number of votes for the county-seat is hereby declared to be the permanent county-seats for said counties." The authorities are numerous and conclusive that the legislature has the right and authority to submit to the vote of the people certain local questions, among which is fixing a county-seat. See *Paine, Elect.* § 268, and cases there cited.

The next question to be considered is, was section 6 of the act of the fifteenth session of the legislature, entitled "An act creating the counties of Elmore and Logan," etc., abrogated by the constitution? Section 2, art. 21, of the constitution, provides that all laws then in force in the territory of Idaho, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature. Section 2, art. 18, of the constitution, is relied upon by the appellants as abrogating the section in question. It is clear from the reading of this section that the framers of the constitution had no such intention. It reads: "No county-seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal. A proposition of removal of the county-seat shall not be submitted in the same county more than once in six years, except as provided by existing law," etc. The conditions apply to the removal of a county-seat once permanently fixed. The county-seat of Logan county had never been permanently fixed. The language of the section is: "The county-seat of Logan county is located temporarily at the city of Shoshone." The

legislature, in effect, says it is necessary that we should designate some place in said county where the county business shall be done, until the people can by their votes designate the place they desire for the permanent county-seat. Therefore the act states the county-seat is located temporarily at the city of Shoshone. The balance of the section puts the meaning beyond question, as follows: "And at the regular election to be held in the year 1890 the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat for their respective counties to the voters of said counties, and the place in each county receiving the highest number of votes for the county-seat is hereby declared to be the permanent county-seat for said county." The language of the act is too plain for construction or argument. It was not the removal of the county-seat which was submitted to the voters, but the permanent location thereof. The said section of the constitution, therefore, was not intended to apply to the location of a county-seat, consequent upon the organization of a new county. A strained construction of the constitution is not required nor permitted in order to work the repeal of statutes not clearly repugnant thereto. It is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction. *McCool v. Smith*, 1 Black, 459; *Bowen v. Lease*, 5 Hill, 221; *Ex parte Yerger*, 8 Wall. 85, 105; *Furman v. Nichol*, Id. 44; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434. We must therefore conclude that the section of the constitution was not intended to and does not repeal section 6 of the act requiring the location of the county-seat of Logan county to be submitted to a vote of the people.

Had the board of commissioners lawful authority to submit the question of the permanent location of the county-seat of Logan county to a vote of the people at the election held October 1, 1890? The language of the act is: "At the regular election to be held in the year 1890 the county commissioners of said Elmore and Logan counties must submit the question of location of the county-seat to the voters of said counties." We accept the definition given to the word "regular" by the appellants, that it is, in this connection, synon-

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ymous with the word "general," and, as used, was intended to mean the general election, as provided for by section 465 of the Revised Statutes of Idaho. Rev. St. Idaho, §§ 465, 466, are as follows: "Sec. 465. There must be held throughout the territory on the first Tuesday after the first Monday of November, in the year eighteen hundred and eighty-eight, and in every second year thereafter, an election to be known as the 'general election.' Sec. 466. At such election the following officers must be elected: One delegate to congress for the entire territory; members of the legislative council and house of representatives, according to the number apportioned by law to the county, or to counties jointly; one probate judge; one treasurer, who is *ex officio* public administrator; one sheriff; one district attorney; one recorder, who is *ex officio* auditor, and *ex officio* clerk of the board of county commissioners; one assessor, who is *ex officio* tax collector; one surveyor; one school superintendent and one coroner for each county; and one county commissioner for each of the three districts of each county; two justices of the peace and one constable for each precinct of each county." It is not a general election because the day on which it was to take place was fixed as the first Tuesday after the first Monday of November, 1888, and every second year thereafter, but because all the officers of the territory, of the districts, and of the counties and precincts were then to be elected. If the legislature, or any other competent authority, should in the mean time change the date on which the same officers should be elected, it would still be the general election for that year. McCrary, Elect. § 159. Congress might have at any time changed the date provided by this statute for the election of the same officers in the territory of Idaho, and it would have still been the general election. The constitution adopted by the people, and ratified by congress, did change the date for the general election for the year 1890, and fixed said time by the proclamation of the governor on October 1st of said year. At said time so fixed were elected all the officers named in section 466, above quoted, and many more. Such a general election never did occur in the history of the territory, and never will occur again in the progress of the state. The term "general election" is more clearly and completely defined by reference to the next section of the statute, which de-

finer "special elections," as contradistinguished from "general elections," described in section 466, as follows: "Sec. 467. Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer." It was not the day on which it occurred, nor the authority which designated the day, but the character of the election, which made it the general election for that year. The statute making it the duty of the board of county commissioners to submit this question to the voters at the general election for the year 1890 rendered it unnecessary for the commissioners to give any notice, in their call for the meeting of July 28th, that such action would be taken. We are of the opinion, therefore, that the board of county commissioners had the authority, and it was their duty, to submit the permanent location of the county-seat of Logan county to the voters at said election; that they did lawfully submit said question to said voters; that said election resulted in the selection of Bellevue as the permanent county-seat; and that the board of county commissioners had lawful authority to remove the records to said town. The action of the judge of the court below, refusing the permanent, and dissolving the temporary, injunction, is approved, and the judgment affirmed. It is further ordered that the plaintiffs herein pay the costs of this action, and that execution issue therefor.

SULLIVAN, C. J., and HUSTON, J., concur.

JONES v. WOOLLEY *et al.*

(March 16, 1891.)

CONTRACT OF CORPORATION—LIABILITY OF STOCK-HOLDERS.

The following instrument in writing was issued by the president and manager of a corporation: "Montpelier, Idaho, April 29, 1884. Be it known by these presents, that I, as manager and president of this institution, do agree to refund to Jacob Jones the sum of \$926 80-100 dollars at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. [Signed] H. S. WOOLLEY." *Held*, that it was the obligation of the corporation, and that an action could be maintained thereon by the payee named therein against the stockholder under section 2609 of the Revised Statutes of Idaho.

(Syllabus by the Court.)

Jones v. Woolley.

Appeal from district court, Bear Lake county.

Action by Jacob Jones against H. S. Woolley and others, as stockholders in "The Montpelier Co-operative Institution," for money loaned and goods sold to said corporation. From a judgment of nonsuit, and from an order overruling a motion for a new trial, plaintiff appeals. Reversed.

Smith & Smith, for appellant.

The contract sued on is an unconditional promise to pay money; it is, in fact, a promissory note. Tied. Com. Paper, § 6.

Defendants, as stockholders, were liable. *Morrow v. Superior Court*, 64 Cal. 384, 1 Pac. Rep. 354.

The stockholders are not sureties for the corporation, but are principal debtors. Insolvency of the corporation need not be alleged. *Bank v. Hill*, 59 Cal. 107; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. Rep. 110.

R. S. Spence, Hawley & Reeves, and *Kimball & White*, for respondents.

This instrument can in no wise be construed but as a corporation obligation. "I, as the manager and president of this institution, do agree," etc. The restrictive word "as," doing away with the individual liability, makes it binding on the corporation alone. *Daniel*, Neg. Inst. (3d Ed.) § 406; *Blanchard v. Kaull*, 44 Cal. 440.

It cannot be anything but a certificate of stock, for it was "to bear interest as other shares of stock in the institution," and the general rule is that one who participates in the profits of a corporation, by receiving dividends, is held to be a stockholder, and the equities attaching to his title are things with which the company and its creditors in general have nothing to do. *Thomp. Liab. Stockh.* § 168.

HUSTON, J. This is an action instituted by the plaintiff against the defendant and several others as stockholders in "The Montpelier Co-operative Institution," alleged to be organized and existing under the laws of Idaho territory, under the provisions of section 2609 of the Revised Statutes. The answer denies any indebtedness by the defendant. Certain other defenses set up in the answer were stricken out on demurrer. The action is based upon a paper writing, as follows: "Montpelier, Idaho, April 29, 1884. Be it known by these presents, that I, as manager and president of this institution, do agree to

refund to Jacob Jones the sum of \$926 80-100 dollars at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. [Signed] H. S. WOOLLEY." Upon the trial the above paper was introduced, its execution proven, as was also the giving of the notice provided for therein, and the plaintiff then rested. Thereupon the defendant moved for a nonsuit, which was granted by the court. We are left to conjecture upon what principle of law, equity, or justice the court based its decision, as no reason is given in the record. The whole defense seems to be based upon the construction of the paper copied above, and this court is presented with a lengthy dissertation upon the word "refund," as defined by the various lexicographers. No attempt is made to disprove the paper or its contents, or to do away with the plain and palpable obligation to repay the money borrowed or received, upon compliance with the conditions prescribed in the paper writing. It is claimed by the defendant that "the instrument in question is a *prima facie* certificate of stock." An inspection of the paper is all that is necessary to show the absurdity of this proposition. In support of this latter contention the counsel of respondent cites *Daniel*, Neg. Inst. (3d Ed.) § 406, and *Blanchard v. Kaull*, 44 Cal. 440. A careful examination of these authorities fails to develop anything in support of the position of the respondent. On the contrary, they militate strongly against such a view; nor is this position supported by the authority quoted from *Thompson on Liability of Stockholders*. The paper writing does not make the plaintiff a stockholder in any sense. While the provision that "it is the understanding that this money shall draw what interest it makes in proportion to all shares in the institution" may have been intended by its author to place the plaintiff in the unfortunate position of a stockholder, the object fails when tested by the plain rules of justice, unaided by revelation. The corporation had the money of the plaintiff. They gave their legal written obligation to pay it, and, as the answering defendants appear from the evidence to have absorbed the assets of the corporation, it is only simple justice that they should "refund" their proportion of the money so received. The objection of respondent to the consideration of the evi-

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dence, which appears in the transcript by this court, we do not think is well taken. The evidence appears in the bill of exceptions, which was prepared, settled, and served in due time, and is properly before us. Judgment of the court below reversed, and cause remanded for new trial.

SULLIVAN, C. J., and MORGAN, J., concur.

JONES v. MEYERS.

(March 18, 1891.)

PUBLIC LANDS — POWERS OF COMMISSIONER OF LAND OFFICE — CANCELLATION OF FINAL RECEIPTS.

1. The commissioner of the general land-office of the United States has the authority to cancel the final receipt or certificate issued to a pre-emption entryman at any time before patent issues to such entryman upon a proper showing, made in accordance with the rules and regulations of the land department, that said entryman obtained such certificate illegally or fraudulently.

SAME.

2. The fact that such entryman had sold and conveyed the land so entered to an innocent purchaser would not deprive the commissioner of the authority to cancel an entry illegally or fraudulently made.

(*Syllabus by the Court.*)

Appeal from district court, Bear Lake county.

Ejectment by Thomas W. Jones against Emil Meyers. From a judgment dismissing the complaint, and for defendant's costs, plaintiff appeals. Affirmed.

Smith & Smith, for appellant.

After final entry has been made upon a pre-emption claim by a pre-emptor in due form, and payment for the land has been made, and final proof certificate issued, and a sale is made by the pre-emptor to an innocent purchaser, for value in good faith, it is not within the power of the land office to cancel the pre-emption entry, and deprive the innocent purchaser of the property he has bought without notice to him, and without any fault upon his part. *Smith v. Ewing*, 23 Fed. Rep. 741; *Perry v. O'Hanlon*, 11 Mo. 585; *Brill v. Stiles*, 35 Ill. 309; *Cornelius v. Kessel*, 58 Wis. 241, 16 N. W. Rep. 550; *U. S. v. Minor*, 114 U. S. 223, 5 Sup. Ct. Rep. 836; *Myers v. Croft*, 13 Wall. 291.

A right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issue. *Stark v. Starrs*, 6 Wall. 402.

R. S. Spence and Hawley & Reeves, for respondent.

A pre-emption claimant acquires no title to land until he has fully complied with all the prerequisite requirements, and paid for the land. *Decision of Secretary Vilas in Smith v. Custer*, 2 Copp, Pub. Land Laws, (1890,) p. 796, subd. 2; *Frisbie v. Whitney*, 9 Wall. 187, 197; *The Yosemite Valley Case*, 15 Wall. 77, 94; *U. S. v. Schurz*, 102 U. S. 378, 408.

Six months' residence of a pre-emptor is a regulation of the land department, well established as a part of the public land system, so that it now has the force and effect of law. *Appeal of McConliss*, 2 Dec. Dep. Int. 622; *Forbes v. Driscoll*, 3 Dec. Dep. Int. 87; *Appeal of Woodley*, 4 Dec. Dep. Int. 198; *Appeal of Kathan*, 5 Dec. Dep. Int. 94; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Frisbie v. Whitney*, 9 Wall. 187; *Kellom v. Easley*, 1 Dill. 281.

The government land department has exclusive jurisdiction of all questions relating to the sale and disposition of the public lands up to the time of the issuing of the patent. *Forbes v. Driscoll*, (Dak.) 31 N. W. Rep. 633; *Shepley v. Cowan*, 91 U. S. 330-340; *Rev. St. U. S. § 2263*; *Myers v. Croft*, 13 Wall. 291-297; *Root v. Shields*, 1 Woolw. 340.

It is the duty of the department to cancel any entry which has been made contrary to law, or where compliance with legal prerequisites did not take place, or where by false proofs a securing compliance was fraudulently established. *Rev. St. U. S. § 2273*; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Harkness v. Underhill*, 1 Black, 316; *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330, 340; *U. S. v. Schurz*, 102 U. S. 378; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. Rep. 249; *Vance v. Burbank*, 101 U. S. 514; *Moore v. Robbins*, 96 U. S. 530; *Aiken v. Ferry*, 6 Sawy. 79.

One who purchases land with a knowledge of facts which would have led him, by the use of ordinary diligence, to a full knowledge of an outstanding equity, is not a purchaser without notice. *Hinde v. Vattier*, 1 McLean, 110.

The purchaser of land is chargeable with notice of the legal consequences of facts within his knowledge. *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169.

SULLIVAN, C. J. This is an action in ejectment, brought by the plaintiff against

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the defendant, to recover possession of certain real estate situated in the county of Bear Lake, in this state. The complaint is the ordinary one in an action of ejectment. The answer is a general denial of the allegations of the complaint, and sets up that defendant is in possession of said land under a homestead entry. The pleadings are not verified. The case was heard in the court below upon the following stipulation of facts: "In the above cause it is stipulated and agreed that the facts are as follows: That about the month of August, 1884, Lauritz Neilson made pre-emption declaratory statement No. 1,362, embracing the land in controversy in this cause, and on the 1st day of October, 1885, made his pre-emption entry and final proof for the land embraced in his declaratory statement, being the lands in controversy in this case and in the case of *S. P. Sorrenson v. Emil Meyers*, [post, 802.¹] That he, on that day, purchased said land, and paid \$200 therefor, and took patent certificate for the same. That on the 28th day of October, 1886, said Lauritz S. Neilson, together with his wife, Catharine Neilson, by deed of conveyance duly executed and recorded, conveyed the lands described in the complaint to the plaintiff, Thomas W. Jones. That said Thomas W. Jones has never conveyed any of said land to any other person. That said conveyance to Thomas W. Jones was made in consideration of the sum of \$200, which had been paid in the month of June or July, 1886. That said purchase was made in good faith by said purchaser on June 7, 1886. That the defendant filed an affidavit in the United States land-office at Oxford, Idaho, charging that Lauritz S. Neilson had failed to comply with the requirements of the pre-emption law in the matter of residence and improvement of said land, previous to his final proof and payment therefor. That Neilson was notified by the officers of the United States land-office that a day had been set for hearing, to determine the question as to whether his final entry should be canceled on account of the fraud charged. That Neilson ignored this notice, and did not endeavor to resist such cancellation, if it could be made. That the defendant appeared at the time appointed, August 10, 1886, and offered his evidence; and that afterwards, on the 24th day of January, 1887, an order was made

by the officers of the land department of the United States canceling the final entry of Lauritz S. Neilson; and thereafter, on the 25th day of January, 1887, the defendant, Emil Meyers, made homestead entry upon said land, which was accepted by the land department of the United States, and the proper certificate issued. That the defendant, Emil Meyers, took possession of the land mentioned in the complaint on the 20th day of January, 1887, and has ever since had possession of the same. That a reasonable rent for the premises described in the complaint during the time that the defendant has been in possession is \$150. That the damage to the plaintiff, being ejected from the land, is \$1.00; and it is agreed, in case the plaintiff recover in this case, that he shall recover \$1.00 damages for the taking of the place by the defendant, and \$150 damages for rent during the time he has been excluded therefrom by the defendant. It is further agreed that said Neilson had not resided upon the said land six months prior to his making said final proof, and did not reside upon the land at the time he made said proof."

It is admitted that Lauritz S. Neilson, the grantor of plaintiff, entered the land in question under and by virtue of the pre-emption laws of the United States, and that at the time he made his final proof and received his final receipt or certificate from the receiver he had not resided upon said land six months, and did not reside thereon at the time of making said final proof. It is conceded by appellant that the final certificate was procured illegally and fraudulently, but appellant contends that the land department of the United States has no authority to cancel an entry where final certificate has been issued, and the land described therein sold to such a purchaser as the stipulation of facts shows appellant to be. It is admitted that respondent entered a contest to set aside Neilson's entry in June, 1886. It is also admitted that appellant purchased the land in question from Neilson in June, 1886, and paid him therefor in June or July, 1886, but that said Neilson did not execute a deed of conveyance conveying said land to the appellant until October 28, 1886. Neilson was duly notified that said contest was set for hearing August 10, 1886, but failed to appear and defend. The respondent in this cause introduced his testimony at said hearing, and thereafter said entry was canceled by the proper

¹ 26 Pac. Rep. 218.

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officer of the land department. The question, then, is, had the land department, under the facts of this case, the authority to cancel said entry? The secretary of the interior is given by law the entire supervision of the survey and the sale of the public lands. The commissioner of the general land-office is by law required to perform, under the directions of the secretary of the interior, all executive duties appertaining to the survey and sale of the public lands of the United States. The registers and receivers are but local officers of the several land-districts, charged with the performance of certain duties, and subject to the direction and supervision of the commissioner of the general land-office and secretary of the interior. From the organization of the land department of the United States down to the present time it has been held by that department (and by the supreme courts of numerous states and territories) that it had the right and authority to cancel all entries of public lands upon a proper showing, made prior to the issuance of a patent, if the entrymen had failed to comply with the law, and had procured final receipt or certificate upon false proof. In *re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited; *Hosmer v. Wallace*, 47 Cal. 461; *Figg v. Hensley*, 52 Cal. 299; *Hestres v. Brennan*, 50 Cal. 211; *Vance v. Kohlberg*, 50 Cal. 346; *Randall v. Edert*, 7 Minn. 450, (Gil. 359;) *Gray v. Stockton*, 8 Minn. 529, (Gil. 472;) *Judd v. Randall*, (Minn.) 29 N. W. Rep. 589; *Bellows v. Todd*, 34 Iowa, 31; *McLane v. Bovee*, 35 Wis. 27; *Franklin v. Kelley*, 2 Neb. 79; *Hayes v. Parker*, 3 Pac. Rep. 901. We have examined the cases cited by counsel for appellant and many other cases not cited, and, with the exception of *Smith v. Ewing*, 23 Fed. Rep. 741, have been unable to find any case that sustains the view taken by appellant. The decided weight of authority is clearly against the position contended for by appellant. The appellant cites *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. Rep. 550, as holding that the commission had no power to cancel a final certificate. The court says: "The land was then subject to entry. It was purchased by him, and paid for. There was no fraud or mistake in the transaction." In the case at bar it is admitted that the entryman had not complied with the law; that he had not resided upon the land six months, and was not residing there at the time he made his final proof.

The case at bar differs from the one last above cited in this: in that case, there was no mistake or fraud; in this, there appears to have been perjury committed in making the final proof, and by such perjury a fraud was committed upon the land department. The appellant also cites *U. S. v. Minor*, 114 U. S. 233,¹ as an authority in this case. It was held in that case that, where the land department had issued a patent upon false and perjured affidavits, the United States is not precluded from instituting a suit in equity to cancel such patent. It does not conflict with former decisions of said court, in which it has been held that the decisions of the land department upon questions of fact and mixed law and fact are conclusive.

Appellant contends that the supreme court of the United States in *Myers v. Croft*, 13 Wall. 291, holds that a sale by a pre-emptor, after entry and final proof and the issue of a final certificate to a *bona fide* purchaser for a valuable consideration, conveys to the purchaser a valid, legal title. The court in that case in no respect intimates that the grantee of a pre-emptor would get any better title than his grantor had, or that any title would pass if the grantor had not in good faith, and in full compliance with the requirements of the pre-emption law, entered the land conveyed. The concluding portion of said opinion indicates very strongly the contrary opinion. The court says: "If it had been the purpose of congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject." 13 Wall. 297. It will not be contended for a moment that Neilson, appellant's grantor, was in good faith the owner of the land in question when he sold the same to the appellant. The case of *Carrol v. Safford*, 3 How. 441, cited by appellant, proceeds upon the theory that the government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. The court says:

¹ 5 Sup. Ct. Rep. 836.

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"But where there has been fraud or mistake the patent may be withheld, and every other purchaser at tax-sale incurs the risk as to the validity of the title he purchases." The case of *Brill v. Stiles*, 35 Ill. 309, is cited by the appellant as holding that the commissioner has no power to cancel the final certificate, and that his doing so is void. The court says: "If the entry was authorized by law, the title passed to him, subject to be defeated by the proof of a right of pre-emption; and, if unauthorized, he acquired no title. But until it was shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable title." There may be some apparent conflict in the Illinois decisions, but in the case of *Robbins v. Bunn*, 54 Ill. 48, the court has clearly shown that there is no conflict in the decisions of that state upon this question. The court says, after citing *Brill v. Stiles*, supra, and other decisions: "These two classes of cases may seem at first inconsistent with each other, and there are probably some expressions in the various opinions not strictly harmonious, but on further consideration it will be seen there is no real antagonism in the decisions. The cases in the first class relate to pre-emption claims upon which the land-offices have decided. The pre-emption law of 1830 required proof of the facts upon which the right of pre-emption depended to be made to the satisfaction of the register and receiver, agreeably to rules to be prescribed by the commissioner of the general land-office. This, by implication, gave them the right to decide all cases of contested pre-emption, so far as they depended upon the facts of prior settlement; and this construction has been uniformly given to the law, as will be seen by the cases before cited and in other authorities quoted in the opinions pronounced in these cases. The finding of the land-officers upon the facts in matters of pre-emption has been held conclusive by the courts, upon the familiar ground that such officers, in these proceedings, were acting in a *quasi* judicial capacity, and within the scope of their authority. But, on the other hand, when these officers have undertaken to cancel a patent or a certificate of entry for which a purchaser has paid his money, either at their discretion, or under some patented regulation of the department which the law did not authorize, or under some clearly erroneous construc-

tion of the law of congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law. The cases cited by counsel for defendant will be found to relate to proceedings of this character. Between those two classes of authorities there is a clear and sound distinction. In the one, the proceedings of the land-officers are held conclusive, because judicial in their character, and within their conceded jurisdiction; in the other, such proceedings are held not conclusive, because they are either ministerial in their character, or, if judicial, beyond the authority given by the acts of congress." In *Stark v. Starrs*, 6 Wall. 402, it is claimed that the supreme court of the United States holds that "a right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issue." This case arose under what is known as the "Oregon Donation Act," and under that act the right of the claimant to a patent became perfected when the certificate of the surveyor general and accompanying proof were received by the commissioner of the general land-office, and he found no valid objection thereto. In that case the law had been fully complied with by the claimant, but the commissioner objected to issuing the patent to Stark upon the ground that the land was brought under the operation of the "town-site act," and was not subject to disposition under said "donation act." If the "donation act" of 1850 was applicable to the lands, Stark's right to a patent became perfect when the certificate of the surveyor general and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements. In that case the commissioner's objection to the issuance of a patent arose, not from any defect in the certificate or proof, but from an opinion that the lands were subject to the provisions of the "town-site act" of 1844. How very different from the case at bar! The appellant's grantor had not complied with the requirements of the pre-emption law. Through false proof he had obtained a final certificate. A hearing was ordered long before the appellant received a deed of conveyance from his grantor, and, had the appellant examined the records of the land-office at Oxford, Idaho, he would have found a contest pending to set aside his grantor's entry

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at least four months before said deed of conveyance was executed. If an entryman can through false proof pre-empt land, and, as soon as he obtains his final certificate, sell the same, and convey a valid title, it seems to us that it would "open wide the door to frauds innumerable and to an extent almost incalculable." Until the patent issues, we think that the rule *caveat emptor* applies with peculiar force to purchasers of lands from pre-emption entrymen.

Chief Justice TRIPP, of Dakota, in the case of *United States v. Edward H. Dudley*, 1887,³ rendered an exhaustive opinion as to the authority of the land department to cancel a final certificate issued to a pre-emptor, in which he reviews and comments upon numerous decisions of the supreme court of the United States and decisions of the highest courts of many of the states and territories, and arrives at the following conclusions, to-wit: "I am clearly of the opinion that the supervisory and appellate powers vested in the secretary of the interior, and the commissioner of the general land-office, under his direction, gives them the right to examine all acts of the register and receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the secretary and commissioner may be exercised by appeal and a re-examination of the fact themselves, or by examination of their action, and requiring them again to examine the questions of fact involved, and in all cases to supervise the purely administrative or executive acts of the local officers." The power of supervision given the secretary and commissioner is a general one over all the acts of the register and receiver. There is no exception made in the matter of the issuing of final certificates; and, if the position here contended for be the correct one, to-wit, that the commissioner must issue a patent at once upon the presentation of the certificate, and that issue of the certificate would conclude all inquiry into matters settled by its issue, then it would conclude all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. I

am led to adopt the contrary of this reasoning. Besides, any other view would lead to hopeless conflict between the department and the courts. Our calendars would be crowded with land contests, and the action of the department would be indefinitely postponed. The only true doctrine, in my opinion, is that announced by the supreme court,—that the jurisdiction of the court commences when that of the department ceases; and that, until the patent issues, and while the matter is still pending before the department, the question is not one of private right upon which the courts have power to act. We are of the opinion that if a pre-emptor has not complied with the law, and procures a final certificate through fraud or perjury, a purchaser from him gets no better title than such pre-emptor obtained, and, if such fraud or failure to comply with the law is established to the satisfaction of the land department, under its rules and regulations, before patent has been issued, the land department has the authority to cancel such certificate. In *re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited. Those decisions which hold that a final certificate is equivalent to a patent issued proceed upon the theory that the pre-emptor has complied with the law as to residence and improvement and all other requirements, and that such certificate was not procured through fraud or perjury. The judgment of the court below is affirmed, with costs.

HUSTON and MORGAN, JJ., concur.

SORRENSON *v.* MEYERS.

(March 18, 1891.)

Appeal from district court, Bear Lake county.

Ejectment by one Sorrenson against one Meyers. From a judgment dismissing the complaint, and for defendant's costs, plaintiff appeals. Affirmed.

Smith & Smith, for appellant. *R. S. Spence* and *Hawley & Reeves*, for respondent.

SULLIVAN, C. J. It is stipulated that the question raised by the appeal in this cause is the same as that raised in the cause of *Jones v. Meyers*, ante, 793, 26 Pac. Rep. 215, (decided at the present term of this court,) and that the decision in this cause abide the decision in said cause of *Jones v. Meyers*. For the reasons stated in the opinion of this court in the said cause of *Jones v. Meyers* the judgment of the court below is affirmed, with costs of this appeal.

MORGAN and HUSTON, JJ., concur.

³ A *nisi prius* decision, (rendered by Chief Justice TRIPP, sitting as judge of the district court,) and not reported in any regular series. But see, also, *Vantongerren v. Heffernan*, 38 N. W. Rep. 52, in which substantially the same language is used in a Dakota supreme court decision.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

APRIL TERM, 1891.

O'CONNOR v. LANGDON, Sheriff.

(May 12, 1891.)

APPEAL—REVIEW—HARMLESS ERROR.

1. A mere misuse of the conjunctive "and" in the place of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law is harmless error, which will not warrant a reversal.

SAME—CONFLICTING EVIDENCE.

2. Where the evidence is conflicting, the verdict of a jury will not be disturbed.

(*Syllabus by the Court.*)

Appeal from district court, Latah county.

Action of claim and delivery by J. A. O'Connor against George Langdon, sheriff. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Affirmed.

Reynolds, Buck & Winston, for appellant.

A statement by counsel in argument, wholly outside of the evidence in the case, is sufficient to entitle the opposite party to a new trial. *Brown v. Swineford*, 44 Wis. 282; *Hatch v. State*, 8 Tex. App. 416; *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. Rep. 710; *Chase v. Chicago*, 20 Ill. App. 274; *Marble v. Walters*, 19 Mo. App. 134; *Willis v. McNeill*, 57 Tex. 465; *Thompson v. State*, 43 Tex. 274; *Berry v. State*, 10 Ga. 522.

Poe & Piper, for respondent.

One who goes to a place with the intention to reside there becomes a resident of that place, whether the residence has been long or short. *Drake*, *Attachm.* §§ 59, 60; 2 *Bouv. Law Dict.* p. 574.

Errors cannot be relied on in the appellate court which are not taken advantage of and raised in the court below. *Morgan v. Hugg*, 5 Cal. 409; *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. Rep. 870.

A verdict not justified by evidence cannot be disturbed when there is a conflict of testimony, even though it should be greatly against the weight of evidence. *Wilson v. Fitch*, 41 Cal. 385; *Hayne*, *New Trials & App.* § 288.

Each instruction need not contain all the exceptions and qualifications necessary if others embody them; and, if fairly presented as a whole, the verdict must stand. *People v. Doyell*, 48 Cal. 86; *People v. Welch*, 49 Cal. 174; *People v. Cleveland*, Id. 577.

HUSTON, J. This is an action of claim and delivery for the recovery of two horses or the value thereof. The horses were seized by defendant upon an execution issued upon a judgment recovered in justice's court of Moscow precinct, Latah county, Idaho. Plaintiff claims that the property so seized was exempt under the statutes of Idaho, for the reason that he, the plaintiff, was an actual resident of Idaho at the time of the seizure, and engaged solely in teaming with said team as a means of livelihood. The answer of defendant denies both the actual residence and occupation of plaintiff. The case was tried to a jury, and verdict rendered for plaintiff for recovery of property, and damages for detention. The appeal is from the order of the district judge over-

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ruling defendant's motion for a new trial. The errors charged are:

First, error in the charge of the court to the jury, in this: The court charged the jury as follows: "There must be two things that must occur in order that this plaintiff may have his property exempt: (1) He must at the time have been an actual resident of Idaho territory; and (2) he must have been a teamster, using his team habitually as a means of livelihood." This instruction was substantially repeated, at least three times, in the instructions of the court; but it appears that in its excess of repetition the court, evidently by inadvertence, used the word "and" in one case where the word "or" should have been used, to-wit, after stating the law as above given, the court says: "If you find, however, the contrary, that he [the plaintiff] was not an actual resident of this territory, and that he did not use those horses habitually as a means of livelihood," etc. It is the use of the conjunction "and" in place of the disjunctive conjunction "or" that is charged as error. We cannot think that this mere *lapsus linguæ*, occurring in a charge which had repeatedly stated the law of the case correctly, could have misled the jury. If technically error, it was harmless, and will not warrant a reversal.

The second error urged is that the attorney for the plaintiff, in his closing argument to the jury, used the following words: "Gentlemen of the jury: If you could have only seen this young man, the plaintiff, come into my office with tears in his eyes, lamenting the loss of his horses, all that he had in the world, the day of the sale, you would not suspect him of endeavoring to deceive you." It is claimed by appellant's counsel that in making the above statement of facts, of which there was no proof in the testimony, the only evidential statement was as to the horses being "all that plaintiff had in the world," and this fact was testified to by the plaintiff, and was undisputed. The agony alluded to by his counsel may be fairly inferred to have been intended to meet some charge of dishonesty or deception charged to have been attempted by the plaintiff. Without the argument upon both sides before us, it is impossible for us to say what degree of relevance there was. At any rate, the matter is too trifling to warrant a reversal.

The only other error charged by the appellant is that the evidence does not war-

rant or sustain the verdict. The evidence upon the fact of the occupation of plaintiff was undisputed. The evidence of residence was somewhat conflicting, but we think fully warranted the finding of the jury. Order of the court below overruling motion for new trial is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

ADVANCE THRESHER CO. v. WHITESIDE.

(May 12, 1891.)

FORECLOSURE OF CHATTEL MORTGAGE — ACTION FOR DEFICIENCY.

The plaintiff held a chattel mortgage given by defendant to secure the payment of three certain promissory notes made by defendant, for purchase price of certain personal property. Default having been made by defendant in the condition of mortgage, plaintiff foreclosed by notice and sale, as provided by statute. The return of the sheriff showed a deficiency of some \$900, to recover which amount plaintiff brings this action. To a complaint setting forth all the details of the transaction, including the foreclosure sale, and report of sheriff showing deficiency, in proper form, defendant enters a general demurrer, which was sustained by the court. *Held*, that the action was properly brought, and that the action of district court, in sustaining demurrer to complaint, was error.

(*Syllabus by the Court.*)

Appeal from district court, Latah county.

Action by the Advance Thresher Company against W. B. Whiteside. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Forney & Tillinghast, for appellant.

A judgment rendered against a defendant without notice to him or an appearance by him is without jurisdiction, and is utterly and entirely void. 1 Black, Judgm. 220; Penoyer v. Neff, 95 U. S. 727; St. Clair v. Cox, 106 U. S. 353, 1 Sup. Ct. Rep. 354; Freeman v. Alderson, 119 U. S. 188, 7 Sup. Ct. Rep. 165.

The power of the clerk to enter judgment without the order of the court is derived from the statutes, and the existence of all the facts which the law requires to authorize the entry must therefore appear. *Iron Co. v. Prader*, 32 Cal. 634; *Kelly v. Van Austin*, 17 Cal. 555; *Stearns v. Aguirre*, 7 Cal. 443.

The clerk has no power to enter judgment out of term when process is not per-

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sonally served on the defendant. *McConkey v. McCraney*, 71 Wis. 576, 37 N. W. Rep. 822; *Northrup v. Shephard*, 26 Wis. 220; *Moyer v. Cook*, 12 Wis. 335.

After sale at public auction under statutory proceedings to foreclose by notice and sale, or under provisions contained in the mortgage, the mortgagee, after applying the proceeds of the sale upon the debt, may sue for any deficiency. *Lee v. Fox*, 113 Ind. 98, 14 N. E. Rep. 890; *Jones, Chat. Mortg.* 711; *Manufacturing Co. v. Lewes*, 30 Kan. 541, 1 Pac. Rep. 812; *Case v. Boughton*, 11 Wend. 107; *Morgan v. Plumb*, 9 Wend. 288; *Olcott v. Tioga R. Co.*, 40 Barb. 179; *In re Haake*, 2 Sawy. 231.

D. C. Mitchell, for respondent.

There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property. Code, § 4520; *Ould v. Stoddard*, 54 Cal. 613; *Bartlett v. Cottle*, 63 Cal. 366.

HUSTON, J. This is an appeal from an order and judgment of the district court for the county of Latah, sustaining defendant's demurrer to the complainant's complaint. The facts as they appear from the record are substantially as follows: On the 19th day of September, 1890, at Moscow, Latah county, Idaho, the defendant made and delivered to plaintiff his three promissory notes,—one being for the sum of \$750, payable on the 1st of November, 1890; and the other two being each for the sum of \$725, one payable the 1st day of November, 1891, and the other the 1st day of November, 1892. Said notes were given in payment for a threshing-machine, engine, etc., bought of the appellant by the respondent. Contemporaneous with the execution and delivery of said notes the defendant, for the purpose of securing the payment of the same, made, executed, and delivered to the plaintiff a chattel mortgage, in the usual form, and also a written agreement to which was attached one of the aforesaid notes, by the terms of which agreement the defendant agreed to deliver to the plaintiff certain other security in addition to said chattel mortgage, namely, certain bankable notes, to be taken from farmers for threshing to be done by the defendant to the amount of \$50 for each week from October 3, 1890, to the 1st day of November, 1890. It was also agreed in the said agreement that, in case the additional security

mentioned therein was not delivered upon demand made by appellant upon respondent, and upon five days' notice of such demand, and failure upon the part of the respondent to so deliver the said security, the said three promissory notes should become immediately due and payable. The complaint alleges that demand was made and notice given, and that the respondent failed and refused to deliver the security so agreed to be delivered. Default having been made by the defendant in complying with the conditions of the chattel mortgage, the plaintiff proceeded to foreclose the same, as provided by statute; and on the 29th day of October, 1890, sold the property at public auction for the sum of \$1,500. The sheriff, after deducting his fees, paid the balance of the proceeds of such sale to the plaintiff, the mortgagee in said chattel mortgage. There being an unpaid balance due upon the notes and mortgage, after applying the proceeds of the sale aforesaid, the plaintiff brings this action to recover the same. The foregoing facts are set forth in the complaint of the plaintiff, to which the defendant demurs, upon the ground that the same does not state facts sufficient to constitute a cause of action, and from the action of the district court in sustaining such demurrer this appeal is taken. The contention of respondent is that the plaintiff, in bringing his action for the recovery of the deficiency, has mistaken his remedy. The statutes of Idaho provide how chattel mortgages may be foreclosed in this state, namely, either by notice and sale, as was done in the case under consideration, or by action in the district court. When the former course is adopted, the officer making the sale is required to make return upon the affidavit of all his proceedings, and file the same with the clerk of the district court having jurisdiction in the county in which the same was made, all of which was done in the present case; and from the return of the officer so made it appeared that, after applying the proceeds derived from the sale of the mortgaged property upon the mortgage debt, there still remained a deficiency of something over \$900. The statutes of Idaho provide, in the case of foreclosure of a mortgage on real estate, for the docketing of a judgment in favor of the plaintiff, and against the defendant or defendants personally liable for the debt; but this provision does not apply in case of a foreclosure of a chattel mortgage by notice, affidavit, and

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sale. How, then, was the plaintiff to recover the deficiency? We know of no other proper course, except the one adopted by it. All the rights of the defendant were fully protected. Any defense he might have, or desire to make, to the foreclosure proceedings, was permissible in this action, and we cannot divine what reasonable objection could be raised to it. By the terms of the chattel mortgage and contemporaneous written agreement, upon default in any of the conditions all three notes were to become due. The judgment of the district court is reversed, and the cause remanded, costs to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

DURANT et al. v. COMEGYS et al.

(May 12, 1891.)

FINAL JUDGMENT—WHAT CONSTITUTES.

1. Upon the minutes of the court the following entry was made: "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiffs' costs, taxed at \$3.40." *Held*, this is not a final judgment.

APPEAL—WHEN LIES.

2. When there is no final judgment no appeal can be taken.

SAME—APPELLATE JURISDICTION.

3. When there is no judgment in the court below this court has no jurisdiction.

COURTS—OBJECTIONS TO JURISDICTION.

4. An objection to the jurisdiction may be made at any time.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county.

Action by Oliver Durant and another against George Comegys and others to compel the specific performance of a contract. From an order sustaining a demurrer to the complaint, and dismissing the action, plaintiffs appeal. Appeal dismissed.

By leave of the court an amended complaint was filed in the above-entitled action on May 29, 1890, and thereafter, on the 2d day of June, 1890, the said complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action. Upon the hearing the demurrer was sustained. Thereafter, on March 9th, the court entered the following order: "At this day the court granted the plaintiffs until March 12, 1891, to elect whether to amend or stand upon their

complaint." On March 11th the following entry appears in the record: "At this day the plaintiffs, by their counsel, announce that they have elected to stand by their amended complaint." Thereafter, on the 12th day of March, 1891, the court made the following entry on the record: "At this day, on motion of defendants' counsel, the court ordered this cause dismissed at plaintiffs' costs, taxed at \$3.40." From this so-called judgment the plaintiffs take an appeal to this court, by filing and serving the following notice: (Title of the court and cause.) "Please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this state from the judgment therein made and entered in the above-entitled district court sustaining the defendants' demurrer to the plaintiffs' complaint, and dismissing the above-entitled action at the cost of the plaintiffs, which judgment, made and entered as aforesaid, was in favor of the defendants and against the plaintiffs, and was entered on the 10th day of March, 1891, and appeal from the whole of said judgment. Dated this 18th day of March, 1891. [Signed,]" etc.

W. T. Stoll and McBride & Allen, for appellants.

This is not an appeal from an order; it is an appeal from a judgment. The form of it—the designation of it as an "order"—is immaterial. The question is, is it in effect a judgment, and is it final? *Sparrow v. Strong*, 4 Wall. 595.

Woods & Heyburn, for respondents.

Where there is a substantial defect in an appeal, the objection may be taken at any time before judgment. *Wilson v. Insurance Co.*, 12 Pet. 140.

No appeal lies from an order sustaining a demurrer until a final judgment is rendered thereon. *Moulton v. Ellmaker*, 30 Cal. 527; *Graham v. Lincham*, 1 Idaho, 780; *Gray v. Cederholm*, ante, 41, 3 Pac. Rep. 12; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. Rep. 189; *Owen v. McCormick*, 5 Mont. 255, 5 Pac. Rep. 280.

An appeal from a judgment cannot be considered if record shows no entry of it. *Mayson v. Chabrie*, (Cal.) 7 Pac. Rep. 634; *Murphy v. King*, 6 Mont. 30, 9 Pac. Rep. 585; *Society v. Meeks*, 66 Cal. 371, 5 Pac. Rep. 624.

MORGAN, J. The first question to be considered is, is this a judgment from which an appeal can be taken? If there is no

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judgment no appeal can be taken, and this court has no jurisdiction. *Gray v. Cederholm*, (Idaho,) 3 Pac. Rep. 12;¹ *Mey-san v. Chabrie*, (Cal.) 7 Pac. Rep. 634; *Stebbins v. Savage*, (Mont.) 5 Pac. Rep. 278. Section 4807, Rev. St. Idaho, is as follows: "An appeal may be taken to the supreme court from a district court—*First*, from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment." In *McLaughlin v. Doherty*, 54 Cal. 519, the court states as follows: "Section 939 of the Code of Civil Procedure provides that an appeal may be taken from the final judgment within one year after the entry of judgment." It will be noticed that the wording is the same as our own statute. In *Gray v. Palmer*, 28 Cal. 416, this provision of the practice act was before the court for construction, and the court in its opinion defined with precision the distinction between the rendition and entry of a final judgment within the meaning of that act. The distinction which the court made was that a judgment is rendered when ordered by the court, and entered when actually entered in the judgment book. See, also, *Trenouth v. Farrington*, 54 Cal. 273. In the case of *McNevin v. McNevin*, 11 Pac. Coast Law J. 92, the journal entry was in the following language: "Ordered that plaintiff's prayer for a decree of divorce be denied, and that defendant have judgment for costs." The court held this to be an order for judgment only, and dismissed the appeal. The same was held in the case of *Thomas v. Anderson*, 55 Cal. 43. Both these cases were approved in *Schroder v. Schmidt*, 71 Cal. 399, 12 Pac. Rep. 302; also in *Tyrrell v. Baldwin*, 72 Cal. 192, 13 Pac. Rep. 475; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. Rep. 189. Section 4454 of our statute requires the clerk to keep a judgment book, in which judgments must be entered. Section 4456 requires him immediately after entering the judgment to attach together and file certain papers, which shall constitute the judgment roll. It is from the judgment so entered in the judgment book that an appeal must be taken, and not from the order of the court directing such judgment. The language used in this case

and recorded in the journal was simply an order directing the entry of judgment of dismissal and for costs. *Black, Judgm. §§ 110, 115; Hayne, New Trials & App. 183, note 6.* It is but just to the eminent counsel engaged in this cause to say that this conclusion was arrived at before the supplemental briefs were filed. Since they were filed the case cited by counsel for appellants has been examined, but has not changed the opinion of the court. In our opinion, an objection to the jurisdiction may be made at any time. If not made at all by counsel, and it appeared in the record, the court would be obliged to take notice of it. Appeal dismissed, without prejudice to another appeal; costs of appeal awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

AH KLE et al. v. McLEAN et al.

(April Term, 1891.)

Appeal from district court, Idaho county.

Action by Ah Kle and others against A. C. McLean and others to recover the possession of certain mining ground. From an order sustaining a demurrer to the complaint, and dismissing the action, plaintiffs appeal. Appeal dismissed.

James W. Poe and *James W. Reid*, for appellants. *James H. Forney* and *Albert Allen*, for respondents.

An order sustaining a demurrer and dismissing an action is not an appealable order. *Rev. St. § 4807; Dixon v. Sanderson*, (Tex.) 6 S. W. Rep. 831; *Moulton v. Ellmaker*, 30 Cal. 529; *Sutter v. San Francisco*, 36 Cal. 114; *Daniels v. Landsdale*, 38 Cal. 567; *Hibberd v. Smith*, 39 Cal. 145; *Agard v. Valencia*, Id. 297; *Ashley v. Olmstead*, 54 Cal. 618; *Moraga v. Emeric*, 4 Cal. 308; *State v. Falconer*, (Ark.) 5 S. W. Rep. 193; *Mordecai v. Lindsay*, 19 How. 624; *Bank v. Lynch*, 76 N. Y. 514.

An appeal cannot be taken from parts of two judgments and an order for judgment by one notice of appeal and one undertaking. *People v. Center*, 61 Cal. 191.

MORGAN, J. The transcript in this case fails to show that any judgment was ever entered, but merely an order for a judgment. Therefore the opinion in the case of *Durant v. Comegys*, ante, 809, 26 Pac. Rep. 755, (decided at this term,) applies to, and will govern, this case. Appeal dismissed, without prejudice to another appeal; costs of appeal awarded to respondents.

SULLIVAN, C. J., and HUSTON, J., concur.

¹Ante, 41.

*People v. George.*PEOPLE *ex rel.* LINCOLN COUNTY *v.* GEORGE.

(June 3, 1891.)

CONSTITUTIONAL LAW—LOCATION OF COUNTY-SEAT
—DIVISION OF COUNTY.

1. The act of March 3, 1891, entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county-seats of said counties, and to apportion the debt of Logan county," held unconstitutional.

SAME—FAILURE TO PROVIDE FOR ELECTION.

2. An act to divide a county, and attach the part cut off to another county, without submitting the proposition to a vote of the people in the segregated part, is in violation of section 3, art. 18, of the constitution.

SULLIVAN, C. J., dissenting.

(Syllabus by the Court.)

Petition by the people, on the relation of Lincoln county, for a writ of mandate to compel Wesley B. George, clerk of the district court and *ex officio* auditor and recorder of Logan county, to deliver to relator certain property alleged to belong to relator by virtue of an act of the legislature creating relator as a county. Petition denied.

Lyttleton Price, George M. Parsons, Texas Angel, N. M. Ruick, and George H. Roberts, Atty. Gen., for relator.

If a county is dissolved or abolished or politically annihilated before the expiration of the lawful term of an officer of the county, the office falls with the county government of which it is a part; and while the constitution (article 5, § 16) provides for a clerk of the district court of each county, and fixes the tenure of office, yet both office and tenure of the clerk of the district court in and for a particular county are dependent upon the existence of that county. *People v. Morrell*, 21 Wend. 577; *State v. Choate*, 11 Ohio, 511; *Respublica v. McClean*, 4 Yeates, 399; *In re Hinkle*, 31 Kan. 712, 3 Pac. Rep. 531; *Hagerty v. Arnold*, 13 Kan. 367.

Counties and county governments may be dissolved and abolished by the legislature. *State v. McFadden*, 23 Minn. 43; *Opinion of Supreme Court Judges*, 55 Mo. 295; *Division of Howard Co.*, 15 Kan. 194; *Opinion of the Justices*, 6 Cush. 578; *People v. Marshall*, 12 Ill. 391.

If the legislature has power to create new counties, it has the power to locate the county-seat of the new county. The people have no vested right to a county-seat at any particular place; and when, by the division of a county, and the creation of a new county, the seat of govern-

ment of the old county falls within the limits of the new, the county-seat as it existed is abolished. *State v. Larrabee*, 1 Wis. 200; *Attorney General v. Fitzpatrick*, 2 Wis. 542; *Division of Howard Co.*, 15 Kan. 194.

If there is any doubt about the constitutionality of an act, it must be resolved in favor of the enactment. "To doubt is to sustain the act." *Sharpless v. Mayor, etc.*, 21 Pa. St. 164; *Hess v. Pegg*, 7 Nev. 30; *Township of Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391; *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Supervisors*, 1 Amer. Rep. 241; *Rumsey v. People*, 19 N. Y. 56; *Ex parte McCollum*, 1 Cow. 510; *National Bank of Chester v. Commissioners of Chester Co.*, 14 Fed. Rep. 240; *State v. Irvin*, 5 Nev. 120.

S. B. Kingsbury, Arthur Brown, and Richard Z. Johnson, for respondent.

Where an officer is created by the constitution, and the term of the office is fixed by the constitution, any person lawfully inducted into such office can only be deprived thereof by the expiration of the constitutional term of office, or in some other manner expressly provided by the constitution. *Com. v. Gamble*, 62 Pa. St. 343; *People v. Dubois*, 23 Ill. 547; *People v. Bangs*, 24 Ill. 184; *King v. Hunter*, 65 N. C. 603; *State v. Brunst*, 26 Wis. 412.

No means can be constitutional which effect an unconstitutional object. *People v. Bangs*, 24 Ill. 185; *Marion Co. v. Grundy Co.*, 5 Sneed, 490, 492; *Rock Island Co. v. Sage*, 88 Ill. 582; *Stuart v. Bair*, 8 Baxt. 141-146; *Gotcher v. Burrows*, 9 Humph. 585, 589-591; *James Co. v. Hamilton Co.*, 89 Tenn. 237, 14 S. W. Rep. 601; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. Rep. 801.

MORGAN, J. On the 3d of March, 1891, the legislature passed an act entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county seats of said counties, and to apportion the debt of Logan county." The first section establishes the county of Alta, composed of the territory of Alturas county as it then existed and about half of the contiguous territory of Logan. Section 2 establishes the county of Lincoln from the residue of the territory theretofore belonging to Logan. Section 3 makes Hailey, then the county-seat of Alturas county, the county-seat of Alta county. Section 4 makes Shoshone the county-seat of Lincoln county. Section 5 authorizes the

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governor to appoint the county officers of the two counties thus established. Section 6 provides that all the county records, books, money, office furniture and fixtures, and all other personal property belonging to Logan county, and all real estate situate in the county of Lincoln, thus organized, before belonging to Logan county, shall become the property of Lincoln county, and that the commissioners of Lincoln county shall within 30 days cause all records, books, funds, and other personal property of said Logan county to be transferred to Shoshone. Section 7 provides that all public buildings, records, books, furniture, money, real estate, and personal property theretofore belonging to Alturas county, shall become the property of Alta county. Section 9 provides that all the indebtedness of Logan county shall be assumed and paid by Lincoln county, and that all the indebtedness of Alturas county shall be assumed and paid by Alta county. Under and by virtue of this act the commissioners of Lincoln county demanded the said books, records, and personal property then in the custody of Wesley B. George, the duly elected and qualified clerk of the district court, and *ex officio* auditor and recorder of Logan county, which being refused, the county of Lincoln, on the 17th day of April, 1891, filed its petition in this court for a writ of mandate to compel said George to deliver said property to Lincoln county. On the same day the said George filed his demurrer to said petition, and alleges that it does not state facts sufficient to constitute a cause of action. The issue thus formed raises the question as to the constitutionality of the act of March 3, 1891.

Considerable of the argument of the cause related to the question as to whether the counties, as recognized by the constitution in section 1, art. 18, as they then existed, could be abolished by act of the legislature. In the view I take of the cause it is not necessary to determine this question. It will also be apparent that it is not necessary to decide the question as to whether defendant, George, being duly elected in pursuance of the provisions of the constitution, is such a constitutional officer that he cannot be deprived of his office by an act of the legislature. The question that must determine this case is, can a portion of the territory of one county be cut off and attached to another without a vote of the people, residing in the segregated portion, consent-

ing thereto, in the manner adopted in this act? The first paragraph of section 3 of article 18 of the constitution is as follows: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division: provided, that this section shall not apply to the creation of new counties." What is the evident intent of the act under consideration? What was the object to be effected? What is the result accomplished? The object was not, certainly, to change the names of the two counties. If that had been desired it could have been effected by a direct act for that purpose, as the constitution does not forbid it, and the act says nothing about changing the names of the counties of Logan and Alturas. It could not have been desired to abolish the counties of Alturas and Logan. Nothing is said in the act about abolishing the counties, and they do not seem to be abolished. The same territory that before the passage of the act constituted the counties of Alturas and Logan, under this act constitutes the counties of Alta and Lincoln. No new territory is added to them; none is taken away; but the larger half of the county of Logan is cut off, and attached to the county of Alturas, and the names of the two counties changed. There were two counties before; there are but two now. It is evident that the whole intent and object of the act was to cut this body of territory from the county of Logan, and attach it to the county of Alturas. In fact, I understand the counsel did not deny that this was the sole object. But the constitution says this cannot be done except by a vote of the people. The legislature cannot do indirectly what it cannot do directly. *People v. Marshall*, 12 Ill. 391; *Craig v. State*, 4 Pet. 410. Says the court in the case first above mentioned: "No means can be constitutional which effect an unconstitutional object. While we would not extend the prohibitions of the constitution so as to embrace measures and objects not manifestly and clearly within the design of its framers, yet, where that is undeniably the case, then by no means whatever should it be allowed to be evaded." See, also, *Rock Island Co. v. Sage*, 88 Ill. 589; *Gotcher v. Burrows*, 9 Humph. 589. It is the duty of the court to give both the statute and the constitution such construction as will give

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effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction. *Doan v. Board*, (Idaho,) 26 Pac. Rep. 167,¹ and cases there cited. Suppose the court should hold that this provision of the constitution could be evaded in the manner adopted by this act, then successive legislatures could go on and sever a portion of the territory of one county and attach it to another in every part of the state, and continue the work indefinitely, without the vote of the people in any case. It will be seen that it would render this provision of the constitution of no effect whatever, as the legislature and the court would have clearly pointed out a method by which it might be evaded. I think the creation of a new county under the proviso in this section must be held to be the creation of an additional county, which the legislature may do out of any territory it may see fit, and without a vote of the people. The constitution is the fundamental law of the state; must control all branches of the government. No evasion, however specious, can be permitted. No amount of circumlocution can divide a county, and attach the part cut off to another, without compliance with section 3, by submitting the proposition to a vote of the people. We are not permitted to consider the apparent necessity of the case, nor the injustice under which any county may be laboring. Wrongs, if they exist, can only be righted by constitutional means. We can only say thus it is written in the constitution. To cut off a portion of any county, and attach the part thus detached to another county, without a vote of the people in the segregated part, would be in direct violation of the clause referred to, and therefore void. The importance of the cause and the ability of the counsel engaged has induced us to examine the cases cited with more than ordinary care, but we have not been able to arrive at a different conclusion. The writ of mandate is denied, with judgment for costs against the relator, and execution may issue therefor.

HUSTON, J., (*concurring*.) I approach the consideration of this case with a full recognition of the fact that, when called upon to pass upon the validity of an act of a co-ordinate branch of the government, courts have a delicate duty to per-

form, but it is a duty the obligation of which must not be evaded or shrunk from. I recognize further the potency of the rule which requires that, before pronouncing an act of the legislature invalid, the court should be fully satisfied that such act is clearly repugnant to some provision of the organic law of the state. In this view let us consider the questions involved in this case. Section 1, art. 18, tit. "County Organization," of the constitution of Idaho, reads as follows: "The several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state." Section 2 of said article is as follows: "No county-seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal of the county-seat shall not be submitted in the same county more than once in six years, except as provided by existing laws. No person shall vote at any county-seat election who has not resided in the county six months, and in the precinct ninety days." Section 3 of said article 18 is as follows: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division: provided, that this section shall not apply to the creation of new counties. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all existing liabilities of the county from which it is taken." Section 4 of the same article reads: "No county shall be established which shall reduce any county to an area of less than four hundred square miles, nor shall a new county be formed containing an area of less than four hundred square miles." On the 3d day of March, 1891, the legislature of the state of Idaho enacted a law entitled "An act to create and organize the counties of Alta and Lincoln, and to locate the county-seats of said counties, and to apportion the debt of Logan county." The sole purpose and effect of this act was to segregate or strike off from Logan county nearly one-half its territorial area, and attach

¹ Ante, 781.

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the part so stricken off to Alturas county, and to change the name of Alturas to Alta, and that of Logan to Lincoln. The provision for the apportionment of the debt of Logan county was a necessary sequence. Was this act, so passed, repugnant to the provisions of the constitution of the state above quoted, or to any of them? We must take this constitution as we find it, as it is presented to us by its makers,—the people. It is not within the purview of our authority or the limits of our jurisdiction to bate, or set aside, or treat as naught, any jot or tittle thereof, and “no accepted canon of construction can justify us in adding to the constitution qualifying words of our own, suggested only by outside considerations, which may or may not have been of weight with the convention in framing, or the people in adopting, that instrument.” Cooley, Const. Lim. Provisions similar to those above cited from the constitution of Idaho, are found in many of the constitutions of other states, and there has been no more disturbing element in the legislation and litigation in many of the states than that which arises from the organization of counties, and the location and changing of county-seats, and the changing of county boundaries. The elements of greed and self-interest enter so largely into the consideration and discussion of these questions that men have been prone, as shown in the history of several of the western states, not only to override constitutional provisions, but to set aside all legal restraints, and resort to brute force, to carry out their purposes in this direction. Idaho, while a territory, had some experience in this sort of legislation, of which, doubtless, the framers of our constitution were not unmindful; hence we find in our constitution a provision unknown to that of the older states, and which can only be found in the constitutions of nine states of the Union, to-wit, Missouri, California, Colorado, N. Dakota, S. Dakota, Washington, Montana, Texas, and Idaho, to-wit, section 1 of article 18. The first appearance of this provision we find in the constitution of Missouri adopted in 1875. We are not at liberty to ignore or treat as meaningless this provision of the constitution more than we could any other. Its incorporation into the organic law by the makers thereof was for a purpose. Doubtless they mean what the language of the section plainly expresses,—that the existing county organizations

should remain as such, subject only to such change as was permitted by the constitution. A careful examination of the authorities will fail to show a single case in which the right of the legislature to abolish a county has been recognized in any state whose constitution contained a provision like that of section 1 of article 18 of the Idaho constitution. The judges of the supreme court of the state of Missouri (55 Mo. 295) did hold that “counties are subdivisions of the state for governmental purposes, and there can be no doubt about the constitutional power of the general assembly to create, alter, abolish, and regulate them as expediency may demand, so that no vested rights are interfered with.” This opinion was rendered in 1873, and it is significant that in the constitution adopted by the people of Missouri in 1875, the following provision appears for the first time in the organic law of that state: Section 1, art. 9. “The several counties of this state, as they exist, are hereby recognized as legal subdivisions of the state.” I have been unable to find a single case in any of the states, whose constitutions contain this provision, where the legislative right to abolish a county has been upheld by the courts. The contention of the plaintiff would make this provision of our constitution a mere “oyez” clause, having no purpose or intention, save to give utterance to a self-evident fact. I dare not so mock the wisdom of the makers of our constitution. It may be conceded as elementary that the legislature has entire control of the questions of county organizations and county boundaries, except where limited by the inhibitions of the constitution; but the plaintiff contends that there are no inhibitions upon the power and authority of the legislature in this matter contained in the constitution; that the first clause in section 3 of article 18: “No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division,”—is rendered null and void by the proviso “that this section shall not apply to the creation of new counties.” Without doubt this section is unhappily constructed. Strictly read, the proviso would apply to the whole of section 3, and yet the legislature did not so construe it, for they made provision in the act under consideration for the apportionment of the debt of Logan county, as required by the

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closing paragraph of section 3. Surely it would require most cogent reasoning to induce any court to arbitrarily set aside a provision of the constitution so plainly and unequivocally expressed, and which is palpably intended to reserve to the people so valuable and important a right as that of having a voice in the decision of a question in which they are the parties most interested. I cannot believe that it was the purpose of the makers of our constitution to thus "palter in a double sense" with the people whom they were representing, to so "keep the word of promise to their ears, and break it to their hopes." The constitution distinctly proclaims that "no county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division." There is nothing equivocal, nothing ambiguous, in this language. The limitation upon the legislative power is direct, palpable, and imperative. The obvious intent, purpose, and effect of the act in question was to cut off or segregate a portion of Logan county, and attach the same to Alturas county. Not for the purpose of creating a new county in the sense that term is evidently used in section 3; but solely, entirely, and exclusively for the purpose of enlarging the area of Alturas county. That this was the sole purpose of the act is so plain "that he who runs may read." The changing of names of the two counties from Alturas to Alta, and from Logan to Lincoln, was but a weak invention, of no more operative force than Faulconbridge's boast: "And if his name be George I'll call him Peter." The makers of the constitution recognized the doctrine that even local governments, "long established, should not be changed for light and transient causes," or be left entirely to the caprice of legislative bodies, to the exclusion of the rights, interests, and wishes of the people who are most interested therein. But we are told that this view does away entirely with the powers of the legislature, clearly allowed by the constitution to form new counties. A mere glance at the map of Idaho will furnish a complete answer to this objection. A very wilderness of new counties can be formed out of the area of this state without the slightest impingement of any of the provisions of the constitution. But if the contention of the plaintiff is to obtain, the whole internal

structure of the state, both territorial and political, will be left to the mutative whims of each succeeding legislative assembly, and the protective provisions of the fundamental law will stand, "like counters in a barber's shop, as much for mock as mark;" and gerrymandering will assume the position of an exact science.

No better rule, it seems to me, can be found for the guidance of courts in the decision of these cases, than that expressed by Chief Justice BRONSON in *Oakley v. Aspinwall*, 3 N. Y. 547. Says that learned jurist in his opinion in that case: "It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no force with me. It is not for us, but those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influence that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." Says Judge Cooley, in his work on Consti-

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tutional Limitations, (5th Ed.) p. 86, note: "We agree with the supreme court of Indiana, (Greencastle Tp. v. Black, 5 Ind. 557, 565,) that in construing constitutions courts have nothing to do with the argument *ab inconvenienti*, and should not bend the constitution to suit the law of the hour." What was intended to be done, what was done, by the passage of the act under consideration? Was any new county formed? The proposition is absurd; the position is untenable. The simply enlarging the area of one county by appropriating a portion of an adjoining county cannot, it seems to me, be seriously claimed to be the organization of a new county, even if the ceremony of rechristening of both counties is resorted to. It is suggestive of the view which the legislature had of the meaning of the provisions of section 3, art. 18, of the constitution, that at the same session at which the act under consideration was passed the same body enacted a law dividing the county of Ada, and erecting from the part segregated an entirely new county to be called "Canyon County," and submitting the adoption thereof to a vote of the people of the segregated territory. What rights have the people of Ada county, under the constitution, which are not shared equally by the people of Logan county? Is the constitution to receive one construction in behalf of the people of one county, and an entirely different interpretation when the rights and interests of the people of another county are involved? Is not this, in the language of the supreme court of Indiana, above cited, "bending the constitution to suit the law of the hour?" The proposition of counsel that the provisions of the constitution are only applicable when in the judgment of the legislature it is expedient to make them so, is something more than startling, it is "monstrous and heretical." We can find no authority in support of such a view. There would be little use for written constitutions if such a rule could obtain. Constitutional provisions cannot be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments of government. *Hunt v. State*, (Tex.) 3 S. W. Rep. 233. A strained construction or astute interpretation is not to be given to relieve against local or individual hardships. *Law v. People*, 87 Ill. 385. While it is true that the constitutions of very many of the states contain clauses similar to section 4,

art. 18, of the Idaho constitution, it is equally true that only in the constitutions of the nine states above mentioned will a provision similar to that of section 1 of article 18 of the Idaho constitution be found; and I have been unable to find a single case in any of those nine states where the authority of the legislature to abolish existing counties has been sustained.

The case of *State v. Larrabee*, 1 Wis. 200, is not in point. Section 7, art. 13, of the constitution of Wisconsin provided that "no county with an area of nine hundred square miles or less shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same." Washington county contained less than 900 square miles exclusive of that part of Lake Michigan within its boundaries. It was claimed that so much of Washington county as was covered by Lake Michigan should not be included in estimating its area; and that therefore the act of the legislature segregating a portion of said county, and erecting the county Ozaukee from the territory so taken off, was in violation of said section 7, art. 13, of the constitution. The court held that in estimating the area of Washington county the portion covered by Lake Michigan should be included, and this took it out of the provisions of said section 7, art. 13. The other question decided by the court in that case, touching the effect of the segregation and organization of the new county upon the county-seat, has no applicability here. The case of *Attorney General v. Fitzpatrick*, 2 Wis. 542, is only another phase of the same question, arising under the same act, and upon the same facts. The other authorities cited by counsel for plaintiff in support of the proposition that the legislature is supreme in the matter of creating or abolishing counties, being all decisions from states whose constitutions have no provision in similitude with section 1, art. 18, of our constitution, cannot be considered of weight herein. It seems to me that the language of Judge CATON in *People v. Marshall*, 12 Ill. 396, is peculiarly applicable to this case. Says that learned judge, in the closing part of his opinion: "There is, no doubt, a certain degree of plausibility in the course of argument by which this law is attempted to

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be sustained. It is truly said that the constitution is a restraint upon legislative powers, and there is no doubt but this law might be passed unless prohibited by the constitution. From this it is argued that, as there is no express prohibition to abolish counties, it is within the power of the legislature to do so, and from necessity there must be authority to organize the disorganized territory. But this reasoning is more specious than sound. As we have before seen, it leads inevitably to the overthrow of the paramount law of the state. No means can be constitutional which effect an unconstitutional object. While we would not extend the prohibitions of the constitution, so as to embrace measures and objects not manifestly and clearly within the design of its framers, yet where that is undeniably the case, then by no means whatever should it be allowed to be evaded." Suppose the legislature of Idaho, in their wisdom, had, in the language of counsel, decided that it was to the advantage of the people inhabiting that portion of the state of Idaho now known and designated as Ada county, to have that county abolished, and the territory of which it is composed attached to Washington county, and should enact a law to that effect, without submitting the question to a vote of the people to be affected thereby, can it be seriously contended that such an act would be constitutional? Or suppose a legislature of Idaho, not actuated or prompted thereto by wisdom, or any principle of righteousness or justice, but "moved and instigated by the devil," as it is said the legislatures of other states sometimes are, should "decide it is to the advantage" of the people inhabiting that portion of Ada county lying north of Main street in Boise City, that such territory should be attached to Boise county, and should pass an act to that effect, without submitting it to a vote of the people to be directly affected thereby, will it be claimed for a moment that such a law could be sustained as constitutional? And yet all these consequences are involved in the acceptance of the contention of the plaintiff. Say the supreme court of Tennessee in *James Co. v. Hamilton Co.*, 14 S. W. Rep. 601: "A county is a government within a government, and its voters must be consulted in all matters pertaining to it. It is not created, nor can it be destroyed, by an arbitrary legislative breath. The county was made at the instance of the

people and for its people, and can be changed or abolished only, when at all, by their consent. If the legislature may dissolve one county and divide it out among its neighbors, it may abolish all, and destroy the state;" and it must be remembered that the state constitution of Tennessee contains no such provision as section 1, art. 18, of the Idaho constitution. It is evident to my mind that section 3, art. 18, of the constitution does not, as it stands, clearly express the intention of the makers of that instrument. A careful analysis of the section will, I think, make this apparent. It seems to me that the proviso is misplaced in that section. Evidently it was the intention of the makers of the constitution that so much of section 3 as required a submission to the people of any proposition for the dividing of any county should not apply to the creation of a new county, and no further. My own view, therefore, is that, to express the evident intention and meaning of the makers of the constitution, section 3, art. 18, should be construed to read: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such division. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. provided, that this section shall not apply to the creation of new counties. When any part of a county is stricken off and attached to another county the part stricken off shall be held to pay its relative proportion of all existing liabilities of the county from which it is taken." I do not think it was the intention of the makers of the constitution that the proviso in section 3 should apply to the last clause of said section. There is no reason grounded in any principle of equity or justice which would make the people of a segregated portion of a county responsible for a *pro rata* portion of the existing liabilities of the old county in case of a division of the county, and not in a case where the same territory was segregated for the purpose of forming or creating a new county. I am unhesitatingly of the opinion that the act of the legislature of March 3, 1891, segregating a portion of Logan county therefrom, and annexing the territory so segregated to Alturas county, was not the creation of a new county in any sense, and that said

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act is void, as contravening the provisions of section 3, art. 18, of the constitution of Idaho; that the provisions of said act abolishing the counties of Alturas and Logan are void as contravening section 1, art. 18, of said constitution; and that the writ of mandate should be denied.

SULLIVAN, C. J., (*dissenting.*) I am unable to concur in the opinion of the majority of the court. The question involved in this cause is whether a certain act of the legislature entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county-seats, and to apportion the debt of Logan county," is in conflict with the constitution. "A state constitution is an instrument of restriction and limitation upon powers already plenary, so far as it affects the powers of the government and the objects of legislation." *State v. Lancaster Co.*, 4 Neb. 537; *People v. Draper*, 15 N. Y. 545; *People v. Flagg*, 46 N. Y. 401. It is a well-established principle that the law-making power of the legislature is supreme, subject only to the limitations imposed by the constitution. In other words, that which the constitution prohibits from being done determines the power of the legislature under it. *McMillen v. Lee Co.*, 6 Iowa, 391; *People v. Blodgett*, 13 Mich. 127. It is also a well-established rule that an express power to make laws is not necessary to enable the legislature to make them. The court is called upon, in this case, to declare a solemn legislative enactment unconstitutional and void. Judge Cooley, in his work on *Constitutional Limitations*, p. 192, says: "The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." Courts have not the power to declare acts of the legislature void simply because, in the opinion of the court, such acts are repugnant to natural justice and expediency. Mr. Cooley says on this point, (*Const. Lim.* pp. 201, 202:) "The rule of law upon this subject appears to be that, except when the constitution imposes limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not, in any particular case. The courts are not the guardians of

the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. * * * It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Effect should be given to this act, unless it is clearly repugnant to the constitution. The rule of decision is, where the constitutionality of a statute is questioned, if there is any doubt, such doubt must be resolved in favor of the statute. "To doubt is to sustain the act." *Sedg. St. & Const. Law*, 409; *Cooley, Const. Lim.* pp. 88, 192, 222, 230; *Winch v. Tobin*, 107 Ill. 212; *Wulff v. Aldrich*, 124 Ill. 592, 16 N. E. Rep. 886; *Sharpless v. Mayor, etc.*, 21 Pa. St. 164. "It must be clearly, plainly, and palpably in violation of the constitution." *Hess v. Pegg*, 7 Nev. 30; *Township of Mountclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391; *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Supervisors*, 1 Amer. Rep. 241, 242.

Construed by the light of the above principles and rules, is said act unconstitutional? That is the question. Article 18 of the constitution, entitled "County Organization," contains all of the inhibitions upon the legislature in regard to the organization of new counties. The first four sections of said article are quoted by Mr. Justice HUSTON, in his opinion; but he bases his opinion upon the first and third sections thereof. The fourth section of said article is substantially the same as section 1, art. 7, of the constitution of Illinois, as to the area of counties, and is as follows: "No new county shall be established which shall reduce any county to an area of less than four hundred square miles; nor shall a new county be formed containing an area of less than four hundred square miles." It was decided by the supreme court of Illinois in *People v. Marshall*, 12 Ill. 392, that an act of the legislature abolishing two counties, and of their territory creating a new one, was not in conflict with said section, "either in letter or spirit." As the people of Idaho adopted this provision of the constitution of Illinois, the rule is that they also adopted the judicial interpretation given to said section by the highest court of that state. *Hess v. Pegg*, 7 Nev. 23; *Leavenworth Co. v. Miller*, 7 Kan. 479; *Daily v. Swope*, 47 Miss. 367. The act in question is not repugnant to section 4. Mr. Justice HUSTON places great stress upon section 1 of said article 18, which section is as fol-

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lows: "The several counties of this state, as they now exist, are hereby recognized as legal subdivisions of this state." The learned justice states that he has been unable to find a single case, in any of the states whose constitutions contain the above provision, where the legislative right to abolish a county has been upheld by the courts. I have been unable to find a single decision, from any of the states whose constitution contains said provision, where the courts have held that said section was a prohibition upon the legislature from abolishing a county. If said section prohibits the legislature from abolishing a county, I submit, then, that it is a prohibition from changing the boundaries in any manner whatever, for said section recognizes the counties of this state "as they now exist." It is admitted by my associates that the legislature has the power to organize new counties. If a new county is organized, it must be conceded that the boundaries of some county or counties must be changed, and that such county or counties so changed would not thereafter "exist" as it or they "existed" at the date of the adoption of the constitution. The entire territorial limit of the state was included in 18 counties, and if the counties must continue as they then "existed," no new counties could be formed, unless the state acquired territory that was not within its limits at the date of the adoption of the constitution. If this section prohibits the legislature from abolishing a county, it prohibits the change of county boundaries in any manner and for any purpose. If this position is tenable, what becomes of the proviso of section 3? If by said section the counties of the state are made constitutional counties, they must each continue to exist as they "existed" at the date of the adoption of the constitution, or until the constitution is amended, permitting a change in their territorial existence or boundaries. Nearly every state constitution of which I have any knowledge recognizes the counties of such states; and many, if not all, state constitutions name each and every county of their respective states. The constitution provides for county government and county organization, but this of itself is not a prohibition upon the legislature from extinguishing a county government and establishing another in its stead, over the same territory, in connection with other territory. County government cannot be abolished by

the legislature, so that the state and people would be deprived of it; and no effort has been made by the legislature to do away with county government. The mere recognition of a county by the constitution should not be construed into an inhibition on the legislature from abolishing it.

Section 3, art. 18, provides as follows: "No county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off, voting on the proposition at a general election, shall vote in favor of such proposition: provided, that this section shall not apply to the creation of new counties. No person shall vote at such election who has not been ninety days a resident of the territory proposed to be annexed. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all then existing liabilities." By the proviso in said section it is declared that in the creation of new counties said section shall not apply. When applied to the creation of new counties, the constitution should be construed as though said section was not contained therein. The only prohibition placed upon the legislature in regard to dividing counties and changing county lines is contained in said section 3, and the prohibition therein contained does not apply to the creation of new counties. Section 3 is not to be considered, and is not applicable to the division of counties, made for the purpose of creating new ones. The power of the legislature is unrestricted, in the creation and organization of new counties, to the extent and out of such territory as it may deem best, so long as no county is created with an area of not less than 400 square miles, which limitation is contained in section 4, art. 18. It is maintained by Mr. Justice HUSTON that said section 3 is unhappily constructed, and that, strictly construed, the proviso would apply to the whole section. The rules of construction would need to be carried to an extreme limit to hold that said proviso does not apply to the whole section. The proviso is in very terse and plain English, and declares that "this section" shall not apply to the creation of new counties. It is too plain to require construction. It is claimed that the legislature did not construe said proviso to apply to all of said section, for the reason that "they made provision in the act under consideration

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for the apportionment of the debt of Logan county, as required by the closing paragraph of section 3." Said entire section applies to the striking off of a part of one county, and attaching the part so stricken off to another county, then in existence. The effect of said section is to leave to the choice of the people, as expressed by their votes, whether they will be removed from one existing county to another. The last paragraph or sentence of said section is as follows: "When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its relative proportion of all then existing liabilities of the county from which it is taken." I do not understand why one of my associates claims that the legislature, by the act in question, apportioned the debt of Logan county, as required by the paragraph above quoted, when section 9 of said act is as follows: "All of the indebtedness of Logan county shall be paid by Lincoln county." There is not an intimation in said act requiring that that part of Logan county taken, in connection with Alturas county, to form Alta county, shall pay its relative proportion of all then existing liabilities of Logan county, but specifically requires Lincoln county to pay all of the indebtedness of Logan county. Said last paragraph of section 3 is not a prohibition on the legislature from apportioning the debts of the counties from which territory may be taken to organize new counties as may be just and equitable.

In the opinions of the majority of this court it is held that the words "new counties," as used in the constitution mean "additional counties." I do not think that construction tenable. Had it been the intention of the framers of the constitution to confine the meaning of the word "new" to an increase in the number of counties, they would have used the word "additional," or some term that clearly expressed the idea that the new counties to be created must increase the number of counties. In the case of *People v. Dubois*, 23 Ill. 548, and *People v. Bangs*, 24 Ill. 184, it was held that the legislature could increase the number of circuits, but that it could not deprive a judge of his office by creating a "new circuit" out of the territory from which such judge was elected, when such new circuit, so created, was not an additional circuit. The provision of the Illinois constitution, permitting the legislature to increase the number of cir-

cuits, is very different from the constitution of Idaho. Section 7, art. 5, provides: "The state shall be divided into nine judicial circuits, in each of which one circuit judge shall be elected by the qualified voters thereof, who shall hold his office for a term of six years, and until his successor shall be commissioned and qualified; provided, the general assembly may increase the number of circuits to meet the exigencies of the state." It will be observed that the state of Illinois was divided, by said section of the constitution, into nine circuits, and the legislature was authorized and empowered to increase the number of circuits to meet the exigencies of the state. Section 15 of the same article provides that, "whenever an additional circuit is created," etc. The word "new" is used in said decisions to designate the circuit created by said act. The court held that a "new" circuit had been created, but that such "new" circuit was not an additional circuit; that the number of circuits were not increased; hence said act was repugnant to the constitution. Had the framers of the constitution intended that the legislature should be confined to the creation of additional counties, apt words would have been used, and the proviso in section 3 would have read: "Provided, that this section shall not apply to the creation of additional counties." Webster defines the word "new" to mean "having existed but a short time;" "recently established." A new county does not necessarily mean an additional county. If three of the counties of the state should decrease in population and wealth, so as not to be able to sustain a county government, or for any other reason the legislature should conclude that it was for the best interest of the people to create a new county out of the territory of the three, such county, so created, would be a new county, within the meaning of the term "new county" as used in the constitution. Only two sections of the constitution refer to the creation of new counties, to-wit, sections 3, 4, art. 18. In section 3 the word "new" is used as follows: "Provided, that this section shall not apply to the creation of new counties." And in section 4 as follows: "No new county shall be established; * * * nor shall a new county be formed containing less than four hundred square miles." Said section 3 cannot apply to a legislative act creating a new county. The constitution places but one restriction upon the legislature in the

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creation of new counties, and that is that no county shall be created with an area of less than 400 square miles. Such new county need not necessarily be an additional county. Mr. Justice MORGAN, in his opinion, says: "It could not have been desired to abolish the counties of Alturas and Logan. Nothing is said in the act about abolishing the counties, and they do not seem to be abolished." Would not said counties have been abolished, provided said act had been held constitutional, as effectually as if said act had contained a section, or several sections, directly declaring them abolished? They certainly would.

The assessment roll of Alturas county for 1888 (before Logan and Elmore counties were created from Alturas) shows the total assessed valuation of Alturas to have been \$3,837,362. A careful estimate, made by the assessor, shows that about \$975,000 of that amount was in the present county of Alturas. The assessment roll of Alturas county for 1889 shows the assessed valuation to have been \$814,387; assessed valuation for 1890, \$649,104; being a reduction, for one year, of \$165,283, and for two years a reduction of \$326,896. This shows a decrease in the taxable property of Alturas county for the years 1889 and 1890 of about 33 per cent. In population, the loss in Alturas county, since 1888, is about 33 per cent., as indicated by the election returns. This great decrease in population and wealth may have been one of the causes that induced the legislature to pass the act under consideration. I only state these facts, by way of reply to the proposition of the majority of the court, as to one of the causes or reasons the legislature had for passing said act. This court "cannot run a race of opinions upon points of right, reason, and expediency with the law-making power," as stated by Judge Cooley, *supra*. This court has no authority to inquire into the motives of the legislature in the passage of the act under consideration. *Wright v. Defrees*, 8 Ind. 298; *Attorney General v. Supervisors*, 33 Mich. 289; *Cooley, Const. Lim.* 223, and note 4, p. 223. Because the legislature passed an act dividing Ada county, and erected from the part segregated a new county, to be called "Canyon County," and submitted the question to a vote of the people living in the segregated territory, it is suggested in the opinion of one of my associates that the legislature placed one construction upon the consti-

tution for the people of Logan county, and a different construction for the people of Ada county. If the legislature has the power to create new counties without submitting the question to a vote of the people, the fact of having submitted the question to a vote of the people is no reason for charging the legislature with interpreting the constitution one way when applied to one county, and directly the opposite when applied to another. There is nothing in the constitution requiring the legislature to exercise all the power which it has. It is claimed that a dangerous power would be left in the hands of the legislature if it had the power to create new counties out of any territory it might deem best. Had the framers of the constitution so thought, they no doubt would have inserted in the constitution such provisions as the constitutions of Illinois or Tennessee contain, prohibiting the legislature from dividing a county, for any purpose, without a vote of the people. On the contrary, they were very careful to provide that section 3, art. 18, should not apply to the creation of new counties; that being the only section that prohibits the legislature from dividing a county without first submitting the question to a vote of the qualified electors. This court is not authorized to so interpret the constitution as to place restrictions upon the legislature which are not warranted by the plain meaning and intent of the constitution. The entire matter of the creation of new counties has been left by the people in the hands of the legislature, with but one restriction, to-wit, that no county shall be made to contain an area of less than 400 square miles. This indicates that the people were not afraid of the "mutatious whims of each succeeding legislature," or that "gerrymandering will assume the position of an exact science." Nor should this court "suppose" that the legislature would be "moved and instigated by the devil" to divide any county in this state, and for that reason attempt to place restrictions or inhibitions on the legislature which the constitution does not clearly warrant. Other departments of our government are, as I believe, quite as apt to be controlled by "mutatious whims" and "moved and instigated by the devil" as is the legislative branch. It has been held by the supreme court of North Carolina that the legislature had the general power to alter the boundaries of counties, to

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create new ones, or to destroy a county altogether. *Mills v. Williams*, 11 Ired. 558; *Granville Co. v. Ballard*, 69 N. C. 18. The people of North Carolina have adopted a new constitution since said decisions were rendered, and did not prohibit therein the legislature from abolishing a county whenever it saw fit to do so. The people were not afraid to leave that power with the legislature. It has been held by the supreme courts of other states that the legislature, under constitutions similar to that of Idaho, had the power to abolish, alter, modify, and create counties. *State v. McFadden*, 23 Minn. 40; *Opinion of Judges*, 55 Mo. 296; *Division of Howard Co.*, 15 Kan. 194; *Respublica v. McClean*, 4 Yeates, 399; *State v. Choate*, 11 Ohio, 511; *Hinkel v. Stevens*, (Kan.) 3 Pac. Rep. 531; *Attorney General v. Fitzpatrick*, 2 Wis. 542-548; 1 Dill. Mun. Corp. §§ 46, 63, 65. The constitution of Illinois, in force at the time of the rendition of the decision of *People v. Marshall*, *supra*; and the constitution of Tennessee in force at the dates of the decisions of *Gotcher v. Burrows*, 9 Humph. 585; *Marion Co. v. Grundy Co.*, 5 Sneed, 492; and *James Co. v. Hamilton Co.*, (Tenn.) 14 S. W. Rep. 601,—prohibited the legislature from dividing a county for any purpose whatever, without submitting the question to a vote of the people, and are not in point. The opinion of the court in *James Co. v. Hamilton Co.*, *supra*, was rendered October 4, 1890, and the court says: "The fact that the question [as to the power of the legislature to abolish a county] has only arisen in two cases, (*People v. Marshall*, *supra*, and the case at bar,) goes to show that legislatures have heretofore interpreted constitutions as giving no such power, either by implication or in terms." This decision should be given no weight as authority in this case for the following reasons: (1) It proceeds upon the theory that a state constitution is a grant of power to the legislature, and that, unless the power to abolish a county is granted the legislature does not possess the power, when it is a well-established principle that a state constitution is an instrument of restriction and limitation upon powers already plenary. (2) The constitution of Tennessee prohibits the change of county lines for any purpose, without a vote of the people, either for the creation of new counties or otherwise. (3) Prior to said decision, the point as to whether the legislature had the power to abolish a county had

been decided by the supreme courts of several different states, (authorities cited, *supra*,) while the court says: "The question has arisen in but two cases," to-wit, the Illinois case, and the case then before that court. The only states whose highest courts have held that the legislature had not the power to abolish a county for the purpose of creating a new one, that I have any knowledge of, are Illinois and Tennessee; and the constitutions of said states prohibit, in terms, the legislature from dividing a county for the purpose of creating a new county or otherwise, without submitting the question to a vote of the people. When the constitution of Idaho was framed it was known that the legislature had exercised the power of changing the boundaries of counties and creating new ones, and that certain consequences resulted therefrom. The framers of the constitution saw fit to prohibit the legislature from striking off a part of one county and attaching it to a county then in existence, without submitting the question to a vote of the people residing in the part to be stricken off, but expressly provide that such inhibition shall not apply to the creation of new counties. Section 2, art. 7, of the Illinois constitution was incorporated into section 3, art. 18, of the Idaho constitution; and, the framers of the constitution knowing the construction that the supreme court of the state of Illinois had placed upon said section in *People v. Marshall*, *supra*, they inserted a proviso, thus clearly indicating that they did not intend to adopt the interpretation given said section by said court.

In interpreting the constitution this court should not apply a prohibition on the legislature which the constitution itself declares shall not be a prohibition. The convention that framed our constitution included some of the most eminent lawyers of the state. With the constitutions of other states before them, and the interpretations thereof as given by the courts of last resort, they did not place any restrictions on the legislature in the creation of new counties except as to area. Lest section 3 should be interpreted to apply to the creation of new counties, the framers of the constitution were very careful to insert a proviso, thus showing the intention to leave the entire matter of the creation of new counties with the legislature, unrestricted, except as to area. The intention of the framers of the constitution is manifest, from the manner in

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which section 3 deals with the subject, in making provision for existing liabilities of the counties, when a part of one is stricken off and attached to another. Was the creation of Alta and Lincoln counties a creation of new counties, within the meaning of that term as used in the constitution? As before shown, the creation of a new county does not necessarily mean an additional county. A "new county" is a new county organization, erected over and upon territory which had not before comprised, in itself, a county. Alta county included a part of the territory of what was formerly Logan, and all of the territory of what was formerly Alturas. Lincoln county included a part of what was formerly Logan county, but not the whole. Hence Alta and Lincoln counties are new counties, within the meaning of that term as used in the constitution. A new county organization was by said act erected over territory, which had not before comprised, in itself, a county. If the legislature has not the power to create new counties by dividing a county as Logan was divided in the creation of Alta and Lincoln counties, then the proviso of section 3 is not the controlling part of said section, and is given no effect whatever in the interpretation of said section; and, to apply the quotation of Mr. Justice HUSTON, it would stand in said section, "like counters in a barber's shop, as much for mock as mark." The act in question does unite a part of what was formerly Logan county to what was formerly Alturas, but within the meaning of section 3, art. 18, it does not strike off a part of Logan county and attach it to Alturas, because Logan and Alturas counties were, by said act, extinguished. The legislature, by this act, does not undertake to do indirectly what it was prohibited from doing directly. Two new counties were created out of Logan and Alturas counties. A part of Logan county was not stricken off and attached to Alturas county; but a new county was created, and the legislature, in creating said new counties, used constitutional means, and effected a constitutional object, to-wit, created two new counties.

It is contended that the office of clerk of the district court of the county of Logan was created, and the term of office fixed by the constitution, and that the defendant was legally elected to said office, and that he could not be legally deprived thereof except by the expiration of the term for which he was elected. The fact is that

the defendant held his office by appointment made by the governor. From our view of this case that makes no difference. In the case of *Respublica v. McClean*, 4 Yeates, 399, the court held that the commission of the officer became void by the political annihilation of that part of the county for which the officer was commissioned. "Article 5, § 16, provides for a clerk of the district court for each county in the state, and fixes the tenure of office; yet both office and tenure of the clerk of the district court in and for a particular county are dependent upon the existence of such county." If the county is extinguished by the legislature, the office fails. *People v. Morrell*, 21 Wend. 577; *Hinkel v. Stevens*, (Kan.) 3 Pac. Rep. 531; *State v. Choate*, 11 Ohio, 511; *Hagerty v. Arnold*, 13 Kan. 367. County officers have no such vested right to their offices as would, under the constitution of Idaho, prohibit the legislature from abolishing a county in the creation of a new county. *Laramie Co. v. Albany Co.*, 92 U. S. 307. The case of *Rock Island Co. v. Sage*, 88 Ill. 589, is not in point, for the reason that the constitution of Illinois prohibits the legislature from changing county lines without submitting the question to a vote of the people. Section 2, art. 7, is as follows: "No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same." In that case the legislature undertook to change the lines of a county without submitting the question to a vote of the people, which act was expressly prohibited by said section of the constitution. The proposition which Mr. Justice HUSTON mentions as having been advanced by counsel, to-wit, that the provisions of the constitution are only applicable when in the judgment of the legislature it is expedient to make them so, is a proposition that I have not been able to find advanced in any of the briefs submitted in this case, and is one that I did not hear advanced, or even intimated, in the oral argument of this cause. The counsel on both sides of this cause are, as I believe, too eminent and honorable to advance such an infamous proposition. In the case of *Edwards v. Railway Co.*, (Colo.) 21 Pac. Rep. 1011, the court says: "The view that a solemn legislative provision is a useless and lifeless thing should be entertained when no reasonable intentment can be fairly deduced therefrom

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after diligent and industrious search, aided by all pertinent rules of statutory interpretation." A reasonable intendment can be fairly deduced from the act in question, and said act can be construed to stand without the slightest impingement on the provisions of the constitution. The act in question is not repugnant to any provision of the constitution, and the writ should issue as prayed for by the relator.

GOLD HUNTER MINING & SMELTING CO. v. HOLLEMAN, Judge.

(August 31, 1891.)

WRIT OF REVIEW—PARTIES.

1. That, to entitle a petitioner to writ of review, he must be a party to the suit or matter in controversy.

SAME—RIGHTS OF INTERVENOR.

2. That an intervenor is a party to a suit, and his substantial rights are as sacred as the original parties', and entitled to the same protection.

SAME.

3. That an intervenor is entitled to a writ of review, equally with the original parties to the suit.

RECEIVERS—APPOINTMENT.

4. A receiver cannot be appointed prior to the commencement of an action.

ACTION—WHEN COMMENCED.

5. An action is not commenced until a complaint is placed in the hands of the clerk or deposited in his office, with directions to file the same.

SAME—PENDENCY.

6. An action is not pending until it is commenced.

(Syllabus by the Court.)

Petition of the Gold Hunter Mining & Smelting Company for a writ of *certiorari* to have reviewed the action of Junius Holleman, judge of the district court of Shoshone county, in certain judicial proceedings in which relator was interested as an intervenor. Writ granted, and the appointment of a receiver by the district court in said proceedings declared void.

Woods & Heyburn, for petitioner.

The suit must be actually pending to justify a court of equity in appointing a receiver. *Baker v. Bachus' Adm'r*, 32 Ill. 79; *Bank v. Kent*, 43 Mich. 292, 5 N. W. Rep. 627; *Jones v. Schall*, 45 Mich. 379, 8 N. W. Rep. 68; *Hardy v. McClellan*, 53 Miss. 507; *In re Hancock*, 27 Hun, 575.

A suit in chancery is not begun until the filing of the bill, and, if a receiver is appointed upon *ex parte* application before the bill is filed, the appointment will be

revoked upon appeal, without considering the merits of the application. *Crowder v. Moone*, 52 Ala. 220; High, Rec. (2d Ed.) § 83.

A general creditor before judgment is not entitled to a receiver against his debtor, on whose property he has acquired no lien. High, Rec. § 406.

When the court makes a void order appointing a receiver, it may be canceled by *certiorari*. *French Bank Case*, 53 Cal. 495-553; *Bateman v. Superior Court*, 54 Cal. 285.

Where a court exceeds its jurisdiction in the appointment of a receiver, *certiorari* is the proper remedy. *Bateman v. Superior Court*, 54 Cal. 285; *French Bank Case*, 53 Cal. 495.

McBride & Allen, Albert Hagan, and *Charles W. O'Neil*, for respondent.

An intervenor must accept the suit as he finds it. *Brown v. Saul*, 16 Amer. Dec. 177.

Nor can an intervenor intrude into a case for the purpose of taking advantage of any irregularities therein. *Brown v. Saul*, 16 Amer. Dec. 180; *Clamageran v. Bucks*, Id. 185.

Petitioner must have a pecuniary interest in the proceedings sought to be reviewed. *Parnell v. Commissioners*, 34 Ala. 278; *Watson v. May*, 6 Ala. 133; *Fraser v. Freelon*, 53 Cal. 644; *Dubbers v. Goux*, 51 Cal. 153; Code Idaho, § 4090.

No third party or person not a party to the original suit can question the validity or regularity of the appointment of a receiver. *Beach*, Rec. p. 570, § 633; *Tyler v. Willis*, 33 Barb. 327; *Powell v. Waldron*, 89 N. Y. 328; *Whittlesey v. Frantz*, 74 N. Y. 456; *Bangs v. Duckinfield*, 18 N. Y. 592.

Restraining orders and orders appointing receivers may be made, where the necessity arises, in advance of the filing of the complaint with the clerk. *Heyman v. Landers*, 12 Cal. 111; *Prader v. Purkett*, 13 Cal. 591; *Mining Co. v. Superior Court*, 57 Cal. 625; *Real-Estate Associates v. Superior Court*, 60 Cal. 223; *Davis v. Reed*, 14 Md. 152; High, Inj. § 1583; 1 Van Santvoord, Eq. Pr. p. 119; High, Rec. § 83; *Morgan v. Quackenbush*, 22 Barb. 76.

MORGAN, J. The record in this case shows that on the 18th day of December, 1890, the complaint of the Spokane National Bank, Plaintiff, v. Charles Hussey and David T. Ham, Defendants, was presented to the Honorable JUNIUS HOLLEMAN, judge of the district court of the first judicial district of this state, in an action then

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about to be commenced, for the foreclosure of a mortgage, given by the defendant Charles Hussey to the plaintiff, the Spokane National Bank, upon certain mining property, therein described as three mining claims, a concentrator, and mill-site, together with all water-ditches, flumes, and a quantity of personal property used in connection with said real estate; that on said date the said judge made an order appointing Peter Porter a receiver, in said action, of said mining claims and other property, with directions to said receiver to take possession of said property, providing also in said order that the same should take effect upon the receiver filing his bond, and the filing of the complaint in the action. On the same day the judge of said court appointed the said Porter receiver of certain other property of the defendant Charles Hussey, in the suit of McNab & Livers against Charles Hussey and the Bank of Murray. On the 19th day of December, 1890, the complaint in the case of the Spokane National Bank v. Charles Hussey and David T. Ham, and of McNab & Livers v. Hussey and the Bank of Murray, placed on file with the clerk of said court, and, upon filing bond, the receiver took possession of the property of the said Hussey, and, as directed, proceeded to work the mines. On the 28th day of February, 1891, the Gold Hunter Mining & Smelting Company filed its petition in intervention in the suit of the Spokane National Bank v. Hussey and David T. Ham, was permitted to intervene, and thereby became a party thereto. Upon the return-day W. B. Heyburn appeared for the petitioner, and Messrs. McBride & Allen, Albert Hagan, and Charles O'Neil for the respondent. On the 6th day of May, 1891, the plaintiff herein filed his petition in this court against said district court for writ of review, alleging, among others, the above facts. The writ, being issued, was made returnable June 17, 1891. Respondents jointly filed their motion to quash the writ of review, on the grounds (1) that the petition does not state facts sufficient to constitute a cause of action; (2) that petitioner is not a party beneficially interested; (3) petitioner is not a party to the suit of McNab & Livers v. Charles Hussey and Bank of Murray, and demurs upon the same grounds. The demurrer, motion to quash, and the main question arising upon the return of the writ were heard together by direction of the court.

The court has arrived at the following conclusions: That the petition does state facts sufficient to constitute a cause of action; that the plaintiff herein, not being a party to the suit of McNab & Livers v. Hussey and the Bank of Murray, has not the right to ask review of any matters occurring in said cause, and as to said cause the writ is dismissed; that, having been allowed to intervene in the suit of the Spokane National Bank v. Hussey et al., it becomes a party thereto, and its rights are as comprehensive as the rights of the original parties to the suit, so far as any action of the court interferes with its substantial rights, (see section 4111, Rev. St. Idaho; Lacroix v. Menard, 15 Amer. Dec. 161;) that plaintiff herein is authorized to bring this writ. The main question, then, is, did the judge of the district court, by his action on the 18th day of December, 1890, exceed his jurisdiction? Section 4329, Rev. St., authorized a receiver to be appointed in certain cases, when an action is pending or has passed to judgment. An action cannot be pending until it has been commenced. Civil actions in the courts are commenced by filing a complaint. Rev. St. § 4138. Section 4068, Rev. St., is as follows: An action is commenced when the complaint is filed. Section 4139 provides that the clerk must indorse on the complaint the day, month, and year that it is filed. The complaint cannot be said to be filed until it is placed in the hands of the clerk, or in his office, for the purpose of receiving the above indorsement. It then becomes the duty of the clerk to make said indorsement thereon. The action is then commenced, is then pending, and the court or judge, as the case may be, then has jurisdiction of the subject-matter, and may deal therewith according to law. The appointment of the receiver on the 18th day of December, 1890, in the cause of Spokane National Bank v. Hussey and Ham, was not within the power of the court, and was therefore void, because there was no suit then pending. Bank v. Kent, 43 Mich. 292, 5 N. W. Rep. 627; Jones v. Schall, 45 Mich. 379, 8 N. W. Rep. 68. We are not permitted to take into consideration the advantages or disadvantages of a discharge of the receiver, or of prosecuting the work upon the mines in question.

SULLIVAN, C. J., and HUSTON, J., concur.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

SEPTEMBER TERM, 1891.

HILLARD, District Court Clerk, v. SHOSHONE COUNTY. (No. 41.)

(September 12, 1891.)

CLERK OF COURT — COMPENSATION — SELF-OPERATIVE STATUTES.

1. Section 16 of article 5 of the constitution provides for the election of a clerk of the district court for each county. Section 6 of article 18 provides that the clerk of the district court shall be *ex officio* auditor and recorder. Section 7 of the same article provides that the compensation of this officer, for all the duties he shall perform as such officer, shall not exceed \$3,000, nor fall below \$500, for any one year. *Held*, that these sections are self-operative; that the clerk of the district court, as such clerk, and as auditor and recorder, for the performance of all his duties therein, cannot receive, for his own use, a greater sum than \$3,000 for any one year; and such compensation must be derived from fees and commissions.

SAME—LIABILITY OF COUNTY:

2. If such fees and commissions fall below the minimum, then the county must make up such deficiency.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; JUNIUS HOLLEMAN, Judge.

Barry N. Hillard presented to the county commissioners of Shoshone county a claim for services rendered as clerk of the district court of said county. The county commissioners disallowed said claim and Hillard appealed to the district court. From a judgment of the district court, affirming

the action of the county commissioners, Hillard appeals. Affirmed.

Woods & Heyburn, (J. Brumback, of counsel,) for appellant.

It is the clerk of the district court who shall receive the compensation, not the auditor and recorder. *Lathrop v. Brittain*, 30 Cal. 680; *People v. Edwards*, 9 Cal. 292; *Kinsey v. Kellogg*, 65 Cal. 112, 3 Pac. Rep. 405.

Charles W. O'Neil, Dist. Atty., and *George H. Roberts*, Atty. Gen., (*Albert Hagan*, of counsel,) for respondent.

When the constitution declares the amount to be paid an officer, it is an appropriation made by law, and no act of the legislature is necessary. *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *People v. Hoge*, 55 Cal. 612-618; *State v. Holladay*, 64 Mo. 526.

A constitutional provision is self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced. *Cooley*, Const. Lim. (5th Ed.) p. 100, § 83.

A law applicable to all the counties of the state, and to all the county officers with which it deals, is neither a local nor a special law. *People v. Henshaw*, 76 Cal. 444, 18 Pac. Rep. 413; *Cody v. Murphey*, 89 Cal. 522, 26 Pac. Rep. 1081; *Longan v. County of Solano*, 65 Cal. 125, 3 Pac. Rep. 463; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615; *Knickerbocker v. People*, 102 Ill. 229.

Hillard v. Shoshone County.

MORGAN, J. On the 14th day of April, 1891, the plaintiff presented to the board of county commissioners of Shoshone county his bill for services rendered as clerk of the district court for Shoshone county, as follows:

March 31st, 1891. To salary as clerk of district court, for the quarter ending March 31, 1891.....	\$125 00
To certified copies of sundry indictments, commitments, journal entries, and judgments, 524 folios, at 20 cents per folio....	104 80
Amounting in all to the sum of.....	\$229 80

—Verified in due form by the plaintiff.

The said board, after duly considering the said bill, entered the following order: "At a regular meeting of the board held the 14th day of April, 1891, the within bill of Barry N. Hillard, made out under the provisions of the Revised Statutes of Idaho, is by the board of county commissioners of said county considered correct; but the same is hereby disallowed, for the reason that the board of county commissioners think that all officers work under the constitution of the state of Idaho, and laws enacted thereunder. C. KRAUS, Chairman." The plaintiff thereupon appealed from the action of said board, and from said order, to the district court of the first judicial district of the state of Idaho, in and for Shoshone county. On the 4th day of June, 1891, the said court affirmed the order of the board of county commissioners aforesaid, disallowing said bill. From the judgment of the said court the plaintiff brings the cause to this court.

In the argument of appellant's counsel, it is stated that the only question involved in this appeal is, does section 7, art. 18, of the constitution, make any provision for a salary to be paid to the auditor and recorder? and then proceeds in the argument to show that the offices of clerk of the district court and auditor and recorder, though held by one person, are separate and distinct offices, and cites a list of authorities from the California Reports tending to sustain that position. We do not think this is the real point in this case. The real question is, was it the intention of the framers of the constitution that the person who held the offices of clerk of the district court and auditor and recorder, both offices being united in one person, should not receive more than the sum of \$3,000, nor less than \$500, for his services

in both positions, and have they so expressed themselves in the constitution? Section 16 of article 5 of the constitution is as follows: "A clerk of the district court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the legislature, and shall hold his office for the term of four years." It will be noticed that this officer does not hold the same office that was occupied by the clerk of the district court before the admission of Idaho as a state. He was then the clerk of the district court for the first, second, or third district, as the case might be, consisting of several counties, and was appointed by the judge. Now he is clerk of the district court for a county only, and is elected by the people. It will be noticed, also, that the section of the constitution quoted above is operative the moment the constitution was approved and the state admitted by congress. This section provides for the first election of clerk. Section 6 of article 18 of the constitution provides that "the clerk of the district court shall be *ex officio* auditor and recorder." This clause in the constitution is also self-operative, and applies to the clerk elected at the first election as well as those thereafter elected. The clerks of the district courts in the several counties did not hesitate in considering both these clauses self-operative, and assumed all the duties of both offices, if we call them separate offices, as soon after their qualification as they could lawfully get possession thereof, and very properly did so. Thus far the constitution has provided for a clerk of the district court for each county, and has made this officer *ex officio* auditor and recorder. He is still one person and one officer, although he holds two or three distinct and separate offices, if we please to call them so, and performs the duties of all. We must not confound the office with the officer or person who holds the office. The compensation is not paid to the office of district clerk, nor to the office or offices of auditor and recorder, but to the one person or officer who holds all these offices, and performs the duties thereof. The constitution having created this officer, and directed what positions he shall hold and the duties he shall perform, then proceeds to provide for his compensation in section 7, substantially as follows: "The clerk of the district court, who is auditor and re-

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corder, shall receive annually, as compensation for his services, not more than three thousand dollars and not less than five hundred (500) dollars." This section, in effect, says that the officer, meaning the person who is clerk of the district court, and who is auditor and recorder, and performs the duties of such offices, shall receive as his compensation, etc. It would seem that this reading, which is strictly in accord with the sense and grammatical construction of the section, would make the meaning of these sections of the constitution unmistakable. This section is also self-operative. It does not provide a salary for this officer, and no salary is anywhere in the constitution provided for either position, but fixes a limitation providing that he shall not receive more than \$3,000 for any one year, and not less than \$500, and provides no means of payment, but, like the other sections referred to, goes into operation as soon as the officer qualifies and enters upon the duties of his office. This section would be operative at once, although the legislature did not provide a schedule of fees for five years after the section went into effect. Its operation does not depend at all upon the amount of fees the officer may charge and receive, nor the source from which he receives them. Section 8 of the same article then proceeds to direct how this officer shall be paid, not a salary, but the compensation provided in section 7, and further provides that all fees and commissions that he receives, under whatsoever law he may receive them, in excess of the maximum, shall be paid into the county treasury, and, in case his fees in any one year shall not amount to the minimum, the deficiency shall be paid him by the county. It will be seen that, in the opinion of the court, the clerk of the district court being *ex officio* auditor and recorder, and performing the duties of both or all three of these offices, cannot receive, as compensation for his own use, for the performance of all of said duties, any sum in excess of \$3,000 for any one year; and this compensation he is to receive in fees and commissions, with the single exception that, if such fees and commissions fall below the minimum, the county shall make up the compensation to that amount. The judgment of the district court is affirmed. Costs are awarded to the respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

HILLARD v. AUDITOR OF SHOSHONE COUNTY.

(September 12, 1891.)

Appeal from district court, Shoshone county; JUNIUS HOLLEMAN, Judge.

Action by Barry N. Hillard against the auditor of Shoshone county for services as clerk of the district court. Judgment for defendant. Plaintiff appeals. Affirmed.

Woods & Heyburn, (J. Brumback, of counsel,) for appellant. Charles W. O'Neil, Dist. Atty., and George H. Roberts, Atty. Gen., (Albert Hagan, of counsel,) for respondent.

MORGAN, J. The question involved in this cause being fully discussed and determined in cause No. 41, between the same parties, ante, 843, 27 Pac. Rep. 678, the judgment of the court below, herein rendered, is affirmed for the reasons there given. Costs awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

PEOPLE *ex rel.* LINCOLN COUNTY v. GEORGE.

(September 16, 1891.)

NEW TRIAL—ORIGINAL PROCEEDING IN SUPREME COURT.

Motion for new trial is not a proper proceeding in the supreme court to obtain a rehearing on an issue of law, when said court is proceeding under its original jurisdiction.

(Syllabus by the Court.)

Petition by the people, on the relation of Lincoln county, for a writ of mandate to compel Wesley B. George, clerk of the district court and *ex officio* auditor and recorder of Logan county, to deliver to relator certain property alleged to belong to relator by virtue of an act of the legislature creating relator as a county. The petition was denied. Ante, 813, 26 Pac. Rep. 983. Relator filed a motion for a new trial. Respondent moved to strike the motion from the files, and the cause from the calendar. Respondent's motion granted.

For former report, see ante, 813, 26 Pac. Rep. 983.

William Ware Peck and Texas Angel, for relator. R. Z. Johnson and S. B. Kingsbury, for respondent.

MORGAN, J. A petition for writ of mandate was heretofore filed in this court by the relator against the defendant. Very able and lengthy arguments were heard at the April term, at Lewiston. The court having, by agreement of counsel, taken the cause under advisement, decided the

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same at Boise City, on May 6, 1891. Opinions, not then being fully prepared, were afterwards filed on the 3d day of June, 1891, (26 Pac. Rep. 983,)¹ and this motion for new trial was placed on file June 12th. Counsel for defendant now move to strike said motion from the files, and said cause from the calendar. In the argument for the plaintiff we have been referred to section 3862, subd. 8, Rev. St., which is as follows: "Every court has power to amend and control its process and orders, so as to make them conformable to law and justice." No one appears to dispute it, not even this court, but the line of argument, which would make this a pertinent authority in support of this motion for new trial, does not commend itself to the court. The terms "process" and "orders" have a well-defined meaning in law, and differ very materially from final judgments. The same may be said with reference to section 4368, also cited by plaintiff, which is: "An issue of law must be tried by the court, unless referred by consent." The method of trying an issue of law is by hearing the argument and examining authorities cited. That the word "tried" was used, in our opinion has no special significance, and simply means, heard and determined. In the decision upon petition for rehearing, which was rendered by the court in the case of *People v. Coon*, 25 Cal. 653, Mr. Justice CURREY seems to have been quite careful as to the language he used. He says: "Our judgment in the case was that of a court of original jurisdiction, and, for the correction of any error which we may commit in such cases, the party aggrieved must pursue the course prescribed by the practice act in like cases, arising in the district courts, so far as may be." It is unnecessary to refer to the particular provisions of the act, specifying the course to be pursued in order to obtain a re-examination of a case by the same court of original jurisdiction, after one decision made therein; the course prescribed by the statute has not been followed, etc. If the learned judge does not mean that the party deeming himself aggrieved by the decision of the supreme court, in a case where said court is exercising its original jurisdiction, may move for a new trial in that court, then it is difficult to understand what he does mean. The language used is almost identical with that used in our statute and

in that of California in the definition of a "new trial." The statute is: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision." In the decision the court says: "It is unnecessary to refer to the provisions of the act, specifying the course to be pursued in order to obtain a re-examination of a case by the same court." This suggestion seems never to have been followed in any instance by the supreme court of California. In the case of *People v. Holloway*, 41 Cal. 409, the issues of fact were sent to the district court for trial, motion for new trial was made in the district court, and the supreme court say that the motion should be made in the supreme court. A lasting peace was given to that decision, and to the whole matter, by the legislature of California in section 1092, Code Cal., and in our statute by section 4984, which is as follows: "The motion for a new trial must be made in the court where the issue of fact is tried." Our statute does not contemplate or prescribe any method for obtaining a new trial, except for the re-examination of an issue of fact in the same court. The statute says: "A new trial is a re-examination of an issue of fact, in the same court, after a trial and decision by a jury or court or by referees." Rev. St. Idaho, § 4438. Section 656, Code Civil Proc. Cal., is the same. See, also, *Knight v. Roche*, 56 Cal. 17; *Benjamin v. Stewart*, 61 Cal. 607. A motion for a new trial is an application for a re-examination of the issues of fact. *Wittenbrock v. Bellmer*, 62 Cal. 560. No new trial can be had, unless there is to be a re-examination of an issue of fact. *Knight v. Roche*, 56 Cal. 17; *Benjamin v. Stewart*, supra; *Wittenbrock v. Bellmer*, supra. The matter of new trial is wholly statutory. *Benjamin v. Stewart*, 61 Cal. 608. When there are findings of fact in a trial before the court, which are not set aside,—not complained of,—there is no new trial as to them. *Wittenbrock v. Bellmer*, supra. A petition for a *mandamus* was filed in this court. To that a demurrer was filed. This admitted all the facts properly pleaded. Therefore there was no issue of fact. If no issue of fact, there can be no new trial. There is no method of obtaining a rehearing on an issue of law, once determined by the district court, pointed out in our statute, except by appeal. This does not apply to the supreme court. The supreme court does point out, by its rules, a method for obtaining a re-

¹ Ante, 813.

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hearing therein. Whether that rule applies to cases of original jurisdiction we are not now called upon to decide. The motion of defendant is allowed. Costs awarded to defendant.

HUSTON, J., concurs.

MEINERT v. SNOW.

(September 17, 1891.)

RECORD ON APPEAL—BILL OF EXCEPTIONS.

1. To entitle a bill of exceptions to be considered in this court it must be settled and signed by the district judge.

ACTION AGAINST ADMINISTRATOR—ADMISSIONS.

2. The admissions of an administrator, made in the allowance of a claim against an estate, although the claim is only allowed in part, bind the estate.

SAME—EVIDENCE—TELEGRAMS.

3. A telegram from P. to M., whom P. had employed to perform certain services, containing these words: "I will leave in about a week, direct for the mine,"—held admissible in an action by M. against the administrator of P. for value of services, as tending to prove that the relations of employer and employe existed at the date of telegram.

(*Syllabus by the Court.*)

Appeal from district court, Custer county; C. O. STOCKSLAGER, Judge.

Action by Irad Meinert against George M. Snow, as administrator of the estate of Hiram Pearsons, deceased, for services rendered deceased in his lifetime. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Affirmed.

T. M. Stewart, for appellant.

The complaint was and is fatally defective, in that it discloses that the claim sued on was never presented to the administrator for allowance.

As the agent of the estate, declarations made by the administrator where his right to act in a particular has ceased are mere hearsay and incompetent. 1 Greenl. Ev. 113.

Where there is no evidence on a point, the court should so instruct. Carroll v. Sprague, 59 Cal. 655.

Texas Angel, for respondent.

In acting upon a claim, it is the duty of the administrator, by virtue of his office, to fully investigate all the facts concerning the matter, and fully inform himself of all the particulars of the claim. Now, if in doing this he admits or acts in his offi-

cial capacity upon any fact which is against the interest of the estate, and is favorable to the claim of the other party, this admission is properly admissible in evidence against him. 1 Greenl. Ev. § 289; 2 Starkie, Ev. p. 16; Faunce v. Gray, 21 Pick. 243; Schouler, Ex'rs, § 263; Sample v. Liscomb, 18 Ga. 687; Neal v. Lamar, Id. 746; Godbee v. Sapp, 53 Ga. 283; Forsyth v. Ganson, 5 Wend. 558; Church v. Howard, 79 N. Y. 419; Whiton v. Snyder, 88 N. Y. 306; Atkins v. Sanger, 1 Pick. 192; Hill v. Buckminster, 5 Pick. 391; Heywood v. Heywood, 10 Allen, 105; Emerson v. Thompson, 16 Mass. 429.

The presentation of a claim to the administrator or executor of an estate is equivalent to bringing suit on the claim, and serves to interrupt the operation of the statute of limitations. Beckett v. Selover, 7 Cal. 215; Pico v. De La Guerra, 18 Cal. 430; Deck's Estate v. Gherke, 6 Cal. 669.

The approval of the account after it has been allowed by the administrator is a judicial act, a *quasi* judgment, and so far affects the rights of the parties as to prevent any further investigation in that court. Neill v. Hodge, 5 Tex. 489.

HUSTON, J. This is an action brought by plaintiff against defendant, as administrator of the estate of Hiram A. Pearsons, deceased, for the value of services, alleged to have been rendered and performed by the plaintiff for the decedent during his life-time, and at his special instance and request. The appeal is from the order of the district court, overruling defendant's motion for new trial. The record purports to contain a bill of exceptions and statement on motion for a new trial. The bill of exceptions was never (as appears by the record) submitted to, settled, or signed by, the district judge, and cannot, therefore, be considered by this court as such.

One of the grounds of error upon which defendant predicates his motion for a new trial, and his appeal from the order of the district court denying the same, is the insufficiency of the evidence to support the verdict. The claim or demand sued upon in this action is for services alleged to have been performed by the plaintiff for the defendant during his life-time, and at his special instance and request. The facts, as they appear from the record, are substantially as follows: The decedent, Hiram A.

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Pearsons, and one J. G. Morrison were the owners of, and were engaged in working and operating, certain mines and a mill, located at Bonanza, Custer county, Idaho, in the year 1888. Morrison was present and attending in person to said operations and working. Pearsons was not present or personally attending to said operations or working, but on or about August 9, 1888, he employed the plaintiff, as the evidence shows, to go to said mines and mill, and look after his interests,—in fact to represent him there,—and gave the plaintiff the following letter, addressed to his (decedent's) partner, which letter was received in evidence without objection, and is as follows: "Challis, Idaho, Aug. 9, 1888. J. G. Morrison, Esq., Bonanza, Idaho—Dear Sir: The bearer, Irad Meinert, I have retained to look after our mill and milling business, and for the better discharge of his duties, which are to commence at once, I wish that any man he may suggest the removal or employment of will be entertained by you. I shall expect him to have the freedom of our mines, books, and business, and, so long as he draws his entire salary from me, to be subject only to removal by me. Instructions as to his duties I have given him. Trusting that he will meet with a courteous reception from you, I am, yours, etc., H. A. PEARSONS." James Hooper testifies that Pearsons told him that "he was going up that afternoon to hire Meinert to look after his interests until the next summer." Hooper further testifies: "I knew Meinert was sent in there afterwards. He was there directly afterwards." Meinert was permitted to testify, without objection, as follows: "Pursuant to the employment indicated in that letter, I went to the mines and mills of Morrison and Pearsons, and went to work in the mill. Mr. Morrison was there, and I continued until Mr. Morrison interfered with my employment of the men. After that I told him he could take charge of the men; that I would have nothing more to do with them. I remained there, looking after Mr. Pearsons' interests in the business, until the time of his death, July 20, 1889." Plaintiff's counsel here offered in evidence the following telegram, received by plaintiff from Pearsons: "Chicago, Ill., June 7th, 1889. Irad Meinert, Bonanza, Idaho, via Ketchum: I will leave in about a week, direct for the mine. H. A. PEARSONS." To the introduction of which defendant objected, up-

on the ground that it was irrelevant and immaterial, which objection was overruled by the court, and which ruling is assigned as error by appellant. From the character of the employment of plaintiff, as indicated by the letter from Pearsons to Morrison and the testimony of Meinert, we think the admission of the telegram was proper, as tending to show that such relation had continued up to that date. The plaintiff further testified, without objection, that "from the 8th day of August, 1888, to the 20th day of July, 1889, (the date of Mr. Pearsons' death,) he did not leave his employment; and that he had not been discharged by Mr. Pearsons; and that he was not under any employment of, or under any contract of, Mr. Morrison. He had no understanding with Morrison whereby Morrison was to keep his time or pay him. He had no control whatever over my wages or time." The only evidence which the record shows on the part of the defendant was the testimony of J. G. Morrison, the partner of Mr. Pearsons, who testified that plaintiff brought to him the letter from Pearsons, given above; that plaintiff worked 98 days, and no more. Although, as we have before stated, the record does not purport to contain all of the evidence, we think from that shown there is a clear preponderance in favor of the verdict. The appellant contends that "there was and is no legal evidence of a price for plaintiff's services." The plaintiff, as required by statute, presented to the administrator his claim against the estate of Pearsons, setting forth the time of service and the price, as he alleges, agreed to be paid him by Pearsons for such service. The administrator assented to the price, but refused to allow plaintiff for more than 98 days' service, which action of the administrator was subsequently approved by the probate judge. This was an admission by the administrator of the amount per month agreed by Pearsons to be paid plaintiff; and, having been made by the administrator while engaged in the discharge of his duties as such, it binds the estate to that extent. *Church v. Howard*, 79 N. Y. 415; *Faunce v. Gray*, 21 Pick. 243; *Whiton v. Snyder*, 88 N. Y. 306; *Hill v. Buckminster*, 5 Pick. 391; 7 Amer. & Eng. Enc. Law, 374. We find no error in the instructions given by the court, or in its refusal to give those proposed. As all the questions raised by defendant's exceptions to the refusal of the district court to give the

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instructions asked have been passed upon by us in the consideration of the case as given, it is unnecessary to again repeat them. The order of the district court overruling the appellant's motion for a new trial is affirmed. Costs awarded to respondent.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit in this case.

ADAMS v. MCPHERSON.

(September 22, 1891.)

DISMISSAL OF APPEAL—RECORD—FINAL JUDGMENT.

Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.

Appeal from district court, Lemhi county; C. J. BERRY, Judge.

Action by George N. Adams against M. M. McPherson, as administrator of the estate of Charles A. Wood, deceased. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

Ralph P. Quarles, for appellant. *Texas Angel*, for respondent.

HUSTON, J. The record shows no final order or judgment from which an appeal could be taken. Appeal dismissed; costs awarded to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

CONNELL v. WARREN.

(September 23, 1891.)

RIGHT TO APPEAL—SPECIAL ORDER AFTER FINAL JUDGMENT.

1. Under section 4807 of the Revised Statutes of Idaho, an appeal cannot be taken from an interlocutory order, made on the trial of an application for a special order after final judgment.

SAME—SPECIAL ORDER AFTER FINAL JUDGMENT.

2. An interlocutory order, made in the trial of an application for a special order after final judgment, is not a "special order after final judgment," within the meaning of section 4807 of the Revised Statutes.

(*Syllabus by Sullivan, C. J.*)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by Joseph Connell against George Warren on a money demand. There was judgment in the probate court for plaintiff. Defendant's application to

quash the writ of execution issued thereon being denied, he appealed to the district court. Plaintiff moved to dismiss said appeal. From an order overruling said motion to dismiss, plaintiff appeals. Appeal dismissed.

Kingsbury & McGowan, for appellant. *Bruner & Parsons*, for respondent.

SULLIVAN, C. J. This is an appeal from the district court of Alturas county. The facts are substantially as follows: The appellant brought his suit in the probate court of Alturas county, on a money demand, against the respondent, and recovered judgment therein. Thereafter a writ of execution was issued by said court for the collection of said judgment. Thereupon the respondent made application to said probate court for an order to quash or vacate said writ. After hearing said motion or application, the probate court denied the same. Thereupon the respondent appealed to the district court, from the order denying said application. Thereafter, and before said appeal came on for trial in the district court, the appellant moved to dismiss the said appeal so taken from the probate court. The district court overruled said motion to dismiss. Thereupon the appellant appealed to this court from the order of the district court overruling said motion to dismiss. The respondent appears in this court, and moves to dismiss the appeal on the ground that the order appealed from is not an appealable order, and cites, among other authorities, in support of said motion, section 4807 of the Revised Statutes of Idaho, as follows: "An appeal may be taken to the supreme court from the district court * * * (3) from an order granting or refusing a new trial; from an order granting or refusing an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment,"—and urges that the order appealed from is not enumerated in said section as an appealable order, and that it is not an order from which an appeal can be taken. The appellant maintains that said order is a "special order, made after final judgment," and is mentioned in said section as one of the orders from which an appeal may be taken; that the final judgment in the main case was made

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and entered by the probate court, and that the order appealed from was made after final judgment therein. This court is called upon to determine whether said order refusing to dismiss said appeal is "a special order, made after final judgment," within the meaning of said section 4807. The order made by the district court, refusing to dismiss said appeal, is an interlocutory order, made in the proceeding to obtain an order to quash or vacate a writ of execution, and is not a "special order after final judgment," within the meaning of said section 4807. If a "special order after final judgment" means every order that a court may make in the trial or hearing to determine whether an order prayed for shall be granted, a separate appeal would lie from each and every interlocutory order made by the court during the trial. I am of the opinion that the expression "special order made after final judgment," as used in said section, means the special or particular order applied for after final judgment, and not every order that may be made by the court in the hearing to determine whether the order applied for shall be granted. By saving the proper exception to all interlocutory orders made by the court on the hearing of an application for an order after final judgment, all of such interlocutory orders may be reviewed on an appeal from the order granting or refusing the order prayed for. For the reasons above stated this appeal should be dismissed, and it is so ordered, with costs against the appellant.

MORGAN and HUSTON, JJ., concur.

STATE v. BRAITHWAITE.

(September 28, 1891.)

PROCEEDINGS BY INFORMATION—VALIDITY—PRELIMINARY EXAMINATION.

Section 8, art. 1, Const. Idaho, authorizes proceedings either by indictment or by information. That section, in connection with the act of the legislature passed to carry into effect the provisions of said section, (see 1st Sess. Laws Idaho, p. 184,) authorizes a proceeding by information only where a defendant has had a preliminary examination as prescribed by chapter 7 of title 3 of the Penal Code of Idaho, or has waived such examination, or is a fugitive from justice.

(Syllabus by Sullivan, C. J.)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

John Braithwaite was convicted of grand larceny, and appeals. Reversed.

Orr & Orr, for appellant.

The allegations of the information being made upon information or belief, the verification in this form is ambiguous, uncertain, and fatally defective. Act March 13, 1891, § 3; State v. Calfer, (Mo.) 4 S. W. Rep. 418; In re Hotchkiss, 58 Cal. 39.

An information is properly filed by the district attorney only when the defendant has been regularly committed, and has had a preliminary examination in accordance with the forms of law. Const. art. 1, § 8; Act March 13, 1891, §§ 6-8; People v. Evans, 72 Mich. 367, 40 N. W. Rep. 473; Kalloch v. Superior Court, 56 Cal. 229.

The committing magistrate had no authority to issue a warrant, and could not acquire jurisdiction until a complaint or deposition had been filed with him charging an offense. Rev. St. §§ 7516-7519, 7552; Id. §§ 7509, 7530; State v. Wakefield, 60 Vt. 618, 15 Atl. Rep. 181.

George H. Roberts, Atty. Gen., for the State.

An information may be verified upon information and belief. Washburn v. People, 10 Mich. 385; State v. Montgomery, 8 Kan. 355.

A plea of guilty cures all irregularities up to the arraignment.

SULLIVAN, C. J. This is an appeal from the district court of the fifth judicial district. The facts are substantially as follows: The appellant was arrested for the crime of grand larceny, and taken before a committing magistrate. The record shows that a warrant of arrest was issued, but fails to show that a complaint or information or any depositions were laid before the magistrate charging the commission of a public offense, as required by section 7516 of the Revised Statutes of Idaho, either before or after the issuance of the said warrant of arrest. The record further shows that a preliminary examination was held, and the depositions of two witnesses taken. The following commitment was indorsed on said depositions: "It appearing to me that the offense in the within depositions mentioned has been committed, and that there is sufficient cause to believe that the within-named John Braithwaite is guilty thereof, I order that he be held to answer the same, and that he is admitted to bail in the sum of five hundred dollars, and is committed to

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the sheriff of the county of Bingham until he give such bail." It is certified in the record that it contains a record of all the proceedings by and before the committing magistrate, and contains all of the papers transmitted to the district court by said magistrate. The depositions of John G. Brown and C. Devinney are the only depositions contained in the record, neither of which contains a question put to the witnesses. At the June term of the district court the district attorney filed an information against the appellant, charging him with grand larceny, which information was filed under and by virtue of section 8 of an act entitled "An act to provide for prosecuting offenses on information, and to dispense with calling grand juries except by order of the district judge," approved March 13, 1891. See 1st Sess. Laws Idaho. Said information contained the following indorsement, to-wit: "Names of witnesses whose depositions were examined before filing the foregoing information: John G. Brown and C. Devinney." After said information had been filed in the said district court, the appellant, by his attorneys, filed a motion to quash the information, on the ground, among others, "that, previous to the filing of the information, the defendant had not been committed or held to answer by any magistrate having authority to commit," which motion was overruled by the court, to which ruling the defendant duly excepted, and assigns said ruling as error. Thereafter the defendant pleaded guilty to the crime charged. On the 25th day of June, 1891, the defendant, by his attorneys, filed a motion in arrest of judgment on the ground following, to-wit: "That the court had no jurisdiction to try the defendant, for the reason that the law had not been complied with in the arrest and preliminary examination of the defendant,"—which motion was overruled by the court, and duly excepted to by the defendant, and the said ruling is assigned as error. The proceeding by information against persons accused of crime is a creature of the constitution, (section 8, art. 1,) and provides that "no person shall be held to answer for any felony or criminal offense of any grade unless on the presentment or indictment of a grand jury, or on information of the public prosecutor after a commitment by a magistrate." To carry into effect said provision of the constitution, the legislature passed the act above cited.

As we view it, there is but one question for this court to decide in this case, and that is, can a defendant be prosecuted for a crime by information, under and by virtue of section 8 of the act above referred to, until such person shall have had a preliminary examination as provided by law, or waived his right to such examination, or is a fugitive from justice? There is no claim in this case that the defendant waived his right to such examination, or that he is a fugitive from justice. Section 8 of said act declares as follows: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law." Section 7576 of the Revised Statutes of Idaho directs how the depositions in a preliminary examination must be taken and authenticated. Subdivision 2 of said section provides that the depositions must contain the questions put to the witnesses, and their answers thereto. Subdivision 5 of said section provides that the deposition must be signed by the witness, and certified by the committing magistrate. Section 8 of the act above referred to, and section 7576 of the Revised Statutes of Idaho, are mandatory, and the district court has no jurisdiction to try any person for an offense by information until the statute in regard to preliminary examinations has been complied with. *Kalloch v. Superior Court*, 56 Cal. 229. In my opinion, the judgment of the district court should be reversed, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

CURTIS, Adjutant General, *v.* MOODY, State Auditor.

(September 28, 1891.)

MANDAMUS TO STATE AUDITOR—DRAWING WARRANT—FUND NOT ESTABLISHED.

1. A writ of mandate will not issue to compel the state auditor to draw his warrant upon a fund that has not been established by law.

ADJUTANT GENERAL—COMPENSATION—MILITARY FUND.

2. An act of the legislature entitled "An act for the organization of the militia of the state of Idaho," (1 Sess. Laws Idaho, p. 217,) provides that the compensation of the adjutant general shall be paid out of the military fund, but fails to provide such a fund.

(Syllabus by Sullivan, C. J.)

Cunningham v. Moody.

Application by Edward J. Curtis for a writ of mandate to compel Silas W. Moody, state auditor, to draw a warrant upon the state treasurer for the salary of plaintiff as adjutant general. Application denied.

S. B. Kingsbury, for plaintiff. *Silas W. Moody*, *pro se*.

SULLIVAN, C. J. This is an application made by the adjutant general of the state of Idaho for a writ of mandate to compel the auditor of the state to issue his warrant upon the state treasurer for the payment of the plaintiff's salary as adjutant general from April 10, 1891, to July 11, 1891. The defendant appears, and by answer waives the issuance of the alternative writ, and, further answering, admits each and every allegation of the petition; and alleges, as the ground of his refusal to issue the warrant demanded, that there is no fund or appropriation provided by law for the payment of said claim, or upon which the defendant may lawfully draw a state warrant in payment thereof. The plaintiff, in support of the application for said writ, contends that section 32 of the act approved March 14, 1891, entitled "An act for the organization of the militia of the state of Idaho," (see 1 Sess. Laws Idaho, p. 217,) appropriates the sum of \$2,100 for the purpose of defraying the current expenses of the Idaho National Guard, and of arming and equipping the companies thereof for the year 1891, and that the sum so appropriated constitutes what is designated as the "Military Fund" in sections 3, 33, 34, and 36 of said act. The defendant contends that section 3 of said act provides that the salary or compensation of the adjutant general shall be paid quarterly out of the "Military Fund," and that the appropriation above referred to does not constitute said fund. The only question for our consideration, then, is as to whether the \$2,100 appropriated to pay the current expenses of the Idaho National Guard constitute the "Military Fund," within the meaning of that term as used in said act. That part of section 3 which refers to the payment of the salary or compensation of the adjutant general is as follows: "He shall be entitled to receive a compensation of five hundred dollars per annum, to be paid quarterly out of the military fund, in the same manner as other state officers are paid." Section 32 of said act provides as follows: "For the purpose of defraying the current

expenses of the Idaho National Guard, and of arming and equipping the companies thereof as they are organized, there is hereby appropriated out of the general fund for the year 1891 the sum of \$2,100, and for the year 1892 the sum of \$2,200, or so much thereof as may be necessary." As will be observed, the above appropriation was made "for the purpose of defraying the current expenses of the Idaho National Guard, and of arming and equipping the companies thereof," and is an appropriation made from the general fund of the state, and is not designated as the military fund mentioned in said act. It is simply an appropriation out of the general fund for the purpose of paying the "current expenses" of the Idaho National Guard. The compensation of the adjutant general is not a part of the "current expenses" of the Idaho National Guard, within the meaning of the term "current expenses," as used in said act. The said act mentions a military fund, but fails to establish such a fund. For the reasons stated, I am of the opinion that the application for the writ should be denied, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

CUNNINGHAM, County Auditor, *v.* MOODY, State Auditor.

(November 27, 1891.)

COLLECTION OF TAXES — PAYMENT INTO STATE TREASURY.

1. All taxes levied and collected for state purposes must be paid into the state treasury, without any deductions for commissions or other charges.

SAME — FEES OF COUNTY AUDITOR — REPEAL OF STATUTE.

2. Such parts of section 1679, and subdivision 5 of section 2157, Rev. St. Idaho, as relate to fees of the county auditor for services in connection with the assessment and collection of taxes, are repealed by section 4, p. 179, 1 Sess. Laws Idaho.

(*Syllabus by the Court.*)

Petition by Art Cunningham for a writ of mandate to compel Silas W. Moody, state auditor, to allow petitioner's account for taxes collected as county auditor. Petition dismissed.

C. M. Hays, for plaintiff. *S. W. Moody*, *pro se*.

MORGAN, J. Petitioner asks the court for a writ of mandate to compel the re-

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spondent to allow his account at the rate of 3 per cent. upon the sum of \$149.96 belonging to the state, and collected in Boise county, under section 1679, and the fifth subdivision of section 2157, Rev. St. Idaho. To the petition the respondent interposes a general demurrer. Section 4 of an act concerning fees and compensation of county officers, (1 Sess. Laws Idaho, p. 179,) so far as it relates to the compensation of the auditor in the assessment and collection of taxes, is as follows: "As the auditor, he is allowed and may receive, when not otherwise provided by law, fees as follows: For all services in connection with the assessment and collection of taxes and other duties relating to revenue, for each year, except licenses, ten cents per name." Section 8 of the same act provides "that all acts and parts of acts inconsistent with this act be, and the same are hereby, repealed." Such parts of section 1679, and subdivision 5 of section 2157, Rev. St. as relates to the fees of the county auditor, are plainly inconsistent with the provisions of section 4 of the first Session Laws, as above quoted, and are therefore repealed. The auditor is allowed 10 cents per name for all his services in connection with the assessment and collection of taxes, and no more. All compensation due the county auditor, not chargeable to or received from other sources, is to be paid to him by the county. See subdivision 10, § 2161, p. 180, 1 Sess. Laws; section 7, art. 18, Const. *Hillard v. Shoshone Co.*, (Idaho,) 27 Pac. Rep. 678.¹ All taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges. Section 7, art. 7, Const. This section of the constitution is self-acting, and goes into effect without any legislation. The demurrer is sustained, and the petition dismissed, with costs awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

JACOBSON *v.* BUNKER HILL & SULLIVAN
MINING & CONCENTRATING Co. *et al.*

(December 2, 1891.)

EJECTMENT—PLEADING—AIDED BY JUDGMENT.

1. J. brought ejectment against defendant for the recovery of certain mining property, claim-

ing it to be community property of her deceased mother and one K., from whom defendant deraigned title. Complaint alleges the coverture of K. and plaintiff's mother, and that the property described in the complaint was community property. Defendant objects for the first time in the appellate court that the complaint does not state facts sufficient to constitute a cause of action. *Held*, that the allegation in the complaint was sufficient after judgment; that the objection should have been raised in the court below by special demurrer for uncertainty; not having done so, it is waived.

COMMUNITY PROPERTY—MINING CLAIM—NON-RESIDENT WIFE.

2. Mining property acquired in this state under the laws of the United States during coverture is community property. Under the laws of Idaho territory, as they existed in July, 1886, all property acquired by the husband in said territory, during coverture, except such as was acquired by gift, bequest, devise, or descent, was community property; and this, although the wife may never have been a resident of the territory.

SAME—ABANDONMENT—EVIDENCE.

3. The evidence in this case examined, and *held* not sufficient to establish abandonment.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Ejectment by Clarissa E. Jacobson against the Bunker Hill & Sullivan Mining & Concentrating Company. From a judgment dismissing the action, entered upon an order granting defendant's motion of nonsuit, plaintiff appeals. Affirmed. Petition for rehearing denied.

Woods & Heyburn, for appellant.

As the complaint alleged that it was community property, that it was acquired during coverture, and that there were no debts existing against it, it was not necessary to plead the facts in detail. *Estee*, Pl. & Pr. §§ 2222, 2237, 2238, 2241; *Bliss*, Code Pl. § 222; *Gimmy v. Doane*, 22 Cal. 635; *Payne v. Treadwell*, 16 Cal. 243; *Howe v. Howe*, 4 Nev. 469; *Stutsman Co. v. Mansfield*, 5 Dak. 78, 37 N. W. Rep. 304; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. Rep. 183; *Broad v. Broad*, 40 Cal. 493; *Slaterly v. Hall*, 43 Cal. 191.

All property acquired after marriage by either husband or wife is community property, presumably. Rev. St. Idaho, p. 635, Act Jan. 6, 1875, § 2; *Broad v. Broad*, 40 Cal. 493; *Broad v. Murray*, 44 Cal. 228; *Murphy's Heirs v. Jurey*, 39 La. Ann. 785, 2 South. Rep. 575; *Webre v. Lorio*, 42 La. Ann. 178, 7 South. Rep. 460; *McCall v. Irion*, 41 La. Ann. 1126, 6 South. Rep. 845; *Broad v. Murray*, 44 Cal. 228.

¹ Ante, 843.

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The domicile of the husband is the domicile of the wife. 2 Bish. Mar. & Div. 127, 129; McKenna's Succession, 23 La. Ann. 369; Moore v. Thibodeaux, 4 La. Ann. 74; Beard v. Knox, 5 Cal. 256; Kashaw v. Kashaw, 3 Cal. 312.

The husband having lived in Idaho, been a citizen thereof, and acquired property therein, during coverture, it is immaterial where the wife lived during that time. Story, Confl. Law, § 474; De Laurantel v. De Boom, 67 Cal. 363, 7 Pac. Rep. 758.

That a husband failed for eight years to support his wife or to live with her was sufficient proof of intent to abandon to have sent the case to the jury. Morrison v. Morrison, 20 Cal. 431; Benkert v. Benkert, 32 Cal. 468; Cline v. Cline, (Or.) 16 Pac. Rep. 282; Osborne v. Osborne, 44 N. J. Eq. 257, 9 Atl. Rep. 698, 10 Atl. Rep. 107, and 14 Atl. Rep. 217.

McBride & Allen, F. Ganahl, A. Hagan, and W. H. Clagett, for respondent.

Every fact which is necessary to be proved to entitle plaintiff to recover must be alleged in his complaint, or no judgment can be sustained. Green v. Palmer, 15 Cal. 413.

Averments of mere evidence or legal conclusions call for no denial. Raconillat v. Rene, 32 Cal. 450.

Unless the facts essential to the support of the case be alleged in the pleadings, evidence upon such omitted facts cannot be heard or considered. Hicks v. Murray, 43 Cal. 515.

The property in question is held by possessory title derived under the act of congress of 1872, and consists of mining claims on the public mineral lands of the United States. These rights are gifts or donations derived from the United States, and are not included in the category of property which, being acquired during marriage, becomes community property. Scott v. Ward, 13 Cal. 458; Noe v. Card, 14 Cal. 596; Fuller v. Ferguson, 26 Cal. 547; Wilson v. Castro, 31 Cal. 433; Hood v. Hamilton, 33 Cal. 702; Lake v. Lake, 52 Cal. 428; Broder v. Water Co., 101 U. S. 276; Forbes v. Gracey, 94 U. S. 763.

Desertion consists of a cessation of cohabitation, coupled with the intent to desert in the mind of the offending party. Morrison v. Morrison, 20 Cal. 431.

Mere lapse of time does not constitute abandonment. Moon v. Rollins, 36 Cal. 333; Partridge v. McKinney, 10 Cal. 181.

HUSTON, J. The facts as stated in the complaint, and shown by the record, are, in substance, as follows: On the 17th day of February, 1874, one Noah S. Kellogg was duly and legally married to one Mary A. Byrd, and the said parties continued in the relation of husband and wife until the death of the said Mary A., which occurred on the 8th day of July, 1886. That during said time the said Noah S. Kellogg acquired and became seised and possessed of the mining property and lode claims described in the complaint, and the same became and were the community property of the said Noah S. Kellogg, and Mary A., his said wife. That on or about the 1st day of November, 1878, the said Noah S. Kellogg abandoned his wife, the said Mary A. Kellogg, and lived separate and apart from her all the time, and continually, until her death, at the time aforesaid, and was living separate and apart from her at the time of her death. That the said Mary A. Kellogg died intestate, leaving as her sole heirs at law the said Clarissa E. Jacobson, the plaintiff in this action, and one Josephine Ward, who were the daughters and the only children and the sole heirs at law of the said Mary A. Kellogg. That the said Josephine Ward refuses to join plaintiff, and become a party plaintiff in this action, and is not joined as one of the plaintiffs herein, for the reason of her said refusal. That no administration was ever had upon the estate of said Mary A. Kellogg, and that there were no debts or claims against the said Mary A. at her death, and that there are now no debts or claims existing against her said estate. The complaint alleges ownership, seizure, and possession by the said Noah S. Kellogg and the said Mary A., his wife, of the property described, at the time of the death of the said Mary A. The complaint alleges ouster of plaintiff by defendant; claims damages in the sum of \$10,000; also avers the rents, issues, and profits of the said land, mining claims, and premises from the 2d day of August, 1887, and while the plaintiff has been excluded therefrom, is \$100,000. And for another cause of action, and for equitable relief, the complaint states the corporate character of the defendant; ownership in fee of the plaintiff and said Josephine Ward to the various interests claimed in the property described in the complaint; the possession of the defendant; the withholding thereof from the plaintiff; waste by the defendant; the values of the entire properties at

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\$3,000,000, and the net value of the ore being extracted therefrom at \$3,000 per day; and the intention of the defendant to make large and extensive expenditures in improvements upon said property, and the exclusion of plaintiff from any knowledge or direction in regard thereto or participation therein. Prays judgment that the plaintiff be let into possession of the described premises and every part and parcel thereof; for the sum of \$10,000 damages for the wrongful withholding of said premises; and for the further sum of \$100,000 for the rents, issues, and profits of said premises, and the use and working thereof by the defendant; and for injunction. The defendant Josephine Ward files a general and special demurrer to the complaint. The defendant corporation, by its amended answer, denies all the material allegations of the complaint, except the marriage of said Noah S. Kellogg and Mary A. Byrd; the death of said Mary A.; and that the plaintiff and said Josephine Ward were her children and heirs at law. Admits the ownership at one time by said Noah S. Kellogg of certain interests in the properties described in the complaint, but avers that, for the purpose of liquidating certain indebtedness incurred by him in defending and protecting his title to said properties, said Noah S. Kellogg conveyed his interests in said properties to certain parties, the grantors of this defendant; that all such purchases and transfers, as well of this defendant as its grantors, were made for an adequate and valuable consideration, in good faith, without any knowledge or information that plaintiff claimed any interest in any portion of said mining claims, or that there was or could be any doubt of the right of said Noah S. Kellogg to sell and convey the same. Answer further avers that on the 23d of December, 1887, and while defendant was in the actual and peaceable possession of said properties aforesaid, it instituted proceedings to acquire patent from the United States to the said properties; that all the requirements of the laws of the United States for the procurement of such patent were complied with by the defendant; and that at no time during the period prescribed by law was any adverse claim filed against the said application of defendant by or on the part of the plaintiff. The issues were tried before the court with a jury. After the proofs on the part of the plaintiff were in, defendant moved for nonsuit, which motion was

granted by the court, and judgment of dismissal entered thereon, from which order and judgment plaintiff appeals to this court. The case is brought here on a bill of exceptions, which purports to contain all of the evidence.

The plaintiff makes the following assignment of errors: (1) The admission of testimony, against the protest of plaintiff, as to the means of support of plaintiff at the time when she was supporting her mother, as shown by folios 192 to 195 of the transcript. (2) The granting of the nonsuit against the plaintiff on motion of the defendants. (3) The refusal of the court to allow plaintiff to amend the complaint to conform to the proofs in the matter of residence of Noah S. Kellogg. (4) The refusal of the court to first try the equitable issues.

As to the first and third assignments of error, while the correctness of the ruling of the district court is, at least, very doubtful, we think it can hardly be claimed to have been prejudicial to plaintiff, as the court seems to have given but little consideration to the testimony objected to, the admission of which is assigned as error, in passing upon defendant's motion for nonsuit, and we are unable to see wherein the amendment of the complaint at the time it was asked would have benefited plaintiff, or the refusal injured her case.

The second assignment of error raises all the questions we deem material in the case, and we will now proceed to consider them. Counsel for defendant raises the objection for the first time in this court that the complaint does not state facts sufficient to constitute a cause of action. Conceding that such objection may be raised for the first time in the appellate court, still we think the contention of counsel cannot obtain. It is claimed by defendant's counsel that the complaint is insufficient, in that it does not contain the exceptional words of the statute in defining what is community property, *i. e.*, that it was not obtained by "gift, bequest, devise, or descent." We are of the opinion that this objection cannot be raised by general demurrer, but only by special demurrer, for ambiguity and uncertainty; but we think the allegation in this case sufficient. *Gimmy v. Gimmy*, 22 Cal. 633; *Gimmy v. Doane*, Id. 635; *Treadway v. Wilder*, 8 Nev. 91; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. Rep. 183.

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The second position of defendant, that the complaint does not state that the community property was not chargeable with debts, is not tenable. The complaint does not state that there are no debts chargeable against "her [the plaintiff's] said estate." If this was not deemed sufficient by defendant, it should have been reached either by a special demurrer for uncertainty, or by motion to make the complaint more certain. When counsel for plaintiff tendered proof upon this matter he was interrupted by the court and informed that that was a matter of defense.

The third ground upon which defendant asked a nonsuit is that mining property, being held under a grant from the United States, is not community property. This proposition is novel, and we have examined all of the authorities cited by counsel in support of it with much care; but we find ourselves unable to agree with counsel for defendant in this contention. All the cases cited by counsel in support of this proposition arose upon Spanish, French, or Mexican grants, and there is, in our view, a manifest difference between the grants referred to in the authorities cited by counsel and the general grant under the mining laws of the United States. In the former cases it is always a special grant to the individual named, based upon grounds or considerations personal to the grantee, while in the latter it is a general grant to all the citizens, as well as those who have declared their intention to become citizens, of the republic. It is suggestive that while nearly all the mining properties in this country have been acquired under this general grant, this is the first time this question has ever come before our courts. A further answer to this contention of defendant is found in the fact that the evidence in the case shows that Kellogg acquired his interest in the properties described in the complaint by purchase, to-wit, an undivided one-half interest in the Bunker Hill lode, and a three-eighths undivided interest in the Richmond lode, from Phillip O'Rourke, an undivided one-fourth interest in the Sullivan lode from Con Sullivan, and an interest in the Fraction mining claim from Joseph Klever.

The next contention of the defendant in support of the nonsuit is that the statute of Idaho, under which, and the amendments thereto, plaintiff claims, is by its terms limited to a community created in

the territory, or to persons who, having been married elsewhere, come within the state and become domiciled there. Section 15 of an act entitled "An act defining the rights of husband and wife" (Rev. Laws Idaho 1875, p. 634) is as follows: "The rights of husband and wife married in this territory prior to the passage of this act, or married out of this territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provisions may be in conflict with the stipulations of any marriage contract." The domicile of the husband, as a general rule, is the domicile of the wife. Is there anything in this act to vary the rule or work an exception to it? Section 2 of said act is as follows: "All property acquired after the marriage by either husband or wife, except such property as may be acquired by gift, bequest, devise, or descent, shall be common property." This act takes from the wife her estate of dower in the realty of which her husband dies seised, which was in no wise affected by residence, and, if the contention of the defendant is correct, gives her nothing in the place of it, should she not be so fortunate as to be a resident of the state. When we remember how very many married men there were in Idaho whose wives were non-residents at the time of the passage of this act; when we remember, to their credit, how exceptionally careful our legislatures have been in preserving and protecting the rights of women,—we are slow to believe that they ever intended to perpetrate such an outrage upon the rights of married women as the construction of this statute contended for by defendant would be. The act, evidently and palpably, was intended to apply to and include "all property acquired after marriage by either husband or wife, except," etc. The residence of the husband was the residence of the community, so far as property rights were concerned.

The fifth ground upon which nonsuit was asked was that there was not sufficient proof of abandonment by Kellogg of the plaintiff's ancestor to support the allegation thereof. The statute under which plaintiff claims is an amendment to the law of the eighth session of the territorial legislative assembly of Idaho, passed at the tenth session of said legislative assembly, and is as follows: "Section

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11 be amended to read as follows: Upon the dissolution of the community by the death of the wife, the entire common property, without administration, shall belong to the surviving husband, if he shall not have abandoned and lived separate and apart from her; but if the husband shall have abandoned his wife, and lived separate and apart from her, the half of the common property, subject to the payment of the debts chargeable to it, shall be at her testamentary disposition, and, in absence of such disposition, goes to her descendants or heirs at law, exclusive of her husband," etc. It will be seen that, to entitle the plaintiff to recover in this action, it is incumbent upon her to establish that the man Noah S. Kellogg "abandoned and lived separate and apart from his wife." A man may live separate and apart from his wife, and still not "abandon" her, in the sense that the term is used in the statute, although he could scarcely abandon her without living separate and apart from her. "Abandonment," in the sense that term is used in this statute, means, we apprehend, a total relinquishment of all marital rights, and a total repudiation of all marital duties, by the husband. It is largely a question of intent. It must be voluntary. An enforced absence, or an absence, although voluntary in its inception, yet prolonged by circumstances beyond the control of the husband, or for reasons or under circumstances which negative the idea of his intention to relinquish his marital rights, or to repudiate his marital obligations, is not an abandonment under this statute. This is unquestionably the sense in which the term was used in the statute. The condition of the territory and its people at the time the act was passed, as well as the language of the act itself, confirms this construction. The instances of men coming to a new mining country, and bringing their wives with them in the first instance, are exceptional. Hence the language of the statute, "abandoned and lived separate and apart from."

Does the evidence in this case, as it appears in the record, support or establish such a case of abandonment as made it obligatory upon the court below to send the case to the jury, or was there such a failure of proof in this behalf as justified that court in granting a nonsuit? Much of the evidence which appears in the transcript, it seems to us, is *dehors* the issue. We do not readily see what the pecuniary

condition of the plaintiff had to do with the question of the abandonment of her mother by Kellogg, any more than did her physical or moral condition. All the testimony, we believe, except that of the plaintiff, in regard to abandonment, is by deposition. The case seems to rest largely upon the testimony of the plaintiff. In fact, her testimony takes up 48 of the 56 pages of the transcript devoted to the testimony in the case. We have not the witness before us, as the district court had, but her evidence, as it appears to us in the record, is more remarkable for crispness of reply than for frankness of expression or lucidity of narrative. She states that her mother and Noah S. Kellogg were living together as man and wife at Dayton, Washington Territory, (now state,) in October, 1878; that about the 10th of that month she received a telegram from Kellogg, that his wife, the mother of the plaintiff, was very ill, and if she wished to see her alive to come at once. In response to the telegram, plaintiff went at once to Dayton; found her mother, the wife of Kellogg, suffering from a stroke of paralysis. From the evidence it appears that Kellogg was at that time not only in very straitened circumstances, but was also in poor health, although the plaintiff, when pressed in regard to these matters, upon cross-examination, seems to emulate the secretive peculiarity of the well-known Puget sound bivalve; but the fact is testified to by Mrs. Josephine Ward, a sister of the plaintiff and a witness on her behalf. It seems that, shortly after the arrival of the plaintiff at Dayton, her sister, Mrs. Josephine Ward, also came there, and the two sisters remained until Kellogg left, in February, 1879. When we look into the testimony of the plaintiff to ascertain what were the circumstances under which Kellogg left, we meet with such a petulant exhibition of female asperity as renders the testimony of this witness most distressingly unsatisfactory, as instance: In the transcript appears the following, upon cross-examination of plaintiff: "Question. He went away leaving her with you in Dayton? Answer. He did. Q. What was the understanding between you and him about that, if any? A. There was no particular understanding. Q. What was said about it? A. There wasn't very much said about it, if anything. Q. I want to know what was said. A. I don't know that there was anything said. Q. Did he say he was going away? A. He said he

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was going away, and he went. Q. Didn't he talk with you about it,—give any reason for it? A. He said he was going away to work. Q. Where did he say he was going? A. He didn't say. Q. Did he give any other reason? A. He did not." Further on, to a question on cross-examination, the plaintiff states: "Answer. He told me that he was going away, but he didn't tell me where he was going to, or what he was going to do. Question. Was there any other conversation about his leaving than that? A. I don't think there was any between Mr. Kellogg and myself. Q. Did you ever make an affidavit in this case at the time that an application was made for a receiver? A. I did. Q. I will ask you if you did not state in that affidavit that about the 1st of February, 1879, the said Noah S. Kellogg abandoned the mother of deponent, and stated, upon his departure, to deponent, that he was badly in debt, and could do the family no good by remaining home, and that he would let deponent hear from him. Did you so state? A. Is that my affidavit? Q. You are here to say,—is it or isn't it? Did you make that affidavit, I am asking you. A. I certainly expected him to do something for her, and I certainly expected to hear from him, and I think he made some such statement that I would hear from him. Q. I asked you a while ago if he made any statement of his condition and circumstances, and you said he did not. A. I don't remember of his ever saying anything about being in debt. I think he was in debt; I don't know. Q. Did you ever make any such affidavit as this: that he was heavily in debt, and could do the family no good by remaining home? A. I might have said so, but I don't remember clearly. Q. Isn't it a fact, and isn't it within your knowledge, that he was at that time involved in debt, and didn't he so state to you, that he was badly involved in debt, and that he couldn't earn anything there for the support of his wife, and that he had better go away, and you would take charge of his wife? A. I certainly had some such agreement with Mr. Kellogg, and he certainly made some such remark, that he would go away, and that if he made money he would send it to me, but he didn't tell me where he was going, and he never sent me the money." And yet it is in the record, and admitted by her counsel on the argument here, that Kellogg did send her deeds for lots at Medical lake, from which she realized at least

\$300; and, from aught that appears in the record, that is all Kellogg ever earned, beyond his living, from the time of his departure from Dayton, in February, 1879, to the time of the death of his wife, in July, 1886.

As another evidence of the uncertain and unsatisfactory character of the plaintiff's testimony, we quote the following, from her cross-examination, as it appears: "Question. I will ask the question now whether she contributed during the time she was there to the support of the family as well as after the time that Mr. Kellogg left. Answer. I contributed to the support of my mother after Mr. Kellogg left. Q. Did you contribute anything before? A. No, sir. Q. So that the only expense that you were to was on your own account during the time he remained there? A. He did not remain very long. Q. Well, we know about the length of time. During that time he supported the family himself? A. He did not during all the time before he left. Q. If he didn't, who did? A. I think that I took complete charge not over a month after I went there, and after that I supported the family. Mr. Kellogg was there several months afterwards."

I have quoted somewhat extensively from the testimony of this witness, because hers is the only testimony in the record which bears directly upon the question of abandonment. Mrs. Josephine Ward, a sister of the plaintiff, who, although she refused to be joined as a plaintiff in the action, appears as a witness on behalf of the plaintiff, when interrogated by the counsel for plaintiff (by deposition) as to the circumstances under which Kellogg left his wife in February, 1879, also emulates the mollusk before referred to, and replies: "I refuse to answer further, or give circumstances." Why counsel did not press her further upon this point, we do not know. Perhaps his experience had taught him the verity of the old distich:

"When a woman will, she will,
You may depend on't;
And when she won't, she won't,
And there's an end on't."

We get a little light upon this matter from the testimony of Mr. Fernando Miller, a witness on behalf of plaintiff, who says, "After Kellogg left [Dayton] I think I had a conversation with plaintiff. She was in my store, and I asked where Kellogg had gone. She said she did not know or care, and that Josie, her sister, had

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told him to 'git,' or some such expression. I met plaintiff a few days ago in Tacoma. She told me Kellogg claimed that he had sent her deeds to property somewhere. Don't know as she said he had sent them. Said, if he did send them, they were worthless." The plaintiff testifies: "I never learned from Mr. Kellogg where they [the deeds] came from. Mr. Kellogg never told me that he sent the deeds." And this is repeated again and again by the plaintiff, not in the same language, but to the same purport and effect; and yet the plaintiff testifies, in her examination in chief, that she received, "I don't think," to use her own language, "over three hundred dollars for the whole thing;" referring to the property at Medical lake.

As before stated, the only evidence in the record bearing directly upon the question of abandonment (for we do not consider proof of mere absence evidence of abandonment) is that of the plaintiff. She testifies in her own behalf. She is playing for a large stake. She has everything to gain, and nothing to lose. She is even unsupported by that sister, who was a co-worker in the support of their invalid mother, and under whose roof the poor old invalid spent the last years of her afflicted life, after having been hawked about the territory of Washington from poor-house to poor-house for years; and this the plaintiff calls supporting her,—such support, we should say, as Lear received from his pelican daughters; and it is upon such testimony that the court is asked to wrest from innocent purchasers, for value, property which the plaintiff estimates at millions of dollars in value. Every witness, including the plaintiff, who testified upon the subject, states that up to the time of his departure in February, 1879, Kellogg and his wife had always lived happily together. It may be that a man possessed of the ordinary instincts of humanity, not brutalized by debasing habits, or the indulgence of a vicious appetite, would, after having lived for years happily with a woman, borne with her the vicissitudes incident to a life in this country, it may be that such a man would without other excuse than the failure of her health willfully abandon the wife he had solemnly pledged himself to support and maintain. I say such a thing might be, for the vagaries of the human heart and human affections are beyond computation or estimation; but before we can make such a conclusion the basis of judi-

cial action, at least to the extent, and entailing the consequences, involved in this case, we must have better assurance than is afforded by the evidence in this record. The judgment and order of the district court are affirmed.

SULLIVAN, C. J., and MORGAN, J., concurring.

ON REHEARING.

(Dec. 21, 1891.)

We have carefully examined the petition for a rehearing filed in this case, as well as the authorities cited therein. Moreover, we have again gone carefully through the record, and the result of our labors has been to confirm us in the opinion heretofore filed in this case. We note the reference of counsel to the provisions of the constitution of the United States and of this state in regard to trial by jury; but counsel must be aware that the non-applicability of those provisions to the question here under consideration is no longer a mooted question in this country. The right of the legislature to confer upon the courts the power to grant nonsuits in certain cases has been too long and too generally conceded to now be questioned. Section 4354, subd. 5, Rev. St. Idaho, provides that the court may grant a nonsuit, "upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." In the federal courts of the United States a compulsory nonsuit cannot be granted, but the same result is reached through a peremptory instruction to the jury. In the case of *Schuchardt v. Allens*, 1 Wall. 359, cited in petition, the court says: "Whenever the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly." It has been repeatedly held by the supreme courts of California and other states whose statutes are similar to those of Idaho that the granting of a nonsuit is a question of law. The doctrine that, if there is even a *scintilla* of evidence, the case must go to the jury, is exploded; and in good time, if courts are to be considered as tribunals where the law is administered in justice. Mr. Proffat, in his work on Jury Trial, (section 107,) says: "The principle is well established, in legal investigation, that the court is to decide upon the law, the jury upon the facts; and, acting upon this principle, it would seem to be within the province of the

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court, when the plaintiff's evidence is submitted, and not controverted by the defendant, to decide on the sufficiency of the evidence, and to order a nonsuit when the evidence has failed to give the plaintiff a right to recover." In *Pratt v. Hull*, 13 Johns. 334, the court says: "This must be a power vested in the court. It results necessarily from their being the judges of the law of the case when no facts are in dispute." Say the supreme court of Connecticut in *Naugatuck R. Co. v. Waterbury B. Co.*, 24 Conn. 468: "The jury have nothing to do with the relevancy and materiality of evidence, nor with inferences of law from facts fully established or not denied." The supreme court of Maryland (*Belt v. Marriott*, 9 Gill, 331) held that whenever the testimony adduced by either party "is so light and inconclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved." Say the supreme court of Maine, in *Connor v. Giles*, 76 Me. 132; "There is no practical or logical difference between no evidence and evidence without legal weight. There is no object in permitting a jury to find a verdict which a court would set aside as often as found." We believe the true rule, and that which now finds very general recognition, to be that where the evidence is such that the trial court would, in the event of a verdict thereon, feel compelled to set it aside, it is the duty of the court to take the case from the jury. Nor do we think trial courts are, or will be, over anxious to assume this responsibility. Our experience is to the contrary. The supreme court of Missouri administer an expressive rebuke to the trial courts of that state for the exhibition of weakness they give in submitting to juries cases in which a verdict ought not to stand if rendered for the plaintiff. It will be found in nearly all the cases upon this question that the decisions have been predicated largely upon the facts of each individual case. The circumstances of this case are peculiar. The plaintiff is seeking to recover a large amount of property, valued by her at millions, and this recovery is sought against third parties, innocent purchasers for value. It is sought under a statute punitive in its character.

Surely, under such circumstances, the plaintiff ought, at least, to make a *prima facie* case; but, as we have before stated, the only evidence in the case which goes directly to the question of abandonment is the testimony of the plaintiff; and she not only contradicts herself, but is contradicted by her own witnesses; and it requires no "reading between the lines," as counsel intimated, to satisfy the court of these facts. As to the *animus* on the part of plaintiff or her conduct on the witness stand, this court has only the record to judge from. It would serve no good purpose for the court to again review the testimony. We have examined the case with all the care it is possible for us to bestow, and our conclusion is that the petition for a rehearing should be denied, and it is so ordered.

SULLIVAN, C. J., and MORGAN, J., concur.

PIERCE v. LANGDON.

(December 5, 1891.)

CHATTEL MORTGAGE ON CROPS—VALIDITY.

1. On the 1st day of October, 1889, D. leased of G. certain lands for the term of three years, at a rental of one-third of the crop to be raised on said lands during the term. D. entered under the lease, and on January 28, 1890, executed to S. a chattel mortgage upon "the crop of wheat that may be sown and grown for the year 1890 upon said lands." The chattel mortgage was duly recorded on January 29, 1890. On March 1, 1890, D. assigned or sublet to P the land aforesaid for the term from March 1, 1890, to December, 1890. In an action by P. to recover from defendant, who, as sheriff, had seized and sold 590 sacks of wheat of the said crop of 1890 under a foreclosure of said chattel mortgage, *held*, that under the statutes of Idaho said chattel mortgage was a valid lien upon said crop, and any rights acquired thereto from D. subsequent to the recording of said chattel mortgage were subject thereto.

CLAIM AND DELIVERY—SUFFICIENCY OF COMPLAINT—AIDED BY VERDICT.

2. Where, in an action of claim and delivery, the evidence shows that the ownership of the property was the only issue, an allegation in the complaint that the plaintiff was the owner of and entitled to the property at the time of the commencement of the suit is sufficient after verdict.

SAME—JUDGMENT—INSUFFICIENT DESCRIPTION.

3. In an action of claim and delivery, the description of the property sought to be recovered simply as "590 sacks of wheat" *held* to be insufficient, and a verdict and judgment which refer only to "the property described in the complaint," giving value, are fatally defective.

(Syllabus by the Court.)

Pierce v. Langdon.

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by J. H. Pierce against George Langdon to recover the possession of certain wheat or the value thereof. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Forney & Tillinghast, for appellant.

An allegation of ownership on the day after the property was taken is not sufficient. *Manufacturing Co. v. Teetzlaff*, 53 Wis. 211, 10 N. W. Rep. 155.

The complaint is defective, in that it does not allege that the plaintiff was entitled to the possession or in possession of the property at any time. *Wade v. Mason*, 12 Gray, 335; *Gaynor v. Blewitt*, 69 Wis. 582, 34 N. W. Rep. 726; *Britt v. Aylett*, 52 Amer. Dec. 283; *Alden v. Carver*, 81 Amer. Dec. 430; *Berthold v. Fox*, 97 Amer. Dec. 243.

Chattel mortgages on crops to be sown and grown are valid. *Arques v. Wasson*, 51 Cal. 620; *Miller v. Harvesting Mach. Co.*, 35 Minn. 399, 29 N. W. Rep. 52; *Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. Rep. 40; *Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. Rep. 85; *Senter v. Mitchell*, 16 Fed. Rep. 206.

Freund & Loughary, for respondent.

To maintain replevin the plaintiff must be entitled to the possession of the property at the time the action is commenced. 1 Chit. Pl. 164; *Cobbey*, Repl. 283; *Wheeler v. Train*, 3 Pick. 257; *Manufacturing Co. v. Teetzlaff*, 53 Wis. 211, 10 N. W. Rep. 155.

Possession of personal property is prima facie proof of ownership, and is presumptive evidence that the possession is rightful. *Cobbey*, Repl. § 1017.

Uncertainty in the description is waived by pleading over. *Cobbey*, Repl. § 553.

"The jury find for the plaintiff, and against the defendant," is sufficient in substance. *Hil. Rem.* p. 96.

The refusal to give an abstract instruction is not error. *Treat v. Lord*, 66 Amer. Dec. 298.

HUSTON, J. This is an action of claim and delivery, brought by the plaintiff against the defendant for the possession of 590 sacks of wheat. The facts as they appear in the record are as follows: On the 1st day of October, 1889, one James F. Davidson leased of C. A. H. Glogaw a certain ranch situated in Latah county, Idaho, for the term of three years from the

1st day of November, 1889, at a rental of one-third of the crop or yield therefrom. That on the 28th day of January, 1890, said James F. Davidson, to secure payment of the sum of \$513, evidenced by three promissory notes made by said Davidson, executed and delivered to M. J. Shields & Co. a chattel mortgage upon "the crop of wheat that may be sown and grown for the year 1890 upon that certain piece or parcel of land lying and being in the county of Latah, territory of Idaho," etc., describing the same land described in and covered by the lease from Glogaw to Davidson, which chattel mortgage was duly acknowledged and recorded in the recorder's office of said Latah county on the 4th day of February, 1890. Default having been made in the conditions of said chattel mortgage, the mortgagee proceeded to foreclose the same, by delivering to the defendant herein—at that time sheriff of Latah county—an affidavit and notice as required by statute, and directing him to take into his possession the property described in said chattel mortgage, and sell the same in the manner prescribed by law. The defendant, by virtue of said notice and affidavit, took the property described in the mortgage into his possession, advertised and sold the same. On the 23d day of October, 1890, the plaintiff instituted his action of claim and delivery by filing a complaint and issuance of summons, to which complaint defendant filed a general demurrer, which demurrer was overruled by the court, and the action of the court therein is assigned as error. The case was tried to a jury, and a verdict was rendered in favor of plaintiff. Defendant moved for new trial, which motion was overruled by the district judge, and judgment was entered in favor of the plaintiff and against the defendant, from which judgment and order defendant appeals.

The appellant specifies 24 errors in his assignment. We shall consider and pass upon such only as we deem material to the settlement of the law of the case. The plaintiff predicates his right to recover in this case upon a certain writing executed by James F. Davidson to plaintiff on the 1st day of March, 1890, and which appears in the record, as follows: "March the first, eighteen hundred and ninety. This is to certify that James F. Davidson has subleased the Glogaw ranch to Joseph H. Pierce, and he agrees to fulfill the agreement stated on the other side, with Glo-

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gaw, for the year 1890 to December, 1890. [Signed] JAMES F. DAVIDSON. In witness: J. H. HENLEY. Witness: G. W. KIRK." This writing, it appears, was indorsed on the lease from Glogaw to Davidson, and purports to have been executed on March 1, 1890. Plaintiff testifies: "I bargained for the place at the mill on the 2d day of October, 1889. I made a contract to take the land off his [Davidson's] hands just as he had taken it from Glogaw, —a verbal agreement between him and Glogaw. I moved on the place the 3d day of October, 1889." G. W. Kirk, a witness called by plaintiff, and who was the attesting witness to the execution of the sublease from Davidson to plaintiff, and who was a brother-in-law of the plaintiff, testifies that the sublease was executed in June, 1890. It is true that the plaintiff attempts to impair the weight of this witness' testimony subsequently by showing his ignorance; but, having selected him as the attesting witness to the instrument, and placed him on the stand as a witness, we think that the plaintiff is estopped from disputing or impeaching his testimony. Mrs. J. F. Davidson, wife of James F. Davidson, the original lessee from Glogaw, testifies, referring to the lease and the sublease: "I have seen this paper before. I thought some of it was not here. It seems to me that there was more. I saw it on the Glogaw ranch, when we lived on the Glogaw ranch. Mr. Davidson had it, and he gave it to me. I had it up to June 28, 1890. Mr. Pierce came over there, and Mr. Davidson and he called for it, and of course I had to give it up to them. I gave it up to them. Mr. Pierce made some alteration in it, and he had me sign Mr. Davidson's name to it. It is my hand-writing. I did it at Mr. Davidson's and Mr. Pierce's request. They were both at my house. * * * Mr. Pierce came to our house. Mr. Davidson was out in the barn, and he [Pierce] went out there, and they came to the house together, and called for the lease, and then they called for pen and ink, and done the writing, except signing Mr. Davidson's name. Then they had me sign Mr. Davidson's name on the lease, [evidently the sublease.] They said to me, this: 'If I did not sign it they would settle my coffin for me.' They said that they had done it to defraud Mr. Shields,—to beat Mr. Shields; that was their intention. I hesitated. I told them I did not think it was right. I told them I thought it was a bad piece of

business." It is impossible, it seems to us, to resist the force of this testimony. Pierce swears that he made the contract, as he calls it, on the 2d day of October, 1889, and went into possession on the 4th of that month. On the 28th of January, 1890, the mortgage is given by Davidson to Shields; and Shields testifies that he furnished Davidson with wheat to seed said ranch, and during all the time from October 1, 1889, to June 28, 1890, the lease had remained in the possession of Davidson. Nothing is said about the subletting until the 28th of June, 1890. The conclusion, it seems to us, is inevitable, the whole matter of the subletting or subleasing was an after-thought, and was done, as testified by Mrs. Davidson, "to beat Mr. Shields." Whatever interest plaintiff took in the crop he took with full notice of the rights of Shields under the chattel mortgage, and any rights he acquired thereto or therein were subject to the chattel mortgage. The plaintiff, introducing the sublease, himself establishes the time when it was made, to-wit, March 1, 1890,—long subsequent to the execution of the chattel mortgage,—by his own testimony; and the testimony of Mrs. Davidson and George Kirk fix it at a still later period, to-wit, the 28th of June, 1890. The plaintiff testifies: "I made a contract to take the land off his hands just as he had taken it from Glogaw;" but the lease from Glogaw to Davidson was for the term of three years, while the sublease from Davidson to plaintiff was for a term from March 1, 1890, to December, 1890.

The first error urged by appellant is raised by the demurrer to the complaint, and is to the effect that it does not appear from the complaint that the plaintiff was in possession of or entitled to the possession of the property in dispute on the 20th day of October, 1890,—the date of the alleged unlawful taking. We think this objection is too technical. The complaint alleges that on the 21st day of October, 1890, the plaintiff "was the owner of and entitled to" the property in question; that on the 20th day of October, 1890, the defendant wrongfully took the same; that on the 23d day of October, 1890, and "before the commencement of this action, said plaintiff demanded of defendant the possession thereof." We think this sufficient, as it manifestly appears by the allegation of the complaint that before the commencement of the suit the property in dispute was in possession of the plaintiff;

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that defendant wrongfully took it from his possession; and that he demanded its restoration. We think this disposes of the second allegation of error.

In the case of *Gaynor v. Blewitt*, (Wis.) 34 N. W. Rep. 726, the nonsuit was granted "because of the failure of the plaintiff to show himself entitled to the possession." It is true that the right of possession does not always follow as a necessary incident of ownership, as seems to have been the case of *Gaynor v. Blewitt*; but in this case, as shown by the evidence, the right of possession was a necessary incident of ownership. The ownership of the property in question was really the only issue tried, and this, an examination of the authorities, we think, will show is the true criterion. *Gaynor v. Blewitt*, (Wis.) 34 N. W. Rep. 726; *Britt v. Aylett*, 52 Amer. Dec. 283; *Alden v. Carver*, 81 Amer. Dec. 430; *Berthold v. Fox*, 97 Amer. Dec. 243.

The third assignment of error urged by the appellant is the insufficiency of the description of the property in the complaint. The only description of the property in the complaint is "five hundred and ninety sacks of wheat." A description of the property is sufficient if it will enable a third person, aided by inquiries suggested by the instrument, to identify the property. We do not think the description in this case comes within this rule. The description "five hundred and ninety sacks of wheat" is too slight in any case, under almost any circumstances; but in a country where whole acres, at the season of the year when this suit was instituted, are covered with sacks of wheat of uniform dimensions and appearance, it conveys virtually no information, and suggests nothing upon which an inquiry could be predicated. In the action of replevin, or claim and delivery, under the Code, it is the identical property which is sought to be recovered, and the fact that a party may have a judgment for the value in case the property cannot be returned, does not avoid or render less necessary a sufficient description of the property in the complaint. *Welch v. Smith*, 45 Cal. 231; *Wells*, Repl. §§ 169-173; *Lockhart v. Little*, (S. C.) 9 S. E. Rep. 511; *Stevens v. Osman*, 1 Mich. 92.

The next error urged by the appellant is the refusal of the court to give the following instructions to the jury: "A mortgage on personal property, not owned, but to be subsequently acquired,

by the mortgagor, is good against him and all claiming under him." While we believe this instruction correctly states the law, we think the court gave it in substance in his charge.

The objection to the verdict is well taken. Had the description in the complaint been sufficient, the verdict might stand, but, as the verdict refers to "the personal property described in the complaint," and the description in the complaint is fatally defective, the verdict is not aided thereby. The same objection obtains as to the judgment.

The chattel mortgage of Davidson to Shields & Co. was a valid lien upon the crop at the time of the execution of sublease by Davidson to plaintiff, and any rights acquired by the latter under the sublease were subject to the lien of the chattel mortgage, of which plaintiff had notice. *Mitchell v. Winslow*, 2 Story, 644; *Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co.*, (Dak.) 43 N. W. Rep. 808; *Ludlum v. Rothchild*, (Minn.) 43 N. W. Rep. 139.

The instructions given to the jury by the court we think give substantially the law of the case, but the jury seems to have paid as little regard to them as to the evidence. The judgment of the district court is reversed; the case is remanded to the district court, with directions to enter judgment for the defendant, with costs of both courts.

SULLIVAN, C. J., and MORGAN, J., concurring.

SHIELDS *et al.* v. RUDDY *et al.*

(December 5, 1891.)

CHATTEL MORTGAGE—RECORD—NOTICE—RELEASE.

1. On October 1, 1889, R. leased by written indenture to D. certain lands situated in Latah county, Idaho, for the year 1890, at a rental of one-third of the crop grown, term to commence October 1, 1889. The lease contained a provision reserving to lessor "the right to seed said ground, provided the said second party [lessee] fail to do the same in good season." No provision of forfeiture or right of re-entry in lease. D. entered under lease, and continued in possession, working and operating ranch to end of term. On 28th January, 1890, D. executed chattel mortgage on said crop to S., which mortgage was duly recorded. On 24th March, 1890, D. executed to R. (lessor) a release of the lease. There was no change in the possession, management, or operating of farm after the execution of release. Crop was divided as provided for in lease. *Held*, that

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the record of the chattel mortgage was notice to all acquiring an interest from D. in the crop subsequent to record thereof that R. took release subject to rights of S. under mortgage. *Pierce v. Langdon*, ante, 878, 28 Pac. Rep. 401, (decided at present term,) followed.

SAME—FRAUD—EVIDENCE.

2. Under the evidence in this case, *held*, that the release from D. to R. was made and intended as a fraud upon S., the holder of the chattel mortgage.

ACTION FOR CONSPIRACY—TESTIMONY OF WIFE—COMPETENCY.

3. In an action for conspiracy to defraud against two defendants under a statute which declares "a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent," *held*, that the wife of one of the defendants might be examined as a witness on the part of the plaintiff, under instructions by the court to the jury, if asked, that her testimony was only to be considered as against the other defendant than her husband.

(*Syllabus by the Court.*)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by M. J. Shields & Co. against Richard Ruddy and James F. Davidson for damages for the unlawful conversion by defendants of certain wheat and barley upon which plaintiffs held a chattel mortgage. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiffs appeal. Reversed.

Forney & Tillinghast, for appellants.

After proof of the combination of the parties, the acts or declarations of one are evidence against the other. *Stovall v. Bank*, 47 Amer. Dec. 85; *Trimble v. Turner*, 53 Amer. Dec. 93; *Mamlock v. White*, 20 Cal. 601; *Reitenbach v. Reitenbach*, 18 Amer. Dec. 610; 1 Greenl. Ev. § 111.

In a suit against two or more defendants, admissions made by one of them cannot be excluded on motion of the other; the only remedy being to request a charge limiting the effect of their evidence. *Hairgrove v. Millington*, 8 Kan. 482; *Mousler v. Harding*, 33 Ind. 176; *Albaugh v. James*, 29 Ind. 398; *Crane v. Buchanan*, Id. 570.

Chattel mortgages on crops to be sown and grown are valid. *Arques v. Wasson*, 51 Cal. 620; *Miller v. Harvesting Mach. Co.*, 35 Minn. 399, 29 N. W. Rep. 52; *Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. Rep. 40; *Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. Rep. 85; *Senter v. Mitchell*, 16 Fed. Rep. 206.

J. C. Elder and *J. A. C. Freund*, for respondents.

Plaintiff having alleged existence of a

lease from one defendant to the other, parol evidence on this point is inadmissible. 1 Greenl. Ev. §§ 87, 88.

Although an agreement may be made to create a lien upon after-acquired property, yet, if the property specified in the lien, or any interest in it, is never acquired by the party agreeing to give the lien, then there is nothing to which the lien can attach, and the record of such a mortgage is not notice of any legal incumbrance. *Jones, Chat. Mortg.* § 157, note 5; *Long v. Hines*, 40 Kan. 216, 16 Pac. Rep. 339.

HUSTON, J. This is an action by the plaintiffs to recover \$1,000 damages for the unlawful conversion by the defendants of wheat and barley upon which plaintiffs held a chattel mortgage. The complaint alleges the execution and delivery by the defendant Davidson to the plaintiffs on the 28th day of January, 1890, of a certain chattel mortgage to secure the payment of certain promissory notes theretofore executed by said Davidson to the plaintiffs, and then owned and held by them. The chattel mortgage then covered the following described property, to-wit: "The crop of wheat and barley that may be sown and grown for the year 1890 upon that certain piece or parcel of land lying and being in the said county of Nez Perces, territory of Idaho, and particularly described as follows, to-wit: 'The northwest quarter of section twenty-three, township thirty-seven north, of range five W., B. M., known as the "Richard Ruddy Ranch."' All the said property being now in the possession of the said first party, in the county and territory aforesaid, and free from all incumbrances." The mortgage is in the form required by the statute, containing usual provisions as to foreclosure and sale in case of default, and provides for an attorney's fee of \$150, and other expenses, in case of foreclosure, and was duly acknowledged, sworn to by mortgagors, and recorded in the proper office of said county of Nez Perces on January 29, 1890. Complaint charges fraud and conspiracy on the part of defendants, with intent and for the purpose of cheating, wronging, and defrauding plaintiffs, by means of which conspiracy an arrangement was made between said defendants whereby said crop of wheat and barley was to be harvested, threshed, and sold by defendant Ruddy, and the proceeds thereof to be divided between defendants, to the exclusion of plaintiffs, and

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in abnegation of their rights under their said chattel mortgage. The complaint charges that in pursuance of said conspiracy said defendant Ruddy had said wheat and barley threshed and sacked, amounting to about 1,000 sacks of wheat and about 500 sacks of barley, and fraudulently sold and conveyed the same to the use of the defendants. Complaint avers the non-consent, in writing or otherwise, of the plaintiffs to the sale of said wheat or barley, or any portion of either; avers the value to be \$1,600, and that demand was made for same prior to commencement of suit. The answer admits partnership of plaintiffs, execution of notes and chattel mortgage, and non-payment, as charged in complaint; denies all other allegations of complaint except value. Answer avers execution by defendant Ruddy on October 1, 1889, to defendant Davidson, of a lease of the premises aforementioned. Entry by Davidson under said lease, which lease was for the term of one year, and is in the words and figures following, to-wit:

"Lease. Richard Ruddy to J. F. Davidson. This indenture, made this first day of October, 1889, between Richard Ruddy, of the town of Genesee, Idaho territory, party of the first part, and J. F. Davidson, of Genesee, Idaho territory, party of the second part, witnesseth that the said party of the first part, for and in consideration of the covenants hereinafter mentioned and reserved on the part of the second party, has let, and by these presents doth grant, remise, and let, unto the said second party, his executors, administrators, and assigns, all that parcel of land situated in the county of Nez Perces and territory of Idaho described as follows, viz.: 'The N. W. $\frac{1}{4}$ of section 23, Tp. 37 N., range 5 W., B. M., containing one hundred and sixty acres, more or less.' To have and hold the said premises, with appurtenances thereto belonging, unto the said second party, his executors, administrators, and assigns, for the term of one year from the first day of October, 1889, to the first day of October, 1890, at a yearly rental of one-third of all grain raised upon said premises, delivered in sacks at threshing-machine; said grain to be well sacked, said first party furnishing sacks for his one-third of the grain. And said second party by these presents covenants and agrees to plow one hundred and sixty acres, or the entire tract heretofore described, and put the same in a good con-

dition to receive the seed; the same to be sown in wheat, oats, or barley, the amount of which to be governed by the condition of land to receive grain at time of seeding. Said first party, however, reserves the right to seed said ground, provided the said second party fail to do the same in good season. Said second party is to put out squirrel poison in the spring, and use his best efforts to exterminate the pests on said premises. Said first party reserves the right to use the fields for pasture for his stock after the grain is harvested, and also the right to feed the straw upon the ground. The said second party is to stack the straw in a workman-like manner, and hold same subject to the order of said first party. Said second party is to keep all buildings and fences in good repair; and it is hereby understood and agreed that at the expiration of this lease the said second party shall give peaceable possession of said premises in as good condition as they were at the beginning of said lease, the usual wear and tear excepted; and it is also understood further, that at the expiration of this lease the said second party shall have the refusal of said premises for a period of one, two, or three years, as he may elect. In witness whereof we have hereunto set our hands and

his

seals. J. F. X DAVIDSON. [Seal.] R. mark.

RUDDY. [Seal.] Signed, sealed, and delivered in the presence of R. RICKERING. Recorded at request of C. D. Fleming, November 1st, 1889, at 4 o'clock P. M. R. P. MUDGE, County Recorder."

—That on the 24th day of March, A. D. 1890, the defendant Davidson, for the expressed consideration of one dollar, released or surrendered the said lease to the lessor named therein, the defendant Ruddy, by an instrument in writing executed by defendants, Ruddy and Davidson, and duly acknowledged and recorded, which is as follows:

"Release. This agreement, made and entered into this 24th day of March, A. D. 1890, by and between Dick Ruddy of the first part, and J. F. Davidson of the second part, witnesseth that for and in consideration of the sum of one dollar to the first party paid by said second party, the receipt whereof is hereby acknowledged, the party of the second part does hereby quit and deliver up possession unto the said first party the ranch heretofore leased and took possession of, to-wit, N.

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W. ¼ of Sec. 23, Twp. 37 north, of range 5; and the lease heretofore entered into and duly recorded in the office of the county recorder of Nez Perces county, Idaho, shall from the filing of these presents be held for naught and no longer of force and effect, and shall be considered as having terminated, and the said Dick Ruddy is hereby given full possession and control of the above-described premises. R. RUD-

his

BY. J. F. X DAVIDSON. In presence of mark.

E. R. WISWELL. C. F. BURR."

"Office of Recorder of Deeds. Territory of Idaho, county of Latah—ss.: I, C. F. Burr, a notary public in and for said county, in the territory aforesaid, do hereby certify that J. F. Davidson, personally known to me as the real person whose name is subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that he executed and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and official seal this 24th day of March, in the year of our Lord one thousand eight hundred and ninety. [Seal.] C. F. BURR, Notary Public.

"[Indorsed:] R. RUDDY. Release of Lease."

"Territory of Idaho, county of Nez Perces—ss.: I hereby certify that the within instrument was filed in this office for record on the 25th day of March, 1890, at 3 o'clock P. M., at the request of C. F. Burr, and was duly recorded in Book 54 of Release of Mortgages, on page 190. R. P. MUDGE, Recorder of Deeds."

Defendant Ruddy avers that, Davidson not being able to procure seed to sow the ground, as provided in the lease, he (Ruddy) on the 24th day of March, 1890, took from Davidson a release, and entered into possession of said premises, sowed and harvested the crop for the year 1890. We have already held in the case of *Pierce v. Langdon*, 28 Pac. Rep. 401,¹ (decided at present term,) that a chattel mortgage upon crops to be sown was valid, and, when duly recorded, was notice to all persons acquiring or claiming to have acquired rights in or to the mortgaged property through or under the mortgagor subsequent to the recording of the mortgage, and this case is already within the rule there enunciated. There was much said

on the argument about forfeiture by the lessee. There is no clause or condition of forfeiture in the lease. The provision that, in the event the lessee should fail to sow the crop in due season, the lessor might proceed to do so, cannot be construed to mean or involve a forfeiture of the term. It was simply a protection to the lessor, and, in the event of his availing himself of it, he became the creditor of the lessee to that extent. It gave him no right to declare a forfeiture of the term, or even to re-enter, except for the specified purpose. We are satisfied from the evidence that the arrangement between the defendants on the 24th of March, 1890, was fraudulent. There was no consideration for it. There was no change of possession or of the management or conduct of the farm thereafter or during the term. Davidson went into possession of the ranch in October, 1889, moved there with his family, and continued to live there, manage, and operate the ranch to the end of the term expressed in the lease, or at least until the crop was harvested and threshed. It is true, defendant Ruddy states: "After the signing of the instrument I went over and took possession of the ranch. I stayed there perhaps a half day. I did not pay him off. There was no difference to be seen there between two hours after and two hours before. I did not change anything,"—but even this oracular statement of a conclusion cannot be accepted as proof of a fact. Ruddy took no part personally in the sowing, harvesting, or threshing of the crop. He seems to have been a sort of an "absentee" after March 24, 1890. It is quite clear from the evidence that Davidson retained and received his interest in the crop as under the lease.

Samuel Nueph testifies: "He [Davidson] told me he got the two-thirds [of the crop] after Ruddy got the seed wheat. I had spoken to him, and asked him when I was going to get my pay. He said, 'Never mind that; I get my two-thirds all the same.'" Like expressions and statements on the part of Davidson are testified to by several witnesses; and after the threshing it seems the crop, or at least a portion of it, was divided into three piles, one of which was allotted to Davidson, one to Pierce, (who, it appears, was in some way interested with Davidson,) and one to Ruddy.

The first four assignments of error urged by the appellant are to the ruling

¹ Ante, 878.

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of the court in rejecting certain testimony offered by plaintiffs of statements made by defendant Davidson as to what share or interest he had in the crop in question. The court held that no statements of Davidson in regard to his (Davidson's) share or interest in the crop were admissible unless shown to have been made in the presence of Ruddy. This, we think, was error. The complaint charges a conspiracy between the defendants to defraud the plaintiffs, and introduced evidence sufficient to make a *prima facie* case; and they were thereafter entitled to prove the several or individual acts or statements of any one of the conspirators made or done in furtherance of the object of the conspiracy. This, we think, covers the objections of appellant to the instructions of the court to the jury upon the same subject. *Stovall v. Bank*, 47 Amer. Dec. 85; *Trimble v. Turner*, 53 Amer. Dec. 93; *Mamlock v. White*, 20 Cal. 601; *Reitenbach v. Reitenbach*, 18 Amer. Dec. 640; *Riehl v. Association*, (Ind. Sup.) 3 N. E. Rep. 633. A much wider latitude of inquiry is permissible in cases involving a charge of fraud than in those where no such element exists or is alleged. *Murch v. Swenson*, (Minn.) 42 N. W. Rep. 290; *Walter v. Gernant*, 53 Amer. Dec. 491; *Stewart v. Severance*, 97 Amer. Dec. 392; *Bump, Fraud. Conv.* (3d Ed.) 588, 589. The ninth assignment of error is that the court allowed E. R. Wiswell, a witness for defendants, to testify as to a conversation between the two defendants, Ruddy and Davidson. This was palpable error; so palpable in fact as not to require authorities to establish it. The next error assigned is the refusal of the court to permit Mrs. M. C. Davidson, wife of one of the defendants, to testify on behalf of plaintiffs. Section 5958 of the Revised Statutes of Idaho declares: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent." In Indiana, under a statute which excluded husband and wife as witnesses "for or against each other," it was held, in an action against husband and wife for slanderous words spoken by the wife, she is a competent witness in her own behalf, and he is a competent witness in his own behalf. *Mousler v. Harding*, 33 Ind. 176. "But it would be the duty of the court by instructions, if asked, to limit the effect of the testimony to the party testifying." We see no reason why that rule should not apply in a case like this, where a sep-

arate judgment might be entered against either of the defendants. Rev. St. § 4351; *Cooley, Torts*, (2d Ed.) 145, and note. Inasmuch as a separate judgment might have been rendered in the case against the defendant Ruddy, the witness Mrs. M. C. Davidson should have been permitted to testify, under instructions from the court to the jury that her testimony should only apply to defendant Ruddy. Judgment and order of district court refusing new trial reversed, and cause remanded; costs to appellant.

SULLIVAN, C. J., and MORGAN, J., concurring.

McCONNELL *et al.* v. LANGDON, Sheriff.

(December 5, 1891.)

ATTACHMENT—ATTACKING VALIDITY OF CHATTEL MORTGAGE.

1. A creditor has the right to attack the validity of a chattel mortgage by attaching the property described therein, giving indemnifying bond to sheriff, and selling the property.

SAME—LIABILITY OF CREDITOR AND SHERIFF.

2. The sheriff and creditor do this, however, at the peril of being obliged to pay all damages to the mortgagee if the mortgage is held good.

CHATTEL MORTGAGE ON CROPS—DESCRIPTION.

3. A crop mortgage, which describes the grain as the "crop of wheat and flax now being, standing, and growing, or all the wheat and flax now growing, upon the land known as the 'timber claim' of the mortgagor in Nez Perces county, Idaho," held good.

SAME.

4. The description, "all wheat and flax to be sown and grown upon the land described," without specifying the year in which it is to be sown and grown, held insufficient.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. C. PIPER, Judge.

Action by McConnell, Maguire & Co., against S. J. Langdon, sheriff, to recover damages for defendant's refusal to sell certain mortgaged chattels. There was judgment for plaintiffs. From an order overruling a motion for a new trial, defendant appeals. Reversed.

Forney & Tillinghast, for appellant.

The court erred in refusing to allow defendant to amend his return to make it conform to the facts. *Jefferies v. Rudloff*, 73 Iowa, 60, 34 N. W. Rep. 756; *Thatcher v. Miller*, 11 Mass. 413; *Spellmyer v. Gaff*, 112 Ill. 29, 1 N. E. Rep. 170; *Shenandoah Val. R. Co. v. Ashby's Trustees*, 86 Va. 232,

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9 S. E. Rep. 1003; *People v. Ames*, 35 N. Y. 482.

A demurrer will only lie to the whole pleading, or to the whole of a particular cause of action or defense. It cannot be directed to a portion only of a single cause of action or defense, for the manifest reason that a demurrer raises an issue of law upon which the court is to render judgment. *Knoblauch v. Hoglesong*, 38 Minn. 459, 38 N. W. Rep. 366; *Locke v. Peters*, 65 Cal. 162, 3 Pac. Rep. 657; *Tunnel Co. v. McKenzie*, 67 Cal. 490, 8 Pac. Rep. 22.

The officer's return did not estop him to prove that the mortgagee in the foreclosure proceedings had no property interest in the property which he held under attachment. *Rogers v. Cromack*, 123 Mass. 582; *Denny v. Willard*, 11 Pick. 519; *Roberts v. Wentworth*, 5 Cusb. 192; *State v. Harper*, 94 N. C. 23; *Barker v. Binninger*, 14 N. Y. 279; *Bigelow*, *Estop.* (5th Ed.) pp. 642, 643.

Sweet & Elder and *Freund & Loughary*, for respondents.

It was too late for appellant to amend his return. *Bigelow*, *Estop.* (3d Ed.) pp. 549-551, 553, note 3; *Barnard v. Stevens*, 16 Amer. Dec. 733; *Freem. Judgm.* (1st Ed.) § 366; *Simmons v. Bradford*, 15 Mass. 82; *Meister v. Birney*, 24 Mich. 435.

MORGAN, J. The complaint alleges that the plaintiffs, on the 2d day of November, 1887, executed and delivered to the defendant, as sheriff, affidavit and notice required by law, and demanded that the said sheriff proceed to sell the personal property in the said affidavit and notice described by virtue of a chattel or crop mortgage owned by plaintiffs, which is attached to the complaint, and marked "Exhibit A." The mortgage was dated April 20, 1887; was given by A. Matheason, a farmer, to the plaintiffs herein, to secure the payment of the sum of \$553, then owing by said mortgagor to the plaintiffs; and covered the following crop, viz.: "The crop of wheat and flax now being, standing, and growing, or that is to be sown and grown, upon that certain piece of land situated, * * * and more particularly described as follows, viz.: All the wheat and flax now growing or that is to be sown and grown on the south half of the south-west quarter and the west half of the south-east quarter of section twenty-two, in township thirty-eight north, of range five west, Boise meridian, known as

the 'timber claim' of the said party of the first part, the mortgagor." Said mortgage was duly acknowledged and recorded April 20, A. D. 1887. The complaint further alleges that said defendant, as sheriff, refused to sell the said property by reason of a levy of a writ of attachment thereon by himself, as sheriff, prior to the levy under and by virtue of said notice, affidavit, and chattel mortgage, (a copy of said affidavit, notice, and return is annexed to the complaint;) alleges damage; and prays judgment in the sum of \$552.12, and interest thereon. The defendant filed his amended answer, admits partnership of plaintiffs, and that the defendant was the duly elected, qualified, and acting sheriff as alleged. Second paragraph admits that on November 2, 1887, the plaintiffs, by their attorneys, delivered to the defendant the affidavit and notice attached to the complaint and marked "Exhibit F," but denies that the same was an affidavit required by law. And third paragraph denies that he (defendant) ever refused to sell the property as by said notice he was required to do, or any part thereof. Denies that as such sheriff, under said mortgage, or under said affidavit, or under said notice, or under any authority whatever, he was authorized or required to sell any property whatever. Denies that the said mortgage was a lien upon or authorized the sale of the property therein described, or any part thereof. Denies that under and by virtue of said chattel mortgage, or under or by virtue of said affidavit or notice, defendant ever levied upon or took into his possession any property described in the said chattel mortgage, or said affidavit, or said notice. Admits that he made the return upon the affidavit for foreclosure of the mortgage, which is as follows: "Territory of Idaho, county of Nez Perces—ss.: I hereby certify that I received the within affidavit on the second day of November, 1887, and proceeded to levy, and did levy, upon the within-described property on the second day of November, 1887, but by reason of a writ of attachment placed in my hands on the first day of November, 1887, and having levied, by virtue of said writ, upon the property described in the within affidavit, with instructions from the plaintiffs named in said writ to hold said property regardless of said mortgage, I therefore refuse to proceed with said foreclosure. Dated this tenth day of November, 1887. S. J. LANGDON, Sheriff. By GEORGE LANGDON, Depu-

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ty." And in the same paragraph alleges that at the time of making said return he had and held under and by virtue of the writ of attachment, duly issued out of the probate court of the county of Nez Perces, Idaho, in an action then pending, wherein Frank Brothers Implement Company was plaintiff, and the said Andreas Matheason and Anna Matheason, his wife, were defendants. That at the time of making said return on said affidavit this defendant, by mistake, supposed that the said grain described in the said affidavit was the same grain which he had in his possession under said attachment. Whereas said defendant alleges, upon information and belief, that the said property he thus had in his possession under said writ was not, nor any part thereof, any of the property described in the mortgage, affidavit, or notice. The fourth paragraph denies damage, etc. The trial was had before the court, a jury being waived, and the court found for the plaintiffs, and gave judgment against the defendant in the sum of \$928 and costs. Defendant moved for new trial, which being denied, he appeals to this court.

We shall take such of the alleged errors, in the order in which they are stated by the defendant, as are deemed necessary to a determination of the material issues in the case. The first error assigned by defendant is: "The court erred in overruling the motion of the defendant, S. J. Langdon, to amend his return upon the affidavit of J. C. Elder, attached to the amended complaint herein, marked 'Exhibit B.'" It is always in the discretion of the court to permit amendments to the return of the officer in order to make it conform to the actual facts. It will be noticed that in the affidavit of the deputy-sheriff in support of defendant's motion for leave to amend his return the affiant states that he did not levy upon any wheat or flax grown or growing upon the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 22 in township 38 N., of range 5 W., Boise meridian, and goes on to state that the said premises, as above described, were not, nor was the crop grown thereon, at any time the property of the said Matheason or his wife; but does not state that the wheat and flax-seed levied upon by the sheriff, both under the attachment and by virtue of the foreclosure proceedings, was not grain grown upon the land "known as the 'timber claim' of the said mortgagor." If it was grain owned by the

said Matheason, and grown upon the said timber claim, in said county of Nez Perces, it would be within the description in the mortgage; and the return, as it stood upon the affidavit, would be proper, and any amendment thereof would be improper. As it was not denied in the affidavit or otherwise that it was grain raised upon said timber claim, and belonged to the said Matheason, and was therefore included in the mortgage, it is presumed that the court below refused to permit the amendment to be made, because he was satisfied that the return correctly stated the facts. In that case his denial was correct, and is approved by this court.

The second assignment of error is as follows, to-wit: "The court erred in sustaining the demurrer of the plaintiffs herein on the 20th day of June, 1891, to paragraphs two and three of the defendant's amended answer." Paragraph 2 admits the delivery of the affidavit and notice for the foreclosure of the mortgage, but denies that the same was an affidavit required by law. This is a legal conclusion, and therefore not proper or necessary. In the same paragraph the defendant denies that said affidavit or notice or demand was executed or made under or by virtue of the chattel or crop mortgage or any mortgage then owned by plaintiffs, other than the mortgage a copy of which is marked "Exhibit A," and attached to the complaint herein. There is no allegation in the complaint that the said affidavit, notice, and demand were made under any other mortgage than the one marked "Exhibit A," and attached to and made a part of the complaint. The denial, therefore, is of a matter that had not been alleged, and is superfluous. The demurrer to paragraph 2 of the defendant's answer was therefore properly sustained. The better practice in this case would have been to have moved to strike out paragraph 2. Paragraph 3 of the answer denies that as such sheriff, under said mortgage or said affidavit or notice, or under any authority whatever, he was authorized or required to sell any property whatever; denies that said mortgage was a lien upon, or authorized the sale of, the property therein described, or any part thereof; denies that under or by virtue of said chattel mortgage or said affidavit or notice defendant ever levied upon or took into his possession any property described in said chattel mort-

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gage, affidavit, or notice. These denials put in issue the validity and sufficiency of the mortgage, affidavit, and notice for foreclosure, and the identity of the grain levied upon with that described in the mortgage; all of which were material issues, which the plaintiffs in the attachment suit, who are the real parties in interest, had the right to raise, and they were not elsewhere raised by the answer. The same paragraph alleges the levy of the attachment in the suit of Frank Brothers Implement Company vs. Andreas Matheason upon the wheat and flax-seed in the controversy, and is proper. The demurrer to the third paragraph should have been overruled. The sustaining the demurrer thereto prevented the defendant from introducing any evidence thereunder, and was therefore error.

The next error assigned which it is thought necessary to notice is the fourth, as follows: "The court erred in allowing any testimony to be introduced on the part of the plaintiffs in this cause, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and in overruling the defendant's objection thereto." Under this alleged error the defendant attacks the validity of the mortgage and the sufficiency of the description of the property therein. The mortgage appears to be duly and legally executed, acknowledged, and recorded. No objection is made to any part of the complaint, except to this description in the mortgage. The description is as above set forth. There can be no doubt of the right of the attaching creditor to test the validity of the mortgage by levying his attachment upon the property claimed to be covered thereby, giving the sheriff bond to save him harmless by reason of such levy and a sale thereunder, and instructing him to sell regardless of the mortgage, as was done in this case. He does so, however, at the peril of being compelled to pay all damages that may accrue to the mortgagee by such action if the mortgage is held good. The description would evidently be good if it covered the crop of wheat and flax now being, standing, and growing, or all of the wheat and flax now growing, on the land described, and known as the "timber claim" of the said mortgagor. As it described property then in existence standing and growing upon said land, the place where said wheat and flax was standing and growing is given, and this is about the only description that can

be given of a growing crop. There is and can be nothing to distinguish it from other growing wheat and flax except the place where it is located. This description would be sufficient if the exact numbers of the land were not given. A description of property is sufficient if it will enable a third person, aided by inquiries suggested by the instrument, to identify the property. *Rawlins v. Kennard* (Neb.) 41 N. W. Rep. 1004; *Jordan v. Bank*, (Neb.) 9 N. W. Rep. 655; *Price v. McComas*, (Neb.) 31 N. W. Rep. 512; *Peters v. Parsons*, (Neb.) 24 N. W. Rep. 688; *Pierce v. Langdon*, (Idaho,) 28 Pac. Rep. 401.¹ The description of wheat and flax as being, standing, and growing upon the land known as the "timber claim" of the said Matheason, mortgagor, was sufficient to put third persons on such inquiry as would identify the grain, and was therefore sufficient notice to creditors. That part of the description, however, which attempts to convey all the wheat and flax to be sown and grown upon the land described, without specifying the year in which said grain is to be grown, would apply as well to the crop to be raised in any subsequent year as to the crop raised in the year 1887, and is too indefinite and uncertain, and is void as to creditors. *Cole v. Kerr*, (Neb.) 26 N. W. Rep. 598; *Pennington v. Jones*, (Iowa,) 10 N. W. Rep. 274; *Barr v. Cannon*, (Iowa,) 28 N. W. Rep. 413; *Eggert v. White*, (Iowa,) 13 N. W. Rep. 426. This disposes of all the questions raised by the appeal and necessary to a final determination of the case. Judgment reversed, and new trial granted; costs of this appeal awarded to the defendant.

SULLIVAN, C. J., and HUSTON, J., concur.

HAMILTON v. SPOKANE & P. RY. CO. *et al.*

(December 8, 1891.)

DECISION BELOW—CONSTITUENTS—FINDINGS.

1. Decision of court, under section 4407, Rev. St. Idaho, should contain only the ultimate facts found, and the conclusions of law applicable to such facts.

PUBLIC LANDS—PRE-EMPTION FILINGS—HOMESTEAD ENTRY—RAILROAD RIGHT OF WAY—DAMAGES.

2. One Wilkins filed declaratory statement November 7, 1888, and relinquished the same October 5, 1889, on which day Daniel made homestead entry of the same tract, and on April 29,

¹Ante, 878.

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1890, made cash entry of said tract, and on September 3, 1890, conveyed by warranty deed to Hamilton a portion of said tract. The railroad company claims right of way over tract conveyed to Hamilton, by reason of compliance with act of congress of March 3, 1875, and the approval of the plat by the secretary of the interior, July 11, 1889. Hamilton claims damages because of company grading its road-bed through said conveyed tract. *Held*, that Wilkins' pre-emption filing did not exempt said land from the grant of right of way to the company, as he relinquished the same before perfecting the title; that there was no privity of estate between said Wilkins and Daniel; that patent to Daniel would take effect, by relation, October 5, 1889, the date of Daniel's homestead entry, and would not ante-date the grant to the company.

SAME—GRANTS IN AID OF CONSTRUCTION OF RAILROAD—RIGHT OF WAY.

3. Distinction between grants of land to aid in construction of railroads and grants of right of way commented upon.

(*Syllabus by the Court.*)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by W. J. Hamilton against the Spokane & Palouse Railway Company and others for damages alleged to have been sustained by defendants' grading a railway road-bed through plaintiff's land. From a judgment for plaintiff, defendant railway company appeals. Reversed.

Albert Hagan, for appellant.

Under the practice of express findings, nothing is implied, but full findings are required without any request therefor. Hayne, New Trials & App. p. 718, § 239.

When a route is adopted by the company, and a map is filed with the secretary of the interior, and accepted by that officer, the route is then "established." It is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. Van Wyck v. Knevals, 106 U. S. 366, 1 Sup. Ct. Rep. 336.

Whoever settles upon or appropriates for any purpose, under any law of the United States, any portion of the public lands on the possible line of the right of way of a road after the date of its "distinct location," does so subject to the grant of the right of way to the railway company. Bybee v. Railroad Co., 26 Fed. Rep. 589, 590; Railroad Co. v. Alling, 99 U. S. 475; Doran v. Railroad Co., 24 Cal. 259; Railroad Co. v. Tevis, 41 Cal. 492; Union P. R. Co. v. Douglas Co., 31 Fed. Rep. 540; U. S. v. Garretson, 42 Fed. Rep. 22; Turner

v. Union, 5 McLean, 344; Railroad Co. v. Meadows, 46 Fed. Rep. 254.

J. A. C. Freund, for respondent.

Public grants convey nothing by implication. Charles River Bridge v. Warren Bridge, 11 Pet. 420; 1 Washb. Real Prop. 202; Bartram v. Turnpike Co., 25 Cal. 285; Lansing v. Smith, 21 Amer. Dec. 89; Wilcoxon v. McGhee, 54 Amer. Dec. 410.

A grant or a franchise must be strictly construed, and, if a corporation is grantee, when there is a doubt the public should have the benefit, and the construction given against the corporation. Spring Val. Water Co. v. San Francisco, 52 Cal. 112.

The cancellation of a homestead entry after a grant to the railroad, and the definite location of its line of road, does *not* inure to the benefit of the railroad company, but the land reverts to the government, and a person who makes a homestead entry of the same, and receives a patent therefor, after such cancellation of the first entry, is entitled to hold the same as against the railroad company. Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. Rep. 112; Railway Co. v. Dunninger, 113 U. S. 629, 5 Sup. Ct. Rep. 566.

There must be a person *in esse* to give, as well as to take, in order to make a deed of an immediate estate by or to such person good. 3 Washb. Real Prop. p. 281, 282; Hunter v. Watson, 12 Cal. 363.

Titles from the government and from individuals are governed by the same rules. Brill v. Stiles, 35 Ill. 308; Crear v. Crossly, 40 Ill. 178.

SULLIVAN, C. J. This is an action brought by the respondent (plaintiff below) against the appellant (defendant below, and three other defendants, who are not appellants here) to recover \$250, damages alleged to have been sustained by reason of appellant having graded a railway road-bed through land claimed by the respondent, and for hauling and piling dirt upon said land. The complaint alleges that the defendant is a railroad corporation; that the plaintiff, on the 3d day of September, 1890, was, and ever since has been, the owner of a piece or parcel of land, being a part of lot 4, section 7, township 39 N., range 3 W., B. M., containing an area of 2.28 acres, and described said parcel of land by metes and bounds; and, further, that the appellant, on the 20th day of November, 1890, entered upon said land unlawfully and

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with force, against the wishes of respondent, and hauled a large quantity of dirt upon and graded a road-bed for a railroad track through said land, to plaintiff's damage in the sum of \$250, for which sum judgment is demanded. The appellant by its answer admits that it is a duly-organized and existing railroad corporation, and denies all other allegations of the complaint, except the allegation that it entered upon said land and graded a railway road-bed through said land. The answer further states that the appellant claims the right of way over the said tract of land by virtue of an act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States;" and that it acquired the right of way over said land to the extent of 100 feet from each side of the middle of its track by reason of a compliance with the terms and conditions of said act of congress; and denies that plaintiff is damaged in and sum whatever by reason of said road-bed having been graded across said land. The court tried the cause without a jury, and entered judgment against the appellant for \$250, damages and costs of suit. From that judgment the appellant brings the case to this court, and demands a reversal thereof, and assigns six specifications of error as ground therefor.

The first and second specifications of error are substantially as follows, and will be considered together: That there are no findings to sustain the judgment; that a written decision of the court is not a finding, and will not sustain a judgment; that, even if the written decision is a finding, it will not sustain the judgment. I do not think the objections raised by these specifications of error well taken. I am of the opinion that the written decision of the court below contains findings of fact and conclusions of law sufficient to sustain the judgment of the court below, provided such finding of facts warrants the conclusions of law. I will, however, say that the document containing the finding of facts and conclusions of law is contained in the transcript, and covers 18 printed pages thereof. Said document contains a statement of the contents of the pleadings, the substance of the testimony, and a review and comment on the authorities cited by counsel on the argument of the case in the court below, and the reasons for the decision, but fails to technically comply with section 4407 of the

Revised Statutes. Said section requires the trial court, when a case is tried to the court without a jury, to give its decision in writing, in which the facts found and the conclusions of law applicable to such facts must be separately stated. The decision should not contain a statement of the case and the reason for the decision. The said document is, technically speaking, an opinion, rather than a decision, within the meaning of the term "decision" as used in said section 4407. The "decision" should contain only the ultimate facts established by the evidence, and the conclusions of law resulting therefrom, and nothing more. *Hidden v. Jordan*, 28 Cal. 305; *Bryan v. Maume*, Id. 244; *Jones v. Block*, 30 Cal. 229; *McClory v. McClory*, 38 Cal. 575; *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. Rep. 872; *Hayne*, New Trials & App. § 242, p. 734. The opinion of the court below will in many cases save us labor, and we are always glad to have it, but it should be entirely separate from the finding of facts and conclusions of law.

The four remaining specifications of error will be considered together, and are as follows: (3) "The evidence shows that the defendant the Spokane & Palouse Railroad Company has acquired a right of way over said land, and constructed the road-bed thereover, prior to the time when the plaintiff acquired any right therein." (4) "That the defendant's map was approved July 11, 1889, by the secretary of the interior, and the homestead entry of Wm. G. Daniel was not made until the 5th day of October, 1889, nor did the said Daniel sell the land in dispute to the plaintiff until September 3, 1890; therefore the said railroad company was prior in right." (5) "That the railroad line has already been built across the land in dispute prior to its purchase by Hamilton, the plaintiff, that he has no condemnable interest in the land." (6) "That upon the opinion of the court the facts as set out entitle the defendant to judgment."

The appellant contends that the evidence shows that the said Spokane & Palouse Railway Company acquired the right of way over said land on July 11, 1889, by reason of its having complied with an act of congress dated March 3, 1875. To determine this contention, I refer to the evidence. The evidence shows that one James H. Day filed his declaratory statement No. 3,446, under the pre-emption laws of the United States, in the proper local land-office, for a quarter section of land,

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which included the 2.28 acre tract, referred to in the complaint, and thereafter, on the 5th day of November, 1888, relinquished the same to the United States; that on the 7th day of November, 1888, one James L. Wilkins filed declaratory statement No. 3,716, in the proper local land-office, for said quarter section of land; that on the 5th day of October, A. D. 1889, said Wilkins relinquished the land (covered by his said filing) to the government of the United States; that on the 5th day of October, 1889, one William G. Daniel entered said land as a homestead, under and by virtue of the homestead laws of the United States, at the proper local office, claiming settlement October 4, 1889; that on the 29th day of April, 1890, said William G. Daniel commuted his said homestead entry, and made cash entry of the land covered thereby, and received the final certificate of purchase from the register of said United States land-office therefor; that on the 3d day of September, 1890, the said William G. Daniel and Alice Daniel, his wife, for the consideration of \$100, conveyed by warranty deed the said 2.28 acres of land to the respondent; that the respondent is the owner of said 2.28 acre tract, and that, by reason of appellant having graded its road-bed thereover, the respondent has sustained damage, provided that appellant had not acquired a right of way over said tract of land under said act of congress as aforesaid; that the appellant was a duly-organized and existing railroad company or corporation, and that said company had complied with the terms and conditions of the said act of congress of March 3, 1875, in regard to acquiring a right of way through the public lands of the United States; that the profile map of the appellant's road through the said 2.28 acres of land (and across other lands) was approved by the secretary of the interior on the 11th day of July, 1889, and such approval noted on said plat, as required by section 4 of said act. The court below substantially found the facts as above stated, with the additional fact that respondent had sustained damages in the sum of \$250; and, as a conclusion of law deduced therefrom, found that the respondent was entitled to judgment for \$250 and costs of suit.

There is no dispute as to the main facts. The principal point in the case, then, is as to whether the conclusion of law deduced from the finding of facts is erroneous; in other words, is the respondent en-

titled to judgment on the facts found? The land in question was a part of what is known and designated as "unoffered public lands of the United States." That class of land is subject to entry under the pre-emption and homestead laws of the United States. It is also included in the act of congress above referred to, through which railroads may acquire rights of way under said act of congress. It will be observed that the land in controversy had been filed upon under the pre-emption laws of the United States, and prior to the approval of appellant's profile map, first by one James H. Day, and after his relinquishment by James L. Wilkins, who relinquished his said filing on the 5th day of October, 1889. The inchoate pre-emption rights of Day and Wilkins under said pre-emption filings were abandoned by such relinquishments.

There is no evidence showing that either of said pre-emption claimants had complied with the pre-emption law as to settlement, residence, improvement, and cultivation. The land covered by their said filings had not been disposed of by the government to either of them. It is not claimed that there was any privity of estate between both or either of said pre-emption claimants and William G. Daniel, (the grantor of respondent,) and there was none. The case of *Bramwell v. Railroad Cos.*, 2 Dec. Dep. Int. 844, is decisive of that point. In that case one Thomas filed his declaratory statement May 19, 1869, and relinquished the same March 29, 1871, on which last-named day Bramwell made homestead entry of the same tract. The defendant companies claimed the tract jointly under an act of congress dated May 6, 1870. The grant to the railroad companies took effect subsequent to the date of Thomas' filing, and prior to his relinquishment. That case is very similar to the one at bar. Acting Secretary Joslyn in that case (page 844) says: "I concur with you [the honorable commissioner] in your opinion, as it will be observed that the record fails to discover [disclose] any privity of estate between Thomas and Bramwell, whereby the latter's rights could be made to antedate the grant, or to take effect by relation as of the date of Thomas' initiation of claim to the premises. Moreover, it should be observed that Thomas' right was merely inchoate, he having relinquished without perfecting the same or doing anything to that end." The record in the case at bar

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discloses that Wilkins relinquished his pre-emption filing on October 5, 1889, and that respondent's grantor made his homestead entry for said land on said 5th day of October. No privity of estate is shown or existed between Wilkins and Daniel, whereby the latter's homestead right to said land would be made to antedate the grant of right of way to the appellant, or to take effect, by relation, as of the date of Wilkins' pre-emption filing. Wilkins' pre-emption claim was merely an inchoate or inceptive right, and he relinquished the same without perfecting his title to the said land. The patent from the United States to Daniel (the grantor of respondent) will take effect, by relation, as of the date of his homestead entry, to-wit, October 5, 1889, whereas the grant to appellant was made July 11, 1889. The land in question was not disposed of by the government until after the grant of the right of way to appellant. Section 4 of said act provides that, after the approval of the plat, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The respondent contends that Wilkins' said pre-emption filing reserved said land from the operation of said grant, and cites a number of authorities in support of such proposition. Upon that proposition the respondent cites *Railway Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112; also *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; also *Railroad Co. v. Pracht*, (Kan.) 1 Pac. Rep. 319; and *Fearns v. Railroad Co.*, (Kan.) 6 Pac. Rep. 237. These cases all arose under acts of congress granting lands to aid in the construction of railroads, and each of said acts contains a provision reserving from such grants all lands to which a pre-emption or homestead right had attached, and are not in point. Mr. Justice FIELD, in the case of *Railroad Co. v. Baldwin*, 103 U. S. 426, very clearly draws the distinction between grants of land to aid in the construction of a railroad and a grant of a right of way, in the following language: "But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purpose designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of

the terms. Those lands would not be the less valuable for settlement by a road running through them; on the contrary, their value would be greatly enhanced." "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route." The sixth section of the act under which that case arose is very similar to the first section of the act of March 3, 1875. It grants the right of way through the "public lands" without reservation. The act of March 3, 1875, grants the right of way through "public lands," except as reserved in section 5 of said act, to-wit: "All lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale." In addition to the reservations mentioned in the act of March 3, 1875, the acts granting lands to aid in the construction of roads reserve all lands from the effect and operation of such grants "to which a homestead or pre-emption claim had attached." The case of *U. P. Ry. Co. v. Douglass Co.*, 31 Fed. Rep. 540, cited by appellant, is a case which arose under the act of congress of July 1, 1862, (12 St. U. S. 491,) granting the right of way to the Union Pacific Railroad Company over public lands. The question presented was, did the grant of the right of way operate upon sections 16 and 36, the sections granted by the organic act of 1854 to the territory of Nebraska for school purposes? It will be observed that the grant to the railroad was later than the grant to the territory of Nebraska. Mr. Justice BREWER says, on page 540: "But the power of congress over lands of which the fee has not already passed and vested is unquestioned." "In the land grant made by this act, congress made specific exceptions of lands to which any pre-emption, homestead, or other claim had attached, while the grant to the right of way is absolute and without exception." In that case Mr. Justice BREWER also discusses the meaning of the term "public lands," referring to a quotation from the opinion in

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Wilcox v. Jackson, 13 Pet. 498, which authority is cited by respondent as an authority in this case. He says: "On the meaning of the term 'public lands,' the language, which is very broad, must be construed with reference to the facts of that case; and there it appeared that land had been reserved for military purposes, and it was held that a subsequent act for the sale of lands in that territory did not operate upon this particular reserved tract. This only shows that, when land has been once reserved, congress will not be presumed to have intended a disposition of it in any other way, unless the intent is clearly expressed; but that does not meet the question in this case, for the act of congress of July 1, 1862, does not purport to grant the fee, but only a right of way;" and cites with approval *Railroad Co. v. Baldwin*, supra; also *Railroad Co. v. U. S.*, 92 U. S. 733. In the following authorities, the distinction between a land grant and a grant of a right of way is recognized and commented upon: *Railroad Co. v. Tevis*, 41 Cal. 492; *Doran v. Railroad Co.*, 24 Cal. 259; *U. S. v. Garretson*, 42 Fed. Rep. 22; *Turner v. Union*, 5 McLean, 344; *Railroad Co. v. Meadows*, 46 Fed. Rep. 254; *Railroad Co. v. Alling*, 99 U. S. 475. In *Bybee v. Railroad Co.*, 26 Fed. Rep. 589, Judge DEADY says: "The grant of a right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in section 8 of the act of 1866 does not include the right of way, but is limited to the 'lands' remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition, except that which the law tacitly annexes to all such easements, —the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose. But it is also a present absolute grant, and takes effect when the line of the road is located, from the date of the act, as against any intervening claim or settlement whatever." In the case at bar the grant took effect from the date of the approval of the plat, which was July 11, 1889. The act of March 3, 1875, grants the right of way through the public lands of the United States upon conditions. The only reservations therein are contained in section 5 of said act, as above stated. The inchoate pre-emption right of Wilkins,

which did not ripen into title, does not come within either of the above reservations. Section 4 of said act declares that, after the approval of the profile map by the secretary of the interior, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." The government of the United States had not disposed of said land within the meaning of the term "disposed of," as used in the fourth section of said act, prior to October 5, 1889, the date of Daniel's homestead entry. The patent to be issued to Daniel will, by relation, take effect as of the date of his homestead entry, and no earlier. The judgment of the district court should be reversed, and judgment entered in favor of the appellant, dismissing this action, and for costs of suit; and it is so ordered.

MORGAN and HUSTON, JJ., concur.

STATE *ex rel.* HOLCOMB *v.* INHABITANTS OF TOWN OF POCATELLO.

(December 10, 1891.)

MUNICIPAL CORPORATIONS — ORGANIZATION BY COUNTY COMMISSIONERS — FAILURE TO DESIGNATE METES AND BOUNDS.

Under section 2224, Rev. St. Idaho 1887, the board of county commissioners of Bingham county incorporated the town of Pocatello, but failed to designate the metes and bounds of said town in the body of the order incorporating said town, but referred to the petition, and granted the petitioner's prayer therein contained, without change or modification. *Held*, that as the recital in the order of the board referred to the petition as a basis for such order, and the metes and bounds were sufficiently explicit in said petition, said petition was regarded as a part of the proceedings of said board, and consequently considered *in pari materia*.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Action in the nature of *quo warranto* by the state, on the relation of J. T. Holcomb, against the inhabitants of the town of Pocatello, to declare void the charter and to forfeit the franchises of defendant corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

George H. Gorman and *Hawley & Reeves*, for appellant.

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its terms. *Broom, Leg. Max.* (Ed. 1864,) p. 415; *Mill Co. v. Muxlow*, 115 N. Y. 170, 21 N. E. Rep. 1048; *Thornley v. U.*

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S., 113 U. S. 310, 5 Sup. Ct. Rep. 491; *Poor v. Considine*, 6 Wall. 458.

Where the statute provides that an application for incorporation must be signed within a certain time preceding its presentation, the record must affirmatively show that this was done. In *re Osborne*, 101 Pa. St. 284.

The right to enjoy the franchise of a municipal corporation depends upon a compliance with the provisions of the statute creating it, and until those provisions are complied with no municipal corporation can exist. *People v. City of Riverside*, 66 Cal. 288, 5 Pac. Rep. 350; *State v. Young*, 4 Iowa, 561; *State v. Ocean Beach*, 48 N. J. Law, 375, 5 Atl. Rep. 142; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. Rep. 465.

All statutory provisions relating to the incorporation of towns must be strictly complied with. *Haynes v. Washington Co.*, 19 Ill. 66; *Stephens v. People*, 89 Ill. 337.

A party will not be allowed to try his case on one theory in the trial court, and then spring a fresh theory on his adversary in this court. *Bray v. Seligman*, 75 Mo. 31-40; *Harrington v. Minor*, 80 Mo. 270; *Dillard v. Thornton*, 29 Grat. 392.

A party to a judgment who has not appealed will not be heard to allege errors in this court. *Poppe v. Athearn*, 42 Cal. 606; *Dougherty v. Henarie*, 47 Cal. 9.

Smith & Smith and *T. M. Stewart*, for respondent.

Quo warranto will not be entertained upon the relation of merely a private citizen without interest in the controversy, even though leave of the court be first sought for that purpose. *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Farmers' Bank*, Id. 415; *Com. v. Railway Co.*, Id. 518; *Dill. Mun. Corp.* §§ 898, 899; *People v. North Chicago Ry. Co.*, 88 Ill. 537; *Com. v. Union, etc., Ins. Co.*, 5 Mass. 230; *Rice v. Bank*, 126 Mass. 304.

A substantial compliance with the statute is all that is required. In *re Spring Val. Water Works*, 17 Cal. 132; *Water Works v. San Francisco*, 22 Cal. 434; *People v. Stockton & V. R. Co.*, 45 Cal. 313.

SULLIVAN, C. J. This is an action, in the nature of *quo warranto*, brought in the name of the state by S. C. Winters, district attorney of the fifth judicial district of the state of Idaho, on the relation of J. T. Holcomb, for the purpose of having de-

clared void the charter, and to forfeit the franchises, of the municipal corporation known and designated as the "Inhabitants of the Town of Pocatello." The action is brought under section 4612 of the Revised Statutes of Idaho. The facts as shown by the record are substantially as follows: On the 18th day of March, 1891, the relator, J. T. Holcomb, addressed his verified petition to S. C. Winters, district attorney of the fifth judicial district of this state, alleging that the said relator resides in the town of Pocatello, Bingham county, Idaho, and that he is engaged in the business of retailing spirituous, vinous, and malt liquors and cigars, and has been in said business. The complaint alleges that the inhabitants of the town of Pocatello, in Bingham county, state of Idaho, (under the name of the "Inhabitants of Pocatello,") have since the 23d day of April, 1889, used and exercised all the liberties, privileges, and franchises that an incorporated town or village may use and exercise, under and by virtue of the provisions of section 2230 of the Revised Statutes of Idaho, without any right or authority so to do, to the great damage and prejudice of the state of Idaho and of the relator; that the relator is a resident and tax-payer of said town; and prays that the defendant be excluded from all corporate rights, privileges, liberties, and franchises, and that defendant be adjudged not to be a corporation. The answer denies the allegations of the complaint, and for a further defense alleges substantially that the town of Pocatello had been duly incorporated on the 23d day of April, 1889, by reason of a compliance with the terms and conditions of section 2224 of the Revised Statutes of Idaho, particularly setting out just what had been done thereunder. A general demurrer was interposed to said answer, and overruled by the court. Thereafter the facts were agreed to by the parties, and the case submitted to the court for decision, upon the pleadings and stipulation of facts. Judgment was rendered in favor of the defendant, from which judgment this appeal was taken, and a reversal of said judgment is demanded, and the appellant specifies two errors therefor.

The first error specified is as follows: "In overruling the demurrer to the answer." The demurrer raises the question as to whether the answer states facts sufficient to constitute a defense. In other words, the appellant contends that the

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facts stated in the answer do not show a legal incorporation of said town by the board of county commissioners, under the provisions of said section 2224 of the Revised Statutes of Idaho. Said section provides as follows: "When a majority of the taxable male inhabitants of any town or village within this territory present a petition to the board of county commissioners of the county in which said town or village is situated, setting forth the metes and bounds of their town or village, together with the adjacent bounds, in all not exceeding six miles square, which they desire to include therein, and praying that they may be incorporated, and police established for their local government, and the county commissioners are satisfied that a majority of the taxable male inhabitants of such town or village have signed such petition, and that the prayer of the petitioners is reasonable, the board of county commissioners may declare such town or village incorporated, designating in such order the metes and bounds thereof." The answer, after denying generally and specifically every allegation of the complaint, alleges as a separate defense as follows: (1) That at the regular April (1889) meeting of the board of county commissioners of Bingham county a petition was filed and presented to said board of county commissioners, signed by 169 citizens, residents and tax-payers of the town of Pocatello, praying, among other things, that said town of Pocatello be incorporated, said petition being in words and figures as follows, to-wit: "To the honorable board of county commissioners of the county of Bingham, in the territory of Idaho: The undersigned, your petitioners, respectfully represent to your honorable body that they are residents of the town of Pocatello. That the town of Pocatello is situated in the county of Bingham, territory of Idaho. That your petitioners constitute a majority of the taxable male inhabitants of said town of Pocatello. That said town is situated within the following boundaries, that is to say: All in township six south, of range thirty-four (34) east, of Boise meridian, to-wit, west one-half section twenty-five, (25,) all of section twenty-six, (26,) east one-half of section twenty-seven, (27,) north-west quarter of section thirty-six, (36,) north one-half of section thirty-five, (35,) north-east quarter of south-west quarter section thirty-five, (35,) north-east quarter of north-east quarter of section thirty-four,

(34,) in all not exceeding six miles square. And your petitioners pray that they may be incorporated and police established for their local government, and that from thenceforth they may be a body politic and corporate, by the name and style of the 'Inhabitants of the Town of Pocatello,' with all powers, rights, and privileges of incorporated towns and villages, as is contemplated, and in such cases especially provided, by the laws of the territory of Idaho, 1887, Revised Statutes thereof;" and signed by 169 residents and tax-payers of said town of Pocatello. And the answer further alleges facts showing a substantial compliance by the board of county commissioners with the provisions of said section 2224 in the incorporation of said town. The overruling of the demurrer was not error.

The second specification of error is as follows: "In entering judgment against appellant upon the agreed statement of fact submitted." The facts agreed to are substantially as follows: That the relator, J. T. Holcomb, was a resident and tax-payer of the town of Pocatello during all the times mentioned in the pleadings. That the affirmative allegations of the answer, relating to the petition of a majority of the taxable residents of the town of Pocatello, asking that said town be incorporated under the general statutes of Idaho, and the orders of the board of county commissioners in regard thereto, were true. That the meeting of the board at the time said petition was presented was a regular meeting of said board, and that the minutes of said meeting were not signed by the chairman or clerk. That the minutes of the adjourned meeting referred to in the answer were signed by the chairman of said board, and that said meeting was an adjourned meeting. It will be observed that the petition required by said section 2224 was presented to the board of county commissioners at the regular April (1889) meeting. That on the 13th day of April, 1889, said board adjourned their said regular meeting until the 29th day of April, 1889, for the purpose, among others, of considering said petition. The record made on the 29th day of April, 1889, clearly indicates that the said board had satisfied themselves that the said petition had been signed by a majority of the taxable male inhabitants of said town, and likewise had satisfied themselves that the prayer of the petitioners was reasonable, thus complying with

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the statute in those requirements. The record does not show what steps were taken to satisfy the board that the requisite number of the taxable male inhabitants had signed said petition, and that the prayer of the petition was reasonable, but the action of the board in granting the petition conclusively shows that said board complied with said two requirements, to-wit, had satisfied themselves that the required number of persons had signed said petition, and that their prayer was reasonable.

This brings us to the controlling contention of appellant in this case, which is that said town was not legally incorporated, for the reason that the order of the board of commissioners declaring said town incorporated failed to designate the metes and bounds thereof. The provision of said section 2224 is as follows upon that point: "The board of county commissioners may declare such town or village incorporated, designating in such order the metes and bounds thereof." The reason of this provision is obvious. The boundaries of a municipality must be fixed and certain, in order that all may know the scope or section of country embraced within the corporate limits, and over which the municipality has jurisdiction. The statute requires the board to fix the boundaries of the municipality created by them under said act. In case the boundaries are clearly designated in the petition, and the board by its order refers to such petition, and grants it, without any change or modification, it is a sufficient compliance with said provision of the statute. Certainly no one will seriously contend that the boundaries of said town are not set forth in the petition, so that they may be readily traced and easily ascertained therefrom. We are of the opinion that the recital in the order of the board referring to the petition is sufficiently explicit to warrant us in regarding the petition as a part of the proceedings, and may consequently be considered *in pari materia*. *People v. Carpenter*, 24 N. Y. 86. We think there was a substantial compliance with the statute, and that is all that is required. *People v. Railroad Co.*, 45 Cal. 306; *Water-Works v. San Francisco*, 22 Cal. 440; *In re Water-Works*, 17 Cal. 132. In the case of *Com. v. Halstead*, (Pa. Sup.) 7 Atl. Rep. 221, there was a variance in the boundaries, as given in the petition and draft, or plat on file, and the court says: "It appears, as set forth

in the eighth assignment, that an error exists in the petition and decree. The description of the boundaries there given is at variance with the draft or plot on file. The proper distances of the sixth boundary line and the bearings of the seventh are omitted. This is manifestly a mere blunder, and might, perhaps, upon proper showing, be amendable here;" thus holding that amendment of description may be made. The appellant insists on a strict construction of said section of the statute. Section 4 of the Revised Statutes of Idaho, among other provisions, provides that "the Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions, and all proceedings under them, are to be liberally construed, with a view to effect their objects and to promote justice." The proceedings of the board of county commissioners, under the statute, in the incorporation of said town, are commanded by said section 4 to be liberally construed with a view to effect the intended object. The said town was incorporated on the 29th day of April, 1889, and used and exercised the liberties, privileges, and franchises which it was authorized to use and exercise under the laws of Idaho, without question, until the commencement of this suit, on March 24, 1891. Thus for nearly two years the legality of said corporation was not questioned. No appeal was taken from the order of the board incorporating said town. The grievance of the relator is that said municipality insisted on taxing him \$100 per month for retailing cigars and spirituous liquors within the boundaries of said municipality. Charters of municipal corporations, which have for their objects the protection of the lives and property of the people, in densely populated districts, should not be overturned and set at naught except for very grave reasons. The corporate existence of such municipalities should be maintained, if possible. The judgment of the court below is affirmed, with costs.

MORGAN and HUSTON, JJ., concur.

PENCE *et al.* v. SWEENEY *et al.*, (McLELLAND, Intervenor.)

(December 11, 1891.)

INTERVENTION—SUFFICIENCY OF COMPLAINT.

1. The court below allowed McLelland to intervene. *Held*, that his complaint in interven-

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tion sets forth facts sufficient to bring him within the requirements of section 4111, Rev. St. Idaho.

RECEIPT AND RELINQUISHMENT—COMPETENCY AS EVIDENCE.

2. A receipt and relinquishment signed by the defendants, although made without the knowledge or consent of the attorneys of record, are testimony in favor of plaintiffs, and it is error for the trial court to refuse to receive the same.

ADMISSIONS—COMPETENCY.

3. A paper in the form of an answer, verified by the defendants, admitting that the allegations of the complaint are true, and consenting that the plaintiffs are entitled to a judgment as prayed for in the complaint, is a sworn admission of the defendants. The court erred in refusing to admit the same in evidence on behalf of plaintiffs, although said sworn statement was made without the knowledge or consent of defendants' attorneys of record.

EQUITY JURISDICTION—CONVEYANCE OF MINING CLAIM—MISTAKE AND INADVERTENCE.

4. Under the pleadings, the court had jurisdiction to hear and determine the question as to whether a mistake had been made in the deed of conveyance from Sebring, Ward, and Altizer to Pence and Starr, and whether the conveyance from Ward to Brown was a cloud upon plaintiffs' title, and in case the mine was sold before the adjudication of said matters, and the proceeds of the sale of the interest in dispute deposited in court, the court had jurisdiction, under the pleadings, to determine the rights of plaintiffs there-to.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Action by C. G. Pence and another against Michael J. Sweeney and others. Thomas E. McLelland was admitted as intervenor. From a judgment dismissing the action, entered upon an order granting defendants' motion for a nonsuit, plaintiffs appeal. Reversed.

Albert Hagan and Frank Ganahl, for appellants.

Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation. *Chester v. Hill*, 66 Cal. 484, 6 Pac. Rep. 132; *Cross v. Zellerbach*, 63 Cal. 643; *Kraft v. De Forest*, 53 Cal. 657; *Quivey v. Baker*, 37 Cal. 472; *Wilson v. Castro*, 31 Cal. 421; *McPherson v. Parker*, 30 Cal. 456.

A *cognovit* is good as an admission *in pais* after answer is filed, and can be put in evidence upon the trial. *Hirschfield v. Franklin*, 6 Cal. 608.

A party's answer in chancery is evidence against him by way of admission. *Ficket v. Swift*, 66 Amer. Dec. 214; *Elliott v. Hay-*

den, 104 Mass. 180; *Knowlton v. Moseley*, 105 Mass. 136; *Cook v. Barr*, 44 N. Y. 158; *Wylder v. Crane*, 53 Ill. 490; *Lawrence v. Lawrence*, 21 N. J. Eq. 317.

Compromises of suits are favored, and are binding upon the parties, and will never be set aside or questioned except for fraud or imposition. *Draper v. Owsley*, 57 Amer. Dec. 218; *Leach v. Fobes*, 71 Amer. Dec. 732; *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. Rep. 756; *Dunman v. Hartwell*, 60 Amer. Dec. 177.

A release given by a client is a bar to any further prosecution of the action by him. It is an estoppel. *Coughlin v. Railroad Co.*, 27 Amer. Rep. 75.

Woods & Heyburn, for respondents.

A court of equity will not relieve third parties from a mistake of law. 2 Pom. Eq. Jur. §§ 842-846, 849; *Hunt v. Rousmanier*, 8 Wheat. 174; *Bank v. Daniel*, 12 Pet. 52; *Jacobs v. Morange*, 47 N. Y. 57; *Bentley v. Whittemore*, 18 N. J. Eq. 366.

Any one who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, may intervene. Comp. Laws, § 4111.

SULLIVAN, C. J. This is an appeal from a judgment and order dismissing appellants' complaint and cause of action. The complaint alleges that on the 21st day of May, 1888, the plaintiffs were the owners of the Sitting Bull lode mining claim. That the said claim was located by one J. A. Ward and John W. Sebring in the year 1885. That thereafter the said Sebring sold one-half of his interest in said claim, to-wit, an undivided one-fourth, to one David Altizer, and thereafter said persons owned their respective interests therein as tenants in common. That, for the purpose of developing said mining claim, they entered into a contract with the plaintiffs, C. G. Pence and one L. J. Starr, whereby the said Pence and Starr agreed to do certain work in the development of said claim, and for which they were to receive an undivided one-half of the respective interests of the said Sebring, Ward, and Altizer. That upon the completion of such work the said Ward, Sebring, and Altizer were to execute and deliver to said Pence and Starr a deed of conveyance conveying to them an undivided one-half of their respective interests in said claim. That after the completion of said work by Pence and Starr the said Ward, Sebring, and Altizer

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executed to them a certain deed, but, instead of designating the respective interests to be conveyed by each grantor under the contract aforesaid, they, by mistake and inadvertence, conveyed by said deed an undivided one-half of said mining claim. That thereafter Starr sold and conveyed his entire interest in said claim to Pence. That Pence thereafter purchased of said Sebring an undivided one-eighth interest in said claim. That thereafter C. E. Kingman (one of the appellants) purchased of the said Altizer an undivided one-eighth of said claim. That thereafter one O. Kingman bought of said Ward all his right, title, and interest in and to said claim, as at that time said Ward believed he possessed an undivided one-quarter thereof. That, by the original deed from Ward, Sebring, and Altizer to said Pence and Starr, it was the intention of the parties to convey to said grantees an undivided one-half of each of their respective interests in and to said claim, to-wit, Ward an undivided one-quarter, that being one-half of his interest; Sebring an undivided one-eighth, that being one-half of his interest; and Altizer an undivided one-eighth, that being one-half of his interest therein. That the mistake was made by conveying an undivided one-half of said lode, and not designating the undivided interest which each was to convey under the agreement with Pence and Starr. That thereafter the defendant Brown, with notice that Ward had already sold all of his right, title, and interest in and to said lode claim to O. Kingman, and knowing that said Ward had no interest therein, being so notified by said Ward, procured from said Ward a quitclaim deed for all of his interest in said claim. That said O. Kingman conveyed all of his interest in and to said claim to the plaintiff Charles E. Kingman, and that the plaintiffs (the appellants in this court) were then the owners of said entire mining claim. That Sweeney, one of the defendants, was, at the date of such conveyances, an employe in the recorder's office of Shoshone county, and that it was by his investigation and suggestion, on information acquired from an inspection of the records of said county, that the apparent interest of said Ward, of the one-twelfth of said mine, was suggested to said Brown, and the conveyance from Ward to Brown thereafter procured. The complaint further alleges that said Sweeney and Brown have con-

tracted, by bond, to convey to defendant Evans the one-twelfth interest so obtained from Ward, and to receive therefor \$3,000, and for such purpose Brown has deposited with Sweeney his deed to said Evans, to be delivered upon payment to Sweeney of the sum of \$3,000. That said Brown is to convey to said Sweeney said one-twelfth interest in said mine in the event of Evans not paying said \$3,000. That Evans is made a party, because he is deemed a necessary party to the enforcement of the judgment or decree prayed for. That plaintiffs do not desire to destroy the sale of said mine, but simply that the proceeds of the sale of said one-twelfth interest be paid to plaintiff in event of a sale being consummated. The answer admits the discovery and location of the said claim, and the conveyance thereafter by Sebring of one-half of his interest therein to Altizer. Admits the making of the deed by Ward, Sebring, and Altizer to Pence and Starr, but explains Ward's connection with the making of the contract with Pence and Starr for the development of the claim, and the execution of the deed to them, and denies that any mistake was made in the execution of said deed.

Prior to the trial of the case the mine was sold under the bond referred to, and the parties entered into a stipulation whereby the money for the one-twelfth interest was deposited with the clerk of the court, subject to the adjudication by the court of the question as to the party entitled thereto. On January 16, 1891, one Thomas E. McLelland was allowed to intervene. The complaint of intervention does not demand any relief in the subject-matter of the suit as to the mining claim, but alleges that one-half of the money which had been deposited in court, under the stipulation aforesaid, on June 25, 1888, had been assigned to said intervener by said Sweeney and Brown, on July 30, 1888. To this complaint of intervention plaintiffs filed an answer denying the same. The cause came on for trial on June 3, 1891. The plaintiffs offered in evidence certain paper writings, claimed to have been executed by the defendants, admitting the allegations of the complaint, and consenting that judgment be taken against them as prayed for in the complaint, all of which were, under the objections of counsel for defendants and intervener, excluded by the court. Thereupon certain oral testimony was offered, and for like

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reason rejected by the court. Plaintiffs thereupon rested. Counsel for the defendants and intervener moved for a nonsuit, which motion was granted, and judgment of dismissal entered. From which order and judgment the appellants bring the case to this court, and demand a reversal thereof, and assign seven specifications of error therefor.

The first error assigned is that "the court erred in allowing McLelland to intervene at all." In order to intelligently pass upon this specification of error, we shall need to refer to the pleadings at some length. The plaintiffs allege in the fifteenth paragraph of the complaint that a sale of the mine in controversy is pending for the sum of \$36,000, one-twelfth of which sum, by the terms of the bond to defendant Evans, is to be paid to the defendant Sweeney. That said Evans is made a party because plaintiffs deem him to be a necessary party to the enforcement of the decree prayed for. That plaintiffs are not desirous of defeating said sale for said one-twelfth interest of said mine, but that, in the event of a sale being completed, the proceeds should be paid to plaintiffs, and not to said Brown and Sweeney. The second paragraph of the prayer of complaint is, in substance, that said money be paid to plaintiffs, in the event a sale is consummated under said bond. It appears from the record that a stipulation was entered into by the parties, through their attorneys, in regard to the sale of the said one-twelfth interest of said mine, and the deposit of the proceeds with the clerk, which stipulation is as follows: "[Title of the court and cause.] It is hereby stipulated that, under the bond mentioned in the complaint, the sum of sixteen thousand five hundred dollars, and no more, was due upon the purchase price of the Sitting Bull lode mining claim at the time this action was commenced; that under the contract with Evan Evans, mentioned in the complaint, the said Evans or his assigns can make payment into court of the amount to be due to-morrow, and a further sum payable July 21, 1888, to the said M. J. Sweeney, being in the aggregate \$1,416.66, less \$72.50, and, upon final payment being made into court, that plaintiffs will release all of the one-twelfth interest of, in, and to the Sitting Bull lode claim from any liability in this action, the fund then in court to be the only matter involved in this action, and notice of *lis pendens* to be withdrawn and vacated as soon as

the first payment shall be made. The said fund to remain in court subject to the adjudication of the court as to the party entitled thereto. Dated June 25, 1888. GAHAHL & HAGAN, Plaintiffs' Attorneys. We agree to this. WOODS & HEYBURN, Attorneys for Defendants. C. E. KINGMAN. By His Attorney in Fact, O. KINGMAN. C. G. PENCE. [Indorsed:] Filed June 15, 1889." The complaint in intervention alleges that the intervener, for a valuable consideration, on the 30th day of July, 1888, purchased from defendants Sweeney and Brown a one-half interest in and to the fund deposited with the clerk of said court, as aforesaid. The intervener claims an interest in said fund, and comes within section 4111 of the Revised Statutes of Idaho, which permits any person to intervene who has an interest in the matter in litigation. There was therefore no error in permitting McLelland to intervene.

The second specification of error is as follows: "The court erred in excluding from evidence the receipt or relinquishment of Sweeney and Brown." The said receipt or relinquishment purports to be the written admission of the defendants that the allegations of the complaint are true, and was testimony in favor of the plaintiffs, which they were entitled to have the benefit of. There was error in rejecting the same.

The third specification of error is as follows: "The court erred in excluding the sworn answer of Sweeney and Brown." The transcript contains the paper designated as the sworn answer of Sweeney and Brown, in which they ask to withdraw the answer theretofore filed, and in answer to the complaint "admit each and singular the allegations averred in the complaint," and authorize judgment to be entered according to the prayer of the complaint. The record shows that counsel for the plaintiffs stated to the court below, at the time said paper was offered in evidence, that they offered the said paper in evidence to show, first, a settlement of the case between the plaintiffs and defendants, and also as an admission by each of the defendants that the complaint was true and correct, and a confession of the defendants that the plaintiffs were entitled to judgment as prayed for in the complaint, and as to the truth of the allegations of the complaint admitted by the defendants, and as a solemn admission that the answer of the defendants on file was untrue, and as a proof that the defendants desired to withdraw their an-

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swer, and as an order to withdraw the same, and as a relinquishment, by the defendants to plaintiffs, of all their right to the fund on deposit with the clerk, and as an assignment of all and every part of that fund to the plaintiffs. The paper offered purported to be the sworn admission of the defendants that the allegations of the complaint were true, and that the plaintiffs were entitled to the funds in the hands of the clerk; all of which was testimony in favor of the plaintiffs, and should have been admitted. The court erred in rejecting the same.

The fourth specification of error is as follows: The court erred in sustaining the objection to the question asked the witness Kingman: "Did you, at any time, pay defendants Sweeney and Brown any money for their interest in this property?" The record shows that the witness to whom the question was propounded was O. Kingman, who is not a party to this action. We cannot perceive the materiality of the question, unless it should be shown that such money was paid for on behalf of the plaintiffs or appellants. The record shows that the receipt and the paper designated as the "sworn answer" of the defendants were executed without the knowledge or consent of their attorneys of record, and it is intimated in the brief of respondents that counsel for appellants had made a surreptitious settlement with the respondents Sweeney and Brown, and had procured from them said receipt and answer, without the knowledge or consent of counsel for respondents, but we find nothing in the record to justify such intimation or conclusion. It is true, however, that some one procured such papers from the respondents, or that they delivered them without solicitation; but we are loath to believe that any attorney of this bar would enter into surreptitious dealings with clients of opposing counsel for a compromise, settlement, or management of the case. Chief Justice SANDERSON, in the case of *Commissioners v. Younger*, 29 Cal. 150, has very clearly expressed the mind of this court upon such dealings, in the following language: "It is proper to add that to entirely ignore the attorney of record, and enter, without his consent, into secret negotiations with his client, touching the management of his case, is unbecoming the dignity of the legal profession, and destructive to the courtesy which is due from one member to another." However, if clients make

settlements, compromises, and admissions, without the knowledge and consent of their attorneys of record, they cannot, for that reason, escape the consequences of such settlements, compromises, and admissions, if they are offered in evidence against them. *Coughlin v. Railroad Co.*, 71 N. Y. 443.

The sixth specification of error is as follows: The court erred in excluding the answer to the question: "Did you ever have any notice of any assignment of any part of this fund to any one?" The record shows that said question was propounded to O. Kingman, who is not a party to this suit. We fail to discover how the answer thereto from said witness could be material. There was no error in refusing to allow the witness to answer the same.

The seventh specification of error is as follows: "The court erred in refusing the motion of plaintiffs to proceed to hear and determine the rights of plaintiffs to the fund deposited with the clerk." The record contains the reason, as stated by the court below, why it refused to proceed and determine the rights of the plaintiffs to said fund, and is as follows: "Now, at this time the court, having examined the pleadings in this case and a certain stipulation on file, and it appearing thereupon, [therefrom,] and from the admissions of counsel on both sides, that all the interest in the mining claims contested for in the suit had been sold, and the money paid into court, and there is nothing before the court except the disposal of that money, and it being an effort on the part of the parties to this transaction to convert an action to quiet title into a suit for money, a practice not allowed by this court, it is ordered that this case be dismissed from the further consideration of the court." The fifteenth paragraph of the complaint, above set forth, avers facts sufficient to give the court jurisdiction of the fund in the hands of the clerk; and by the second paragraph of the prayer of the complaint the plaintiffs demand that, in the event of the sale mentioned in the fifteenth paragraph of the complaint being consummated, one-twelfth of the sum for which the whole mine was sold be paid to the plaintiffs. Evan Evans had the bond on the mine, and he is made a party to the action, so that, in case a sale is made, the court will have jurisdiction to enforce its judgment or decree, in case one is entered in accordance with the prayer of the second

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paragraph of said complaint. Under the pleadings, the court had jurisdiction to determine whether or not the undivided one-twelfth interest in and to said mine was the property of the plaintiffs; and if, when that fact was determined, the mine had been sold and the money paid into court, it had jurisdiction to determine whether plaintiffs were entitled to said money or not. Equity does not favor a multiplicity of suits, and will not permit litigation by piecemeal, but favors determining the whole controversy so as to prevent future litigation. *Chester v. Hill*, 66 Cal. 484, 6 Pac. Rep. 132; *Cross v. Zellerbach*, 63 Cal. 623; *Kraft v. De Forest*, 53 Cal. 657; *Quivey v. Baker*, 37 Cal. 472; *Wilson v. Castro*, 31 Cal. 421; *McPherson v. Parker*, 30 Cal. 456. The court had jurisdiction of the parties and the subject-matter, and should have determined the controversy. The court erred in refusing to determine the rights of plaintiffs to the fund deposited with the clerk.

The conclusions that we have arrived at in regard to the second, third, and seventh specifications of error make it unnecessary for us to say anything in regard to the eighth specification of error, except to say that the court erred in granting the nonsuit, and entering judgment of dismissal. The judgment of the court below is reversed, and the case remanded to the court below, with instructions to proceed and try the case and determine the issues as indicated in this opinion.

MORGAN and HUSTON, JJ., concur.

ORR v. STATE BOARD OF EQUALIZATION.

(December 12, 1891.)

CERTIORARI BY CITIZEN AND TAX-PAYER—REVIEWING ACTION OF TAX BOARDS.

1. Every citizen and tax-payer of the state has the right to bring a proper suit to determine whether any board or officer having any authority connected with the levy and assessment of taxes has performed his duties as the law requires.

STATE BOARD OF EQUALIZATION—NATURE OF POWERS.

2. The state board of equalization, in exercising the functions conferred upon it by law, is exercising judicial functions.

SAME—CHANGING TAXABLE VALUATION.

3. The statute does not authorize the state board of equalization to raise or diminish the valuation put upon any class or classes of property, nor to fix the valuation of any class of prop-

erty, but may raise or diminish the aggregate valuation of the property of any county by such percentage as justice may require.

(Syllabus by the Court.)

Petition of Samuel Orr for a writ of *certiorari* to have reviewed the action of the state board of equalization in adding to the valuation of certain personal property in Bingham county for purposes of taxation. Writ granted, and proceedings of board declared void.

T. M. Stewart and Smith & Smith, for petitioner.

A taxpayer has the right to prosecute this action. *Maxwell v. Board*, 53 Cal. 389; *Collins v. Davis*, 57 Iowa, 256, 10 N. W. Rep. 643.

The remedy by *certiorari* is the proper one to set aside the action of the board of equalization where it is void for want of jurisdiction. *Rev. St. § 4962 et seq.*; *People v. Goldtree*, 44 Cal. 323-325; *Mayor, etc., v. Davenport*, 92 N. Y. 604; *Royce v. Jenney*, 50 Iowa, 676; *Cooley, Tax'n*, pp. 758, 759.

The power of the state board is limited to an equalization of values as between counties, and must be made by comparing the values returned from the respective counties with each other, and they have no authority to alter or change the individual assessments or the assessed valuation of different classes of property. *Wells, Fargo & Co. v. Board of Equalization*, 56 Cal. 194; *People v. Sacramento Co.*, 59 Cal. 321; *San Francisco & N. P. R. R. Co. v. State Board of Equalization*, 60 Cal. 12; *People v. Dunn*, 59 Cal. 330; *Baldwin v. Ellis*, 68 Cal. 495, 9 Pac. Rep. 652.

The state board of equalization has nothing to do with individual assessments, and cannot alter by either adding to or subtracting from the amounts assessed to various classes of property, or to individual taxpayers. *Tweed v. Metcalf*, 4 Mich. 579; *Boyce v. Sebring*, 66 Mich. 210, 33 N. W. Rep. 815; *Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. Rep. 160, 367.

The property of the district must be treated in the aggregate by the state board. *Getchell v. Supervisors*, 51 Iowa, 108, 50 N. W. Rep. 574; *Braden v. Trust Co.*, 25 Kan. 362; *People v. Hadley*, 76 N. Y. 337.

George H. Roberts, Atty. Gen., for respondent.

MORGAN, J. This is the petition of Samuel Orr, who is a citizen and tax-payer of

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Bingham county, and beneficially interested in the matter set forth in the petition. He alleges that the persons above named constitute the state board of equalization, and charges on information and belief that the said board, on the 18th day of September, 1891, and on subsequent days, having under consideration the value of real and personal property among the several counties and towns of the state of Idaho, the same being a judicial matter, and the said board exercising judicial functions in that behalf, without authority of law, and in excess of the jurisdiction conferred on it by law, added to the valuation of the sheep of said Bingham county an amount sufficient to fix the valuation thereof at the sum of \$2.50 per head. That said board, in like manner, and without authority of law, and in excess of its jurisdiction, on the 21st day of September, 1891, by order, added to the valuation of the cattle of said Bingham county, for purposes of taxation of the same, a percentage of 10 per cent. on the assessed valuation thereof, as returned by the assessor of said Bingham county. That the said board, sitting for the purpose hereinbefore set forth, without authority of law, and in excess of any jurisdiction conferred upon it, did order and adjudge that the Utah & Northern Railway, from Pocatello northward to the state line between Idaho and Montana, should, for the purposes of taxation, be a branch road, and that the valuation thereof should be reduced from \$8,000 per mile to \$5,000 per mile for each and every mile thereof. That said board, sitting as aforesaid, did on the 21st day of September deduct from the valuation of the part of the Oregon Short Line Railway lying in said county, and from a portion of the Utah & Northern Railway lying south and east of Pocatello, as fixed by the assessor of said county, and not changed by any county board of equalization, the sum of \$1,000 per mile for each and every mile thereof. That each and all of these changes so made were by the board of equalization certified to the auditor of said Bingham county by the secretary of said board. That affiant has no appeal from said action of said board, and has no other plain, adequate, and speedy remedy at law. A writ of review is prayed for and issued, requiring the said board of equalization to return to the supreme court all the proceedings concerning said additions to and deductions from

the assessed valuations of said property taken by and remaining before said board, and for other relief. Upon the return of this writ the matter came on for hearing in the supreme court. The first matter to be considered by the court is the question as to whether a citizen and tax-payer is authorized to bring this suit for the purpose of determining whether the state board of equalization has, in the matters herein set forth, acted in excess of the jurisdiction conferred upon it by law.

In the case of *Maxwell v. Board*, 53 Cal. 391, the board of supervisors of said county, without advertising for bids for printing, or giving any notice whatever that said board would entertain or receive sealed proposals or contracts for the county printing for Stanislaus county, entered into a contract with the Stanislaus County Weekly News, by which said board agreed to advertise all the reports, statements, and advertisements of the officers of said county in the said Stanislaus County Weekly News at a rate fixed in said contract. Petitioner further alleged that the said contract was made without giving any notice, public or otherwise, that such printing would be let by the county through its board of supervisors to the lowest bidder, or would be let at all. All of which was contrary to law. After said order had been made by the board, the said contract entered into, the plaintiff in this case, Charles Maxwell, filed this petition as a citizen and tax-payer of the said county to annul and set aside said contract. The first question coming before the court for decision was as to whether the petitioner had the right to apply for the writ. The court, McKINSTRY, J., says, in discussing this question: "The neglect of a public officer to discharge a public duty may effect the interest of every tax-payer, but such result would, in ordinary cases, be uncertain, and dependent upon contingencies. When, however, a public board or officer has exceeded the limited powers conferred by law, and the direct consequence of such excessive use of authority must be to add to the burden of local taxation, it clearly appears that, unless the act *ultra vires* be annulled, each tax-payer must suffer injury common in character, but special in amount or degree. It would seem that one thus directly affected should be entitled to a remedy, and our conclusion is that the petitioner was authorized

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to commence his proceeding." It will be seen that in the above case it had not yet been determined that the contract for the printing described could have been let to any other parties for a less amount per annum, and therefore it is uncertain whether the burden to the tax-payer would be greater or less under this contract; but because the board had exceeded its jurisdiction in making the contract the court decides that a citizen and tax-payer is authorized to bring suit. The case at bar is precisely a parallel case. It is alleged that the state board of equalization, in excess of the jurisdiction conferred on it by law, has reduced the valuation of a certain class of property in said county, and has increased the valuation placed upon other certain classes of property by the local assessor. It is uncertain whether the burden of taxation to the individual tax-payer, not owning cattle or sheep, or a stockholder in a railroad corporation, is greater or less than it would have been had these changes not been made, nor, in our view, is it necessary for the tax-payer or this court to enter into a lengthy mathematical calculation to ascertain this fact. Large reduction has been made in the assessed valuation of railroad property in said county, and considerable increase has been made in the valuation of cattle and sheep. Whether the aggregate increase of valuation in the county is equal to the aggregate decrease in such valuation, or is greater or less, we are unable to say; but every citizen and tax-payer of the state has the right to insist that every board or officer having any authority connected with the levy and assessment of taxes shall, in the exercise of his duties, pursue the methods pointed out by the statute. *Maxwell v. Board*, supra. The state board of equalization, in exercising the functions conferred upon it by law, was exercising judicial functions. *People v. Goldtree*, 44 Cal. 323; *Mayor v. Comptroller*, 92 N. Y. 604. It is alleged in the petition that said board, in performing its duties under said act in the matter hereinbefore mentioned, exceeded its jurisdiction.

There is no method of appeal pointed out by the statute to secure a review of the action of said board. The writ of *certiorari* is the proper and the only means of bringing such action before this court for review. Rev. St. Idaho, § 4962; *Desty, Tax'n*, p. 631. The matters contained in the petition for the writ of *certiorari* and the answer of the board of equal-

ization thereto are therefore properly before this court. It appears by the return made by the state board of equalization to the writ of *certiorari* issued in this case that the said board, being in regular session, on the 18th day of September, 1891, made and entered in their records the following order, to-wit: "On motion, it was ordered that the assessed valuations of the main lines of the Oregon Short Line Railway Co., the Union Pacific Railroad Co.'s System, the Northern Pacific Railroad Co., and the Utah and Northern Railroad Co., be fixed at the uniform valuation of \$7,000.00 per mile throughout the several counties of the state of Idaho, and that wherever the assessment exceeds or is less than said sum of \$7,000.00 per mile the said valuation be decreased or increased (as the case may be) by such a percentage as shall fix the valuation of the mileage of said main lines at \$7,000.00 per mile. On motion it was ordered that the equalized valuation of all the telegraph lines in the several counties of the state of Idaho (except the Caldwell and Silver City line) be fixed as follows: One wire, per mile, \$80.00; each additional wire, per mile, \$15.00. And wherever the assessment appears to be greater or less than said rates, that the proper percentage be added or deducted therefrom to correspond with said rates." On September 21, 1891, the following order was made: "On motion, it was ordered that that portion of the Utah & Northern Railroad Co. extending from Pocatello, Idaho, northerly to the boundary line between the states of Idaho and Montana, be considered a branch line of railway, and that the equalized valuation thereof be fixed at \$5,000 per mile." On the same day the following order was made: "On motion, it was ordered that the following rate of percentage be added to the assessed valuation of cattle in the following named counties, viz.: Bingham county, 10 per centum." On September 22, 1891, the following order was made: "On motion, it was ordered that the assessed valuation of sheep be equalized in the counties of Ada, Alturas, Bear Lake, Bingham, * * * by adding to the *per capita* assessed valuation in said several counties such a percentage as shall make the *per capita* equalized valuation the sum of \$2.50." A number of changes were made in the valuation of property in other counties, which are not recited here, such recitals being unnecessary in the determination of this case.

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On the 22d day of September, the secretary of said board was instructed to certify to the auditors of the several counties the changes that have been made by this board, the character of such changes in the several classes of property assessed, which certificate shall contain the following clause: "The county auditor of ——— county is hereby informed by the state auditor that the state board of equalization have made the following changes in the assessed valuation of the following classes of property returned by the county auditor, (here state changes;) and the said county auditor is hereby instructed to increase or diminish (as the case may be) the assessed valuation of said classes respectively as hereinbefore shown, by a proper percentage, to conform in valuation to the rates herein fixed by said board as the equalized valuation thereof at the regular meetings of said board on the 18th, 19th, 21st, and 22d days of September, A. D. 1891; and, where railroads are concerned, said county auditor is further instructed that this equalization is to be held as including all railroad property of every kind, including rolling stock, improvements that are situated on the right of way. Railroad lands outside the right of way are to be separately assessed as heretofore, except in cases where acre lands in the county may have been increased in valuation as above noted, in which case their valuation is changed the same as other acre property." In pursuance of this order of the board the following letter of instructions was sent by the state auditor to the county auditor of Bingham county: "Office of the State Board of Equalization. Boise City, Idaho, Sept. 23d, 1891. Certificate of Changes in Assessed Valuation. The county auditor of Bingham county is hereby informed by the state auditor that the following changes have been made by the state board of equalization in the assessment of the following classes of property returned to said board by said county auditor, viz.: The assessed valuation of the Utah & Northern main line, being that portion lying south and east of Pocatello, has been changed to \$7,000 per mile; that portion of the said main line from Pocatello to the boundary line between the states of Idaho and Montana has been changed to \$5,000 per mile; and the assessed valuation of the main line of the Oregon Short Line Railway Co. has been reduced to \$7,000 per mile. The as-

essed valuation of cattle has been increased ten per cent. *per capita*. The assessed valuation of sheep has been changed to \$2.50 *per capita*. The assessed valuation of telegraph lines has been changed to \$80 per mile for one wire and to \$15 per mile for each additional wire. Said county auditor is instructed to increase (as the case may be) by proper percentage the assessed valuation of the classes hereinbefore shown, to conform in valuation to the rates herein fixed by said board as the equalized valuation thereof at the regular meeting of said board on the 18, 19, 21, and 22 days of September, A. D. 1891; and, where railroads are concerned, said county auditor is instructed that this equalization is to be held as including railroad property of every kind, including rolling stock and improvements that are situated upon the right of way. Railroad land outside the right of way, and all improvements not upon the right of way, are to be separately assessed as heretofore, except in cases where acre lands in the county may have been increased or diminished in valuation as above noted, in which case their valuation * * * the same as other acre lands. Witness my hand and official seal, this 23d day of September, 1891. SILAS W. MOODY, State Auditor of Idaho. [L. S.]"

The constitution (section 5, art. 7) has the following provision: "All taxes shall be uniform upon the same class of subjects within the territorial limits of authority levying the tax." This provision of the constitution is self-acting, and applies to all officers and boards that have anything to do with the levy and assessment of taxes upon all classes of property. It is a requirement of the constitution, and its effects may be illustrated as follows: The board of commissioners at the meeting, when authorized so to do, levy for all county purposes a tax of two and a half per cent. upon all classes of property subject to taxation in the county. This is then a uniform rate of taxation to the extent of the territorial limits of the county. The assessor then values all the stock cattle, numbering them, of A., B., and C., who are tax-payers of said county, at the rate of \$12 per head. This would be a uniform valuation as to the three individuals and as to this class of stock. If the same valuation was put upon the same class of stock substantially throughout the coun-

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ty, it would be a uniform valuation of this class of property in the county, and therefore in accordance with the provisions of the constitution. The same may be said of all classes of property. The board of county commissioners of the county is by law constituted a board of equalization for the county. This board is given plenary powers. They may correct any valuation by adding or deducting such sum as may be necessary to make it conform to the actual cash value. Rev. St. Idaho, § 1476. They may direct the assessor to assess any taxable property that has escaped assessment, increase any valuation, or add to the amount, number, or quantity, or property of any individual or corporation within their jurisdiction. They may make and enter new assessments. Section 1483, Rev. St. In short, they may, in the manner directed by the statute, enforce the assessment of all property within the county at a uniform valuation. It may still happen that all the property of Bingham county is valued at one-third of its real cash value, although this would be in direct violation of the statute. For instance, stock cattle are valued at \$5 per head, and in Oneida county the same class of property is valued at \$10 per head. Evidently, as between counties, the commissioners can in no manner compel a uniformity of valuation of the same classes of property, as the jurisdiction of each board extends only to the limits of its own county. Has the state board power or authority in any way to compel a uniformity of valuation between and among the several counties of the same classes of property, or has this board the power to say that the valuation of cattle in Bingham county shall be increased 10 per cent. and in Oneida county the valuation of the same class of property shall be decreased 10 per cent? If they can lawfully do this, then they can go on, and do the same with any and all classes of property throughout the state. This the board has assumed to do, as appears by the copy of their record as above set forth. Further, they have declared the line of railroad running north from Pocatello to the Montana line to be a branch line, and have fixed the valuation thereof at \$5,000 per mile, without any reference to any rate of percentage.

The state board of equalization is wholly the creature of the law. It has no power or authority except that which is

given by the act of March 14, 1891. 1 Sess. Laws, p. 227. That act, so far as it relates to the power and jurisdiction of the board, is as follows: "Sec. 2. The board shall have the power—*First*. To prescribe rules for its own government and for the transaction of its business. *Second*. To prescribe rules and regulations, not in conflict with other provisions of law, to govern county boards when equalizing, and assessors when assessing. *Third*. To call before it, or before any member thereof, any officers of the county, and to require them to produce any public records in their custody. *Fourth*. To issue subpoenas for the attendance of witnesses or the production of books before the board, or any member thereof, to raise or diminish the valuation of the several counties. Sec. 3. The board shall meet at the state capitol on the first Monday in September in each year. Sec. 4. The governor shall be chairman, and the auditor, by virtue of his office, shall be secretary. The governor and auditor, with any other member of the board, shall constitute a quorum for the transaction of business. Sec. 5. The state auditor, by virtue of his office, shall lay before the board abstracts received by him from the county auditors, and the board shall proceed to equalize the valuation of real and personal property amongst the several counties and towns in the following manner: *First*. They shall add to the aggregate valuation of real and personal property of each county which they believe to be valued below its proper valuation such percentage in each case as will raise the same to its proper valuation. *Second*. They shall deduct from the aggregate valuation of real and personal property of each county which they believe to be valued above its proper valuation such percentage in each case as will reduce the same to its proper valuation." The first sentence of the above statute necessary to consider is the last clause of the fourth paragraph of section 2, which is: "The board shall have power to raise or diminish the valuation of the several counties." How? In what manner? Section 5 gives the only direction that is given in the statute as to the manner in which this is to be done, as follows: "The board shall proceed to equalize the valuation of the real and personal property amongst the several counties and towns in the following manner: *First*. They shall add to the aggregate

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valuation of real and personal property of each county which they believe to be valued below its proper valuation such percentage in each case as will raise the same to its proper valuation. *Second.* They shall deduct from the aggregate valuation of real and personal property of each county which they believe to be valued above its proper valuation such percentage in each case as will reduce the same to its proper valuation." No power whatever is given to the board to raise or diminish any class or classes of property by any percentage or in any manner whatever; no power is given it to assess or fix the value of any kind of property; no power is given the board to fix the value of any railroad; and no power is given by said statute to said board to declare any portion of any railway a branch line or main line. It is not intended by this opinion to intimate that the value of railroad property, as fixed by the state board of equalization, is too high or too low. We believe that railroad property, like all other property, should be valued at its actual cash value, and, like all other property, its capacity to produce profit should be taken into consideration. It is profitless to multiply words to show what the board is not empowered to do. What they can do may be given in few words. They may add to or deduct from the aggregate valuation of real and personal property of a county by a certain percentage. The statute, having specified what they may do, necessarily excludes every other power. It may be granted without argument that this will not enable the board to fix a uniform rate of assessment upon the different classes of property throughout the state. It may be granted that the assessor of one county may value cattle at \$10 per head and the assessor of an adjoining county may value the same class of property at \$15 per head, and there is no remedy, within the power of the state board, except to raise or lower the aggregate valuation of all the property in the county. If it was intended by the legislature to give the board of equalization the power to raise or lower certain classes of property in the county which would seem to be desirable, it has utterly failed to do so. This court cannot add to or take from the words of the statute. If the statute was uncertain, indefinite, or ambiguous, the court, by a proper construction, might be able to render it certain, definite, and un-

ambiguous. These words cannot be misunderstood, and will admit of no construction to change their meaning.

The respondents cite as a justification of their action in the case at bar the statute relating to the state board of equalization, and decisions thereunder, of the state of Illinois, claiming that said statute is similar to our own, and therefore the power of the state board in this state is similar to that in Illinois. The sections of the Illinois statute in relation to the power and jurisdiction of said board are as follows, (section 104, p. 27, Laws Ill. 1871-72:) "Sec. 104. It shall be the duty of the secretary of said board, under the direction of the auditor of public accounts, to compile the abstracts of assessments received from the county clerks into tabular statements convenient for the use of the board, which statements and the original abstracts shall be submitted to the board on the first day of its session in each year, or as soon thereafter as the board is organized. The secretary shall perform such duties in vacation as shall be assigned to him by the board." "Sec. 106. Said board, in equalizing the valuation of property as listed and assessed in the different counties, shall consider the following classes of property separately, viz., personal property, railroad and telegraph property, lands and town and city lots, and, upon such consideration, determine such rates of addition to or deduction from the listed or assessed valuation of each of said classes of property in each county, or to or from the aggregate assessed value of each of said classes in the state, as may be deemed by the board to be equitable and just; such rates being in all cases even and not fractional; and such rates, as finally determined by said board, shall not be combined. Sec. 107. In equalizing the value of personal property between the several counties, said board shall cause to be obtained the state averages of the several kinds of enumerated property from the aggregate footing of the number and value of each; and the value of the several kinds of enumerated property in each county shall be obtained at those average values; and the value of the enumerated property thus obtained, as compared with the assessed value of such property in each county, to be added to or deducted from the total assessed value of personal property in each county: provided, that whenever in the opinion of the board it is necessary to a more

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just and equitable equalization of personal property that a rate per cent. be added to or deducted from the value thus obtained in any one or more of the counties, said board shall have the right so to do; but the rate per cent. hereinbefore required shall first be obtained to form the basis upon which the equalization of personal property shall be made." "Sec. 111. Lands shall be equalized by adding to the aggregate assessed value thereof, in every county in which said board may believe the valuation to be too low, such rate per centum as will raise the same to its proper proportionate value, and by deducting from the aggregate assessed value thereof, in every county in which said board may believe the valuation to be too high, such per centum as will reduce the same to its proper value. Town and city lots shall be equalized in the same manner herein provided for equalizing lands, and, at the option of said board, may be combined and equalized with lands. Sec. 112. When said board shall have separately considered the several classes of property as hereinbefore required, the results shall be combined into one table, and the same be examined, compared, and perfected in such a manner as said board shall deem best to accomplish a just equalization of assessments throughout the state, preserving, however, the principle of separate rates for each class of property." It will be seen that this statute contains a well-considered and carefully worded method of valuation of the different classes of property, both real and personal, and authorizes the board to add to or deduct from any of said classes such sum or sums as would render the assessment in the several counties uniform throughout the state. The statute is about as different from our own as is possible in two statutes relating to the same subject-matter, and the authority quoted from 76 Ill.,¹ construing the above statute, is therefore inapplicable to the case at bar.

It is contended also that, the board of equalization having performed the acts complained of, and forwarded the result to the county auditors with directions to make the changes indicated in the assessment list, the presumption is that the changes have been made, and a large portion of the taxes collected, and it is now too late for the board to make any change in the method of the so-called "equaliza-

tion," and therefore the action of the board should not be declared unlawful. The force of this argument can be better appreciated if we state it thus: If the board has acted without authority of law, and beyond its jurisdiction, yet its acts should be approved, because it is too late this year to pursue the method pointed out in the statute. This argument bears upon its face its own refutation. The petitioner in this case is not seeking to compel the board to perform any act within its jurisdiction, but prays that the acts done by said board in excess of its jurisdiction be declared void. It is therefore considered and adjudged by this court that all the acts complained of in the said petition, to-wit: The order of said board of September 18, 1891, fixing the valuation of the main lines of the Oregon Short Line Railway and the Union Pacific Railway system in Bingham county; the order on the same date, fixing the value of all telegraph lines in said county; the order of said board, entered on the 21st day of September, 1891, declaring the Utah & Northern Railway, running from Pocatello north to the Montana line, a branch road, and fixing its value at \$5,000 per mile; the order on the same day, adding 10 per cent. to the assessed valuation of cattle in said county; the order of September 22, 1891, fixing the assessed valuation of sheep in Bingham county at \$2.50 per head,—were each and all made without authority of law, and void.

SULLIVAN, C. J., and HUSTON, J., concur.

DURANT *et al.* v. COMEGYS *et al.*

(December 18, 1891.)

SPECIFIC PERFORMANCE—LACHES.

1. Though time may be expressly made of the essence of a contract, or may appear to be so from the circumstances of the case, and laches a bar to a specific performance, yet generally time is not so treated, by a court of equity, in the absence of negligent delay, or delay unaccounted for.

SAME—CONTRACT TO PURCHASE MINE—TIME THE ESSENCE OF.

2. The rule that time is of the essence of the contract is especially applicable to contracts for the purchase and sale of mining properties.

SAME—EVIDENCE.

3. In cases where specific performance is demanded on the ground that time was not of the essence of the contract, the court demands that

¹Porter v. Railroad Co., page 561.—[Ed.]

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the party shall make out a case free from doubt, and show that the relief asked for is, under all the circumstances of the case, equitable, and account in a reasonable manner for his delay and apparent omissions.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Action by Oliver Durant and another against George Comegys and others to compel the specific performance of a contract to convey a two-thirds interest in a mining claim. From a judgment dismissing the action, entered upon an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

For former appeal, see ante, 809, 26 Pac. Rep. 755.

W. T. Stoll and McBride & Allen, for appellants.

Time is generally not of the essence of the contract, and the purchaser does not forfeit his right of purchase by neglect to pay at the day. *Wells v. Wells*, 3 Ired. Eq. 596; *Runnels v. Jackson*, 1 How. (Miss.) 358; *Brashier v. Gratz*, 6 Wheat. 533; *Hepburn v. Auld*, 5 Cranch, 270; *Taylor v. Longworth*, 14 Pet. 174; *Willard v. Tayloe*, 8 Wall. 557.

It is not necessary to enable a party to specifically enforce a contract that the other could do the same thing. While usually a contract must be such that the whole of it can be enforced, a party entitled to have it enforced may waive any defect or provision in his favor, and accept what he could not be forced to take. *Waters v. Travis*, 9 Johns. 460.

Woods & Heyburn, for respondents.

Where the time of payment by the vendee is made essential, the vendee must make an actual tender of the price, and a demand of the deed, at the specified time. *Duffy v. O'Donovan*, 46 N. Y. 228; *Gale v. Archer*, 42 Barb. 320; *Wells v. Smith*, 2 Edw. Ch. 78; *Kimball v. Tooke*, 70 Ill. 553; *Phelps v. Railroad Co.*, 63 Ill. 468; *Heuer v. Rutkowski*, 18 Mo. 216.

Where a party has no right of action at law, equity will not interfere to enforce a contract unless there have been some circumstances of fraud, mistake, etc. *Allen v. Beal*, 3 A. K. Marsh. 554; *Tevis v. Richardson*, 7 T. B. Mon. 654; *Buckmaster v. Grundy*, 8 Ill. 628; *Marston v. Humphrey*, 24 Me. 514.

There must be a mutuality of contract before it can be enforced by a court of equity. *King v. Ruchman*, 20 N. J. Eq. 316.

SULLIVAN, C. J. This is an action brought to compel the specific performance of a contract to convey a two-thirds interest in a mining claim. The amended complaint is as follows: "[Title of court and cause.] Come now the plaintiffs above-named, and by leave of the court, first had and obtained, file this their amended complaint, and allege: (1) That the plaintiffs now are, and during all the times hereinafter mentioned were, citizens of the United States over the age of twenty-one years. (2) That prior to and at the time of the making and delivery of the agreements hereinafter mentioned the defendants George Comegys, Lake D. Wolfard, and Samuel B. Morgan represented and stated to the plaintiffs that they, the said Comegys, Wolfard, and Samuel B. Morgan, were the sole owners of that certain lode mining claim known as and called the 'Tuscumbia Lode,' situated on Goat mountain, in Beaver mining district, county of Shoshone and territory of Idaho, and being fifteen hundred (1,500) feet in length and six hundred (600) feet in width, and lying between the Tough Nut mine on the west and the Sitting Bull and Parrott mines on the east, as the same was located and marked upon the ground, and being the same mining claim located on the 20th day of August, 1883, by Wm. Sutherland, Charles W. Toole, and the defendant Samuel B. Morgan. (3) That heretofore, to-wit, on the 6th day of March, 1888, the said defendants George Comegys, Lake D. Wolfard, and Samuel B. Morgan, for a valuable consideration, made and entered into an agreement in writing to and with the plaintiffs, a copy of which agreement is hereto attached, and marked 'Exhibit A,' and hereby made a part of this complaint; and that the 'Tuscumbia Mine,' mentioned in said agreement, was the same lode mining claim heretofore described as the 'Tuscumbia Lode' mining claim, and none other; and that at the time of making of said agreement the plaintiffs believed said statements and representations of said defendants Comegys, Wolfard, and Morgan, to the effect that they were the sole owners of said mining claim, and that, relying upon said statements and representations, and believing the same to be true, plaintiffs entered into said agreement. (4) That immediately after the making and entering into said agreement as aforesaid, and still relying upon said statements and repre-

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sentations, and believing the same to be true, and under and in pursuance of said agreement, and in performance of the terms and conditions of said agreement on their part, the plaintiffs in good faith entered into the possession of said mining claim, and commenced the work of prospecting and developing of said mining claim, and thereafter continued the said work of prospecting and developing of the said mining claim in a judicious manner, and in the manner for the best development thereof, and in so doing the plaintiffs expended on said mine in such work more than five hundred (\$500) dollars per month, until they had expended therein and in such work more than the sum of five thousand (\$5,000) dollars, and that by such work and expenditure the said mining claim was developed from a mere prospect of but small value into a mine worth many thousands of dollars, and that plaintiffs have ever since continued to be, and are now, in possession of said premises. (5) That afterwards, to-wit, on the 1st day of September, 1888, the plaintiffs elected to purchase the said two-thirds interest in said mining claim, and to form a corporation to own and work said mining claim, as provided in said agreement they might do, and notified said defendants Comegys, Wolfard, and Morgan of such election, and that said defendants Comegys, Wolfard, and Morgan, for a valuable consideration, entered into a supplemental agreement to and with the plaintiffs, whereby and by the terms whereof they agreed with plaintiffs that the plaintiffs should have until the 1st day of October, 1888, in which to elect to purchase the two-thirds interest in said mining claim mentioned in said agreement of March 6, 1888, and that time for making the payment of the sum of three thousand (\$3,000) dollars therein [mentioned] should also be extended until said 1st day of October, 1888. (6) That said defendants Comegys, Wolfard, and Morgan were not at the time of making of said statements and representations and agreement of March 6, 1888, the sole owners of said Tuscumbia lode mining claim, as stated and represented by them as aforesaid, but, on the contrary, only held the title to an undivided fifty-sixtieths (50-60) thereof; and that the other undivided ten-sixtieths (10-60) thereof was owned by one Elgin Wilcox and one Chas. W. Toole. That after the making of said agreement, to-wit, on the 4th day of May 1888 in a cer-

tain action then pending in the district court of said Shoshone county, wherein Chas. W. Toole was plaintiff, and the defendant herein, Samuel B. Morgan, was defendant, a writ of attachment duly issued out of said court, and all of the right, title, and interest of the said Samuel B. Morgan in and to said mining claim was duly levied upon and attached by the sheriff of said county, as security for the payment of the sum of seven hundred and fifty (\$750) dollars, then due and owing from said Morgan to the said Toole, which said attachment became and remained a lien upon said Morgan's interest in said mining claim from the said date of the levy of said attachment until long after the said 1st day of October, 1888. And that on said 1st day of October, 1888, there was also pending in the district court of said county a certain action wherein Charles W. Toole and Elgin Wilcox and the defendant Samuel B. Morgan were plaintiffs, and the said defendants Comegys and Wolfard were defendants, in which action notice of the pendency thereof was duly filed in the office of the county recorder of said county, which action was brought for the purpose of obtaining a decree of said court setting aside and declaring void a certain deed, dated November 29, 1886, from Wm. Sutherland to said defendants Comegys and Wolfard, and adjudging and decreeing the [said] Chas. W. Toole and Elgin Wilcox to be the owners of an undivided one-sixth interest in said mining claim, and which said deed so sought to be set aside was a deed from said Wm. Sutherland, one of the locators of said mining claim, to said Comegys and Wolfard, and was part of the claim of title to said mining claim. That said last-mentioned action remained pending and undetermined in said court until the 4th day of June, 1889; and that on that day the said Comegys and Wolfard, without notice to the plaintiffs herein, and without their knowledge or consent, conveyed to said Elgin Wilcox and Charles W. Toole an undivided one-sixth interest in said mining claim. (7) That, after the 1st day of October, 1888, and prior to the 4th day of June, 1889, to-wit, on the 22d day of May, 1889, the defendant Samuel B. Morgan conveyed to the defendant James W. McKune an undivided one-fourth interest in and to said mining claim, and plaintiffs allege that at the time of the making and delivery of said last-named deed the said defendant McKune had full

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knowledge of the said agreements between plaintiffs and defendants Comegys, Wolfard, and Morgan, and of the plaintiffs' rights thereunder, and that the plaintiffs allege upon information and belief that the defendants conspired together to cheat and defraud plaintiffs by clouding and embarrassing the title to said mining claim by placing the title thereto in the hands of third persons, who would pretend to be innocent purchasers, and that said deed to said McKune was made in pursuance of said conspiracy, and that the title to the interest so conveyed to said McKune was and is held by said McKune for the benefit of the defendants, and not otherwise; whereby the value of said mining claim was greatly diminished to the plaintiffs. (8) Plaintiffs further allege that they fully and in all respects complied with and performed all the terms and conditions of said agreements on their parts to be performed, until the said 1st day of October, 1888, and that they have at all times been ready and willing to carry out and perform all the terms and conditions thereof on their part to be kept and performed for the purchase of said two-thirds interest and the organization of said corporation in accordance with the terms of said agreements. But plaintiffs allege that the defendants Comegys, Wolfard, and Morgan have not at any time since the making of said agreements been able to or in condition to carry out or perform the conditions of said agreements on their part to be performed. (9) That, although the said defendants have never been able or willing to comply with their said contract to convey the said Tuscumbia mine and premises as required, the plaintiffs have offered and are willing to waive the inability hereinbefore stated, and to accept a conveyance from the defendants of the two-thirds thereof to themselves, and have been always heretofore ready and willing to make the payments in said agreements specified therefor, and, in pursuance thereof, have, prior to this action, offered to pay the said defendants the sum of money specified as the purchase price, and demanded of the defendants the conveyances required in such case by said agreements; and plaintiffs allege that the said purchase price was declined by defendants, and the demand for conveyance refused; wherefore plaintiffs claim relief as follows: That the defendants be required to convey to the plaintiffs, upon the payment of the purchase price specified, less such deduction as the

court may find to be equitable on account of the inability of defendants to fully comply with said agreements, the premises so agreed by them to be conveyed, to-wit, an undivided two-thirds of said Tuscumbia mine; that the conveyance to said McKune be declared and decreed to be fraudulent and void as against the plaintiffs; that the amount, less any deductions from said purchase price, be ascertained and determined, and the amount to be paid to the defendants be in like manner ascertained and determined. And as a further relief, pending this action, the said defendants and all persons claiming interests in said mine adverse to the plaintiffs and under these defendants be enjoined from interfering with the possession of these plaintiffs in or to said premises, or to the ores or minerals therein or thereon, and from conveying or incumbering the same, until the final determination of this action, and for such other and further relief as may be equitable and just, and for costs. JOHN R. McBRIDE, W. T. STOLL, ALBERT ALLEN, Attorneys for Plaintiffs."

"Exhibit A. This agreement and contract, made this sixth day of March, A. D. 1888, by and between Geo. Comegys, Lake D. Wolfard, and Samuel B. Morgan, parties of the first part, and Alexander H. Tarbet and Oliver Durant, parties of the second part, witnesseth that the said parties of the first part, for and in consideration of the covenants and agreements hereinafter made and to be performed by said parties of the second part, agree that the parties of the second part herein may take immediate possession of the 'Tuscumbia' mine for the purpose of prospecting and doing development work thereon. The parties of the second part herein agree to commence such prospecting and development work not later than June first, 1888, and continue the same in a judicious manner for the best development of said Tuscumbia mine, at an expenditure of not less than five hundred dollars per month on said mine, until the whole sum of three thousand dollars is expended. That on or before the first day of September, 1888, the parties of the second part may elect to purchase an undivided two-thirds interest in said mine for the sum of seventeen thousand dollars, to be paid to the parties of the first part as follows: Three thousand dollars on the said first day of September, A. D. 1888, and the sum of fourteen thousand dollars to be paid to the parties of the

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first part on or before December first, A. D. 1888. Whereupon, after said conditions and terms are fully complied with on the part of the parties of the second part, and as soon as said fourteen thousand dollars shall have been paid to the parties of the first part, according to the terms and in the manner hereinbefore set forth, then the parties of the first part herein agree and covenant with the parties of the second part to remise, release, and forever quitclaim unto the parties of the second part an undivided two-thirds interest in and to the 'Tuscumbia' mine. Upon the parties of the second part purchasing the said two-thirds interest in the said 'Tuscumbia' mine as aforesaid, they, the said parties of the second part, may elect to form a corporation for the purposes, among others, of purchasing and working the said mine, such corporation to have a capital stock of one million five hundred thousand (\$1,500,000) dollars, to consist of three hundred thousand (300,000) shares of the par value of \$5.00 per share, fully paid up, and non-assessable; of said stock fifty thousand shares to be set aside as a working capital, and the remaining two hundred and fifty thousand shares to be issued to the parties hereto, respectively, according to their respective interests in said mine, in payment therefor, to-wit, to the parties of the first part 83,334 shares, and to the parties of the second part 166,666 shares; and upon the receipt of the same the said parties hereto do hereby mutually agree one with the other to make, execute, and deliver a good and sufficient deed conveying by quitclaim to such corporation such parties' interest in said mine; that is to say, the first party shall convey and quitclaim the undivided one-third interest in said mine, and the second parties the undivided two-thirds interest in said mine, to such corporation. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written. GEORGE COMEGYS. [Seal.] Witness signature Geo. Comegys: J. N. BALTHIS. LAKE D. WOLFARD. [Seal.] Witness signature of Lake D. Wolfard: THOMAS SECRETT. SAMUEL B. MORGAN. [Seal.] Witness signature Sam'l B. Morgan: J. W. MCKUNE. ALEX. H. TARBET. [Seal.] Witness signature Alex. H. Tarbet: F. T. MCBRIDE. OLIVER DURANT. [Seal.] Witness signature Oliver Durant: C. M. HALL."

The defendants interposed demurrer to the amended complaint, on the ground

that said complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court. The plaintiffs thereupon elected to stand upon their amended complaint, and thereafter said action was dismissed at plaintiffs' costs. Thereupon an appeal was taken to this court at its April term, 1891. Said appeal was dismissed without prejudice, on the ground that the record failed to show that judgment of dismissal had been entered in the court below. After such dismissal the court below entered judgment, and the case is brought here on an appeal from the order sustaining said demurrer and from the judgment of dismissal.

The respondents question the authority of the court below to enter judgment, as was done in this case, and cite some authority in support of that proposition, but, in our view of the case, it is unnecessary for us to pass upon the question thus raised. The demurrer admits all of the allegations of the amended complaint. The question for our determination then is, do the facts stated in the amended complaint authorize the court to enter a decree in favor of the plaintiffs? The agreement on which this action was brought is attached to the amended complaint, and made a part thereof, and is above set forth in full. It is admitted that the appellants did not tender the \$3,000, due by the terms of the original agreement on the 1st day of September, 1888, and by the supplemental agreement, on the 1st day of October, 1888. It is also conceded that appellants failed to tender the \$14,000 due by the terms of said agreement on the 1st day of December, 1888. It is also conceded that the appellants have been in default. The question then is, do they allege in their amended complaint facts and circumstances sufficient to warrant a court of equity to compel a specific performance of the contract sued on? Appellants contend that time is not of the essence of said contract, and claim that the rule that should govern in this case was stated by Chief Justice MARSHALL in *Brashier v. Gratz*, 6 Wheat. 533, as follows: "If, then, a bill for a specific performance be brought by a party who is himself in default, the court will consider all the circumstances of the case, and decree according to those circumstances." Referring to the class of cases to which the above rule applies, Justice STORY, in *Taylor v. Longworth*, 14 Pet. 172, says: "But in all such cases the court expects the party to make out a case

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free from all doubt, and to show that the relief he asks is, under all the circumstances, equitable, and to account in a reasonable manner for his delay and apparent omission of his duty." This rule was laid down in the case of the sale of a town lot, where an actual sale had been made, and \$2,458.33 of the purchase price was paid on the day of the purchase, while in the case at bar there was no contract of purchase,—simply an option to purchase,—no part of the purchase price was paid down, or paid at all. The rule that should govern in the case at bar, we think, was correctly laid down by the supreme court of Idaho in the case of *Settle v. Winters*, 10 Pac. Rep. 216.¹ It is there held that time is of the essence of the contract when the character of the property involved renders it liable to great fluctuations in value, and that this rule should be adhered to in the construction of contracts for the purchase and sale of mining properties. Waiving the rule laid down in that case, and testing the case at bar by the rule in *Taylor v. Longworth*, supra, should the demurrer have been sustained? In other words, does the amended complaint state a cause of action free from all doubt, and show that the relief asked is, under the circumstances stated, equitable; and does it in a reasonable manner account for the delay and default in the tender of the purchase price, and the delay in bringing this suit? The amended complaint alleges that the appellants entered into the possession of said mining claim, and expended more than \$500 per month, until they had expended more than \$5,000, in prospecting and developing said mine, prior to the 1st day of September, 1888; that, after expending said sum, to-wit, on the 1st day of September, 1888, they elected to purchase the said two-thirds interest in said mining claim, and elected to form a corporation for the purpose of purchasing and working said mining claim, and notified said defendants, Comegys, Wolfard, and Morgan, of such election; and further alleges that said defendants Comegys, Wolfard, and Morgan, for a valuable consideration, entered into a supplemental agreement with the plaintiffs, whereby they (the said Comegys, Wolfard, and Morgan) agreed with plaintiffs that plaintiffs should have until the 1st day of October, 1888, in which to elect to purchase the two-thirds interest in said mining

claim mentioned in said agreement of March 6, 1888, and that the time for making the payment of the \$3,000 therein mentioned was by said supplemental agreement also extended until said 1st day of October, 1888. It will be observed from the said allegations that the appellants elected to purchase said two-thirds interest in said mine, and also elected to incorporate as per terms of said agreement, and that they notified defendants, Comegys, Wolfard, and Morgan, of such election, and that thereupon said Comegys, Wolfard, and Morgan, for a valuable consideration, agreed to extend the time to October 1, 1888, which the appellants should have to elect to purchase the two-thirds interest in said mine, and also extended the time for the payment of the \$3,000 until the 1st day of October, 1888. Is it not significant that, after appellants had elected to purchase said two-thirds interest, they should pay the defendants a valuable consideration for extending the time in which to elect to purchase? Is it not also significant that, after electing to purchase the two-thirds interest and to incorporate, they should pay a valuable consideration for time in which to elect to purchase, and not also have the time extended in which to elect to incorporate?—as it was contended in the argument by counsel for appellants that the time had arrived on September 1, 1888, for them to elect whether they would incorporate or not. If time was not of the essence of this contract, and so considered by the appellants, why pay a valuable consideration for an extension of the time, and have it extended to a fixed date?

Appellants contend that respondents were not in a position to comply with their covenants in said agreement, for the reason that the interest of said defendant Morgan in said mine had been incumbered by the levy of a writ of attachment thereon to secure the payment of \$750, and for the further reason that Toole, Elgin, and respondent Morgan had brought suit against respondents Comegys and Wolfard for the purpose of obtaining a decree for a one-sixth of said mine; that for these reasons the appellants were excused from tendering the purchase price, when due by the terms of said contract, as such tender would have been an idle act. The amended complaint fails to show that appellants did not have full knowledge of said incumbrance and suit on the 1st day of September, 1888, when they paid a val-

¹Ante, 199.

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uable consideration for an extension of the time in which to elect to purchase said mine, and in which to pay the \$3,000. Instead, then, of standing on the proposition "that, as respondents could not convey the whole mine, free from said attachment lien, and the claim of Toole and Wilcox to an undivided one-sixth interest therein, they paid a valuable consideration for the extension of the time in which to elect to purchase, after having once elected, as alleged. When the 1st day of October, 1888, arrived, they did not tender the \$3,000 then due, not because the respondents, Comegys, Wolfard, and Morgan, were not in a position to convey the two-thirds interest, but because they were not in a position to convey the whole mine to a company thereafter to be incorporated. Thus it will be observed that on September 1, 1888, appellants acted on the principle that time was of the essence of the contract, and paid for an extension of time, but on the 1st day of October, 1888, and since said date, they have acted on the theory that time was not of the essence of said contract.

It is alleged in the amended complaint that said mine had been developed from a mere prospect into a mine worth many thousands of dollars by the expenditures of appellants. What, then, was the condition? A mine worth thousands of dollars, with \$3,000 due the respondents on the 1st day of October, 1888, provided appellants elected to purchase two-thirds of said mine, and \$14,000 due from appellants on December 1, 1888. Under such circumstances, would not the appellants have been in better standing in a court of conscience if they had tendered to respondents on October 1, 1888, the \$3,000, less the amount necessary to satisfy said attachment lien of \$750? Would they not, by thus doing, have shown themselves more ready, willing, prompt, and eager to comply with their covenants in said contract than they have by refusing to tender the first payment, for the reason that the respondents were not in a position to convey one-third of said mine to a corporation, not yet in existence, after having conveyed to appellants two-thirds thereof? Appellants contend that their delay and omission in tendering payment are justified, because they had elected on September 1, 1888, to incorporate a company to purchase and work said mine, and respondents were not in a position to convey the one-third

interest to a corporation not yet *in esse*. The question arises as to the date when appellants had the right to elect to incorporate a company for the purpose of purchasing and working said mine by the terms of said agreement. The appellants covenanted, by the terms of said agreement, to expend \$3,000 in the development of said mine prior to September 1, 1888, at the rate of not less than \$500 per month. They were therein given the option to purchase an undivided two-thirds interest in said mine on or before September 1, 1888, for the sum of \$17,000, \$3,000 payable on September 1, 1888, and \$14,000 payable on December 1, 1888. After setting forth the above covenants, the agreement proceeds as follows: "Whereupon, after said conditions and terms are fully complied with on the part of the parties of the second part, (appellants here,) and as soon as said \$14,000 shall have been paid to the parties of the first part, according to the terms and in the manner hereinbefore set forth, then the parties of the first part herein agree and covenant with the parties of the second part to remise, release, and forever quitclaim unto the parties of the second part an undivided two-thirds interest in the said 'Tuscumbia' mine. Upon the parties of the second part purchasing the said two-thirds in said Tuscumbia mine as aforesaid, they, the said parties of the second part, may elect to form a corporation for the purposes, among others, of purchasing and working said mine." By the terms of said contract the appellants had the right to elect to incorporate a company for the purpose of purchasing and working said mine when they had paid or tendered the entire purchase price of \$17,000, and not before; for it is expressly stipulated in said agreement that, as soon as said \$17,000 shall have been paid according to the terms and in the manner set forth in said agreement, the first parties thereto, to-wit, respondents, Comegys, Wolfard, and Morgan, agreed to remise, release, and forever quitclaim unto the appellants the undivided two-thirds interest in and to said Tuscumbia mine; that upon the said appellants purchasing the two-thirds interest in said mine, as aforesaid, they might then elect to form a corporation for the purpose of purchasing and working said mine, and not before. The covenants in said agreement are too plain to be misunderstood or to require construction. The appellants (by the terms of said agree-

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ment) had no right to elect to form a corporation for the purpose of purchasing and working said mine until they had paid the \$17,000 as stipulated. Besides, the amended complaint alleges that a supplemental agreement was entered into on the 1st day of September, 1888, and for a valuable consideration the respondents extended the time which appellants had to elect to purchase a two-thirds interest in said mining claim, and extended the time for the payment of the \$3,000 to October 1, 1888; but it is not alleged that the time to elect to form a corporation, as aforesaid, was also extended. If, as contended by appellants, September 1, 1888, was the time at which they should elect to purchase a two-thirds interest therein, and the time to elect to form a corporation for the purchase of the whole mine, it would appear to us that, if they procured more time in which to elect to purchase said two-thirds interest and in which to pay the \$3,000, and failed to secure an extension of the time in which to elect to incorporate a company, they had abandoned the idea of or desire to form such corporation, or that respondents had refused an extension of time for that purpose. As one of the points urged by appellants is that they had elected to incorporate a company, and as respondents were not in a position to convey one-third of said mine to said corporation, they were exonerated from making any tender for that reason. We do not believe that said agreement will bear the construction which was placed upon it by counsel for appellants in their argument of this case to this court, and the construction given it in the complaint, as to the time when appellants were in a position to elect whether to organize a corporation or not; but appellants' construction of said contract is a circumstance which this court may and ought to consider in the determination of this case. The appellants contend that, as they had been in possession of said mine since taking possession thereof under said agreement, that is a circumstance in their favor. The complaint shows that appellants have been in the possession of said property from the time of taking possession thereof under said agreement up to the time of bringing this suit. It also shows that appellants expended more than \$5,000 in prospecting and developing said mine prior to September 1, 1888, but it does not show that they have expended one dollar thereon since said last-mentioned date. They held pos-

session, but failed to do development work. The record further shows that the respondents, Comegys, Wolfard, and Morgan, were in a position to convey to the appellants an undivided two-thirds interest in said mine, as late as the 22d day of May, 1889, the date when respondent Morgan conveyed an undivided one-fourth interest therein to respondent McKune; the only cloud thereon being the attachment lien for the small sum of \$750 against respondent Morgan's interest. But, by failing to make said tender, they have shown themselves not ready, willing, prompt, and eager to comply with the conditions imposed on them by the terms of said agreement. If the appellants had tendered the \$3,000 when due, and the \$14,000 when due, and respondents had failed and refused to clear the title of said incumbrance of \$750, and had refused to convey the two-thirds interest which they had agreed to convey, appellants' position before a court of equity would be very different from what it now is. Another circumstance which the court may consider in this case is the long delay of appellants in bringing this suit. This suit was not brought until over a year had elapsed after the right to an action had accrued, and no excuse is offered for this delay. We are of the opinion that the appellants, by their amended complaint, do not make out a case free from doubt; that they do not show that the relief asked for is, under all the circumstances, equitable; that they have not accounted in a reasonable manner for their delay and failure to comply with their covenants in said agreement; and are of the opinion that the judgment of the court below should be affirmed, with costs of appeal to the respondents, and it is so ordered.

HUSTON and MORGAN, JJ., concur.

BROWN *et al.* v. HANLEY, Sheriff.

(December 18, 1891.)

UNDERTAKING ON APPEAL—TIME OF FILING.

1. Section 4808, Rev. St. Idaho, requires an undertaking on appeal to be filed within five days after the service of notice of appeal, in order to render an appeal effectual for any purpose.

SAME—JURISDICTION OF SUPREME COURT—FILING AFTER STATUTORY LIMIT.

2. This court has no jurisdiction or authority to permit an undertaking on appeal to be filed after the five days have expired.

(Syllabus by the Court.)

Harkness v. Smith.

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Action of claim and delivery by Brown Bros. & Co. against Thomas F. Hanley, sheriff. From a judgment for defendant, plaintiffs appeal. Appeal dismissed.

Alex. E. Mayhew and Cox, Teal & Minor, for appellants.

In the case of receivers the courts have uniformly held that, even where receivers have instituted suit without giving bond, a *nunc pro tunc* order may be entered; and the same rule has been applied in cases of injunctions and other provisional remedies. *O'Farrell v. Stockman*, 19 Ohio St. 297; High, Rec. § 112; *Morgan v. Potter*, 17 Hun, 403; *Whiteside v. Prendergast*, 2 Barb. Ch. 471; *Railroad Co. v. Patton*, 5 W. Va. 234; *North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co.*, 79 N. C. 48; 2 High, Rec. § 1634.

So a party appellant is frequently relieved against a failure to file the transcript in time. *Platt v. Preston*, 19 Blatchf. 312, 8 Fed. Rep. 182; *Hardt v. Birely*, 72 Md. 134, 19 Atl. Rep. 606.

A party appellant is frequently relieved against irregularities, imperfections, and mistakes in the undertaking or bond on appeal, even in cases where such undertaking or bond is so fatally defective as to be absolutely void. *Boyd v. Burrell*, 60 Cal. 281; *Perkins v. Cooper*, 87 Cal. 243, 25 Pac. Rep. 411; *Means v. Trout*, 16 Serg. & R. 348; *Saterlee v. Stevens*, 11 Ohio, 420; *Pow. App. Proc.* § 18.

Albert Hagan, for respondent.

SULLIVAN, C. J. Respondent moves this court to dismiss this appeal, on the ground that no undertaking on appeal was filed within five days after the service of the notice of appeal. The record shows that the notice of appeal was served on the 22d day of July, 1891, and that the undertaking on appeal was filed on the 1st day of August, 1891. There is no dispute as to the facts. Appellants make a counter-motion for a *nunc pro tunc* order permitting an undertaking to be now filed, based upon an affidavit setting forth the cause of the delay in filing said undertaking within the time required by law. Counsel for appellants urge, with marked ingenuity and ability, that this court has the authority to grant said motion, especially as our statutes, and all proceedings under them, must be liberally construed, with a view to effect their objects and to promote justice. Section

4808 of the Revised Statutes of Idaho is too plain to require construction. It is imperative, and provides that "the appeal is ineffectual for any purpose, unless within five days after the service of the notice of appeal an undertaking be filed." This is a statute of limitation, and this court has no authority to extend it. This court has no jurisdiction to permit an undertaking on appeal to be filed in this court, unless one has first been filed in the court below, within the time allowed by said section 4808. This view is fully sustained by numerous decisions, under statutes similar to ours, by courts of last resort. *Cook v. Railway Co.*, (Utah,) 27 Pac. Rep. 5, and authorities therein cited. This attempted appeal is dismissed, with costs in favor of respondent.

HUSTON and MORGAN, JJ., concur.

HARKNESS v. SMITH, Sheriff.

(December 18, 1891.)

FRAUDULENT CONVEYANCE—CHANGE OF POSSESSION—RIGHTS OF CREDITOR.

1. The statutes of Idaho make all sales of personal property in the possession of the vendor, except things in action, unaccompanied by immediate delivery, and followed by an actual and continued change of possession, void as to subsequent purchasers, creditors, etc. G., being largely indebted, sold a stock of merchandise to H., one of his principal creditors, and who held a chattel mortgage upon the stock of merchandise owned by G. as security. The sale was made at the residence of H., 25 miles from the place where the merchandise was. No invoice was taken, no inspection or examination of the stock, no change in the clerical force, nor in the conduct or management of the business. G. continued to conduct the business as before, except that he added the abbreviation "Mgr." when signing letters, checks, etc. *Held*, there was no such immediate delivery and actual and continued change of possession as the statute requires, and the sale was void as to creditors.

SAME—KNOWLEDGE OF CREDITOR—EFFECT.

2. The fact that the attaching creditor knew of the pretended sale of G. to H., and continued to deal with G. as "Mgr.," is of no moment, and cannot be urged to prevent the operation of the statute.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Action of claim and delivery by H. O. Harkness against C. S. Smith, sheriff. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Harkness v. Smith.

Smith & Smith, for appellant.

Delivery must be made of the property. The vendee must take the actual possession, and that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. *Norton v. Doolittle*, 32 Conn. 405; *Stevens v. Irwin*, 15 Cal. 503; *Godchaux v. Mulford*, 26 Cal. 316; *Wright v. McCormick*, 67 Mo. 426; *Lawrence v. Burnham*, 4 Nev. 361; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. Rep. 809; *Grum v. Barney*, 55 Cal. 254; *Dean v. Walkenhorst*, 64 Cal. 78, 28 Pac. Rep. 60; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. Rep. 699; *Hesthal v. Myles*, 53 Cal. 623; *Woods v. Bugbey*, 29 Cal. 466; *Hull v. Sigsworth*, 48 Conn. 258; *Perrin v. Reed*, 35 Vt. 2.

Hawley & Reeves, for respondent.

As plaintiff assumed control, and ordered goods from the party beneficially interested, who had full knowledge of the transaction, such possession was amply sufficient under the rule. *Cook v. Mann*, 6 Colo. 21; *Gray v. Sullivan*, 10 Nev. 416; *Billingsley v. White*, 59 Pa. St. 464; *Godchaux v. Mulford*, 26 Cal. 316.

HUSTON, J. Plaintiff brought action of claim and delivery for the recovery of possession of a stock of merchandise alleged to have been wrongfully taken and unlawfully detained by defendant. Defendant was sheriff of Bingham county, and under and by virtue of a certain writ of attachment, issued out of the district court for Bingham county, at the suit of F. J. Keisel & Co. vs. P. Gallagher, levied upon and seized a certain stock of merchandise in the town of Pocatello, in said county, as the property of said P. Gallagher. The answer of defendant is a general and specific denial of all the allegations of the complaint, except the taking. The evidence establishes the following facts: On the 21st day of November, 1890, one P. Gallagher was, and for some months prior thereto had been, engaged in a general merchandise business in the town of Pocatello, Bingham county, Idaho. It appears by his own testimony that at the time he entered into the business he had about \$3,000 invested therein; that shortly after, for the purpose of erecting a store building, he borrowed \$2,000. He also testifies that his monthly profits from the time he started in business in March, 1890, to the time of his alleged sale to plaintiff on November 21, 1890, were about \$300

per month. The plaintiff is a ranch and stock man and capitalist, residing at McCammon, about 25 miles from Pocatello. On November 21, 1890, Gallagher goes to McCammon, to the residence of plaintiff, and there makes a sale of his said stock of merchandise to plaintiff, who at that time held a mortgage of \$4,000 on said stock of merchandise. The price alleged to have been paid by plaintiff was \$7,240. This included the store building. After deducting the amount of his chattel mortgage plaintiff says he paid the balance of \$3,240 to Gallagher in his checks, which were paid. On the morning following the sale plaintiff and Gallagher went to Pocatello. The clerical force in the store at that time consisted of a man by the name of Smith, and the son and daughter of Gallagher. Harkness (plaintiff) said to Smith when he first went into the store, on the day after the alleged sale by Gallagher to him, "Will you work for me for the same salary Gallagher has been paying you?" and Smith said he would. No invoice was taken, no change was made in the *personnel* of the establishment, no sign was changed. Gallagher continued in charge of the business as theretofore. The clerical force was the same, two of the employes being members of Gallagher's family. Gallagher continued to buy and order goods as before the alleged sale, except that the letter-heads were in the name of "H. O. Harkness," and Gallagher signed all letters, checks, etc., "P. Gallagher, Mgr.," and this continued to be the condition of affairs up to the time of the levy of the attachment by defendant on February 25, 1891. The case was tried by the court with a jury, and verdict rendered for the plaintiff for return of property and \$125 damages. Upon said verdict judgment was entered. Motion for new trial was made and overruled. From the judgment and order denying motion for new trial defendant appeals.

The first assignment of error by the appellant is that the evidence is insufficient to justify the verdict. This point, we think, is well taken. The statutes of Idaho (Rev. St. § 3021) are as follows: "Every transfer of personal property other than a thing in action, and every lien thereon other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and

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continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." It is not enough that there is an actual delivery and an actual change of possession as between vendor and vendee, so long as the property, without legal excuse, is so placed back into the same condition and the same apparent relation to the vendor that there is no such manifest and continued change of possession as would indicate to the world that there has been a change of title. *Norton v. Doolittle*, 32 Conn. 405; *Lawrence v. Burnham*, 4 Nev. 361; *Wright v. McCormick*, 67 Mo. 426; *Dean v. Walkinhorst*, 64 Cal. 78;¹ *Godchaux v. Mulford*, 26 Cal. 316; *Bassinger v. Spangler*, (Colo. Sup.) 10 Pac. Rep. 809. The evidence fails entirely to show "either an immediate delivery 'or' an actual and continued change of possession."

The second assignment of error is "that the verdict is against law, for the reason that the jury entirely disregarded the instruction of the court." The court instructed the jury as follows: "The court instructs the jury that every transfer of personal property other than a thing in action is conclusively presumed, if made by a person having at the time the possession or control of property, and not accompanied by the immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors, while he remains in possession." This is copied from the statute. The evidence on the part of the plaintiff shows that the case is clearly within the statute. There was never either "delivery" or "change of possession," as those terms are used in the statute, and have been repeatedly construed by the courts. We think this assignment of error is well taken.

The third assignment of error is predicated upon the allowance by the court, over objection of defendant, of the following question by plaintiff to witness P. Gallagher: "What knowledge, do you know if any did F. J. Keisel & Co. have

of this change of possession or change of ownership in that store?" This was error, and it was, we think, the error which caused the jury to render the verdict they did in this case. The plaintiff was permitted by the court to show that Keisel & Co., plaintiffs in the attachment suit, knew or were advised of the change through the alleged sale of November 21, 1890, and that they continued to deal with plaintiff through P. Gallagher, manager. This evidence was improperly admitted. Whether Keisel & Co. or any other creditors of Gallagher knew or did not know of his pretended transfer to plaintiff, could in no way change the provisions of the statute, and the admission of evidence to establish such fact was error. The mistake which counsel for respondent makes is in confounding the provisions of section 3020, Rev. St., with those of section 3021. These two sections present distinct propositions. Under the first section great latitude of inquiry is permissible. Any facts which tend to prove that the transfer was made "with intent to delay or defraud any creditor or other person of his demands" are pertinent and proper. Under section 3021 the sole inquiry is, was there an "immediate delivery, followed by an actual and continued change of possession?" No question of intent, *bona fides*, or notice cuts any figure in such case. *Lawrence v. Burnham*, 4 Nev. 361; *Bassinger v. Spangler*, (Colo. Sup.) 10 Pac. Rep. 809.

The fourth to eighth assignments of error are as to the refusal of the court to give certain instructions asked by the defendant. As to the first, we think the instruction was proper, but it was given in substance by the court in its instructions upon its own motion. The second instruction asked by defendant and refused by the court, or that marked "B," was a peremptory instruction to the jury to render a verdict for the defendant. While we think that the evidence, by a large preponderance, brought the case within the provision of section 3021, still we are not prepared to say, under all the circumstances of this case, that the court erred in refusing a peremptory instruction in behalf of defendant. The third instruction asked by defendant and refused by the court was as follows: "The jury are instructed that, although they may find Keisel & Co. knew of the sale of the store to Harkness, still defendant is entitled to recover if the jury find that there was not

¹28 Pac. Rep. 60.

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an actual and continued change of possession of the store." There was no error in refusing this instruction. There was no store or the possession of a store involved in this case. We think instruction "D" was virtually covered by the instructions given by the court. If the refusal to give instruction marked "E" was based upon the wording of it, there was no error in refusing it. It is as follows: "The jury are instructed that if they find that Gallagher was largely indebted to various parties, and that Harkness knew this," etc. The jury can only find facts from the evidence, and an instruction which even inferentially gives them a wider range of inquiry is properly refused. We think the law as given by the court was correct as far as it went, but, as is not unfrequently the case in this country, the jury paid but little heed to the instructions of the court. The motion for a new trial should have been granted. The judgment and order of the district court are reversed, and the cause remanded, with instructions to the district court to grant a new trial; costs to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

McCONNELL et al. v. McCORMICK et al.

(December 18, 1891.)

COSTS—EXPENSES OF SHERIFF—REMOVING ATTACHED PROPERTY.

Where the statute provides that the sheriff shall be allowed "for his trouble and expense in taking and keeping possession of and preserving property under attachment," etc., "such sum as the court may order, provided no more than \$3 per day be allowed a keeper," where an expense of \$688.20 was incurred by the sheriff without an order of court for the removal of lumber from the mill of defendants, no necessity for such removal appearing, *held*, that said charge should be disallowed.

(*Syllabus by the Court.*)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by McConnell, Maguire & Co. against McCormick Bros. There was judgment for plaintiffs. From an order disallowing part of their cost bill, they appeal. Affirmed.

J. A. C. Freund, for appellants.

Retaxation of costs is a question of fact, and cannot be determined by a review of the cost bill and motion. *Evans v. Jacob*, 59 Cal. 629.

It is a question of fact to be tried by the court. *Nestor v. Bischoff*, 123 N. Y. 517, 25 N. E. Rep. 1046.

Forney & Tillinghast and *J. C. Elder*, for respondents.

The clerk's minutes of the trial are no part of the transcript on appeal. *People v. Empire G. & S. Min. Co.*, 33 Cal. 173.

Unless the court makes an order, the sheriff has no right to expenses incurred in executing processes. *Bower v. Rankin*, 61 Cal. 108; *Lane v. McElhany*, 49 Cal. 424; *Geil v. Stevens*, 48 Cal. 590.

HUSTON, J. This is an appeal from an order of the judge of the second district in and for Latah county, made after judgment, disallowing a portion of a bill of costs. Appellants brought action in the district court for Latah to recover from defendants the sum of \$565.15, and recovered judgment thereon for that amount, with interest and costs. At the time of commencing action plaintiff procured a writ of attachment to be issued, which was levied upon 172,050 feet of lumber, the property of defendants, and then being at the saw-mill of defendants, situated some 11 or 12 miles from the town of Moscow, the county-seat of said Latah county. Attachment was issued on 4th day of September, 1890, and levy was made on same day. At the time of making the levy the sheriff employed a keeper to take charge of the attached property. On November 21st, the sheriff having procured an order of the district judge therefor, the attached property was sold at public auction at Moscow, it having been previously removed by the sheriff from the saw-mill of defendants to said town of Moscow, at an expense of \$4 per thousand feet. The lumber was sold for \$4.95 per thousand feet, one of the plaintiffs being the purchaser. The contention arose upon the bill of costs filed by plaintiffs, defendants claiming that the charge of \$688.20, for removing said lumber from their saw-mill to Moscow, was unnecessarily incurred, and ought not to be allowed. In support of their contention defendants file the following affidavit:

(Title of Court and Cause.) "State of Idaho, county of Latah—ss.: Charles E. McCormick, being duly sworn, says that he is one of the defendants in the above-entitled action. That on the 4th day of September, 1890, and long prior thereto, the defendants above named were the owners and in possession of 172,000 feet

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of lumber situated on the yard at McCormick Bros.' saw-mill, about eleven miles east of the town of Moscow, in Latah county, in the state of Idaho. That on said 4th day of September, 1890, Geo. Langdon, as sheriff of said Latah county, at said saw-mill, attached and took into his possession the whole of said lumber, and at the same time and place appointed a keeper therefor, who took possession of the same. That said saw-mill yard, where said lumber was situated, was a safe and convenient place in which to keep the same. That between the 15th day of October, 1890, and the 1st day of November, 1890, the said sheriff, Geo. Langdon, removed and hauled away from said saw-mill yard the said 172,000 feet of lumber to the town of Moscow, in said county and state. That said lumber was so removed without any order of court authorizing the same, without the consent of said defendants or either of them, and against the protest of said defendants and each of them. That prior to and at the time said lumber was attached, as aforesaid, the defendants had been selling lumber of the same kind and character at said saw-mill at the rate of \$8 and \$9 per thousand. That at about the time said lumber was removed, as aforesaid, the defendants were offered for the entire lot of said lumber, delivered at said saw-mill yard, \$5 and \$6 per thousand, or an average price of \$5.50 per thousand, and that the same was at said time and place reasonably worth the sum of \$7 per thousand, for the entire lot of said lumber, and that at no time since the removal of said lumber as aforesaid has the price of such lumber depreciated at said saw-mill. That on or about the 21st day of October, 1890, the said Geo. Langdon, as sheriff, by order of court, sold at said town of Moscow the entire lot of said lumber so removed, as aforesaid, at the rate of \$4.95 per thousand, and that R. S. Brown, one of the plaintiffs herein, was the purchaser thereof. Affiant further says that said lumber, and the whole thereof, was removed by said Geo. Langdon, as aforesaid, at the request and earnest solicitation of plaintiffs herein, and at an expense of \$4 per thousand, as this affiant is informed and believes, and that the defendants herein have received no benefit whatever therefrom, and that said expense of \$4 per thousand for hauling said lumber was useless and unnecessarily incurred. Affiant further says that said removal of said lumber as aforesaid was

not necessary for the protection, preservation, and safe-keeping of said lumber, or any part thereof. And further this affiant saith that the order of court for the sale of said lumber as aforesaid was made without the consent of defendants, or either of them, or their attorney, and against their protest. [Signed] CHARLES E. McCORMICK."

Plaintiffs filed the following affidavit of the sheriff, which it appears the district judge refused to consider: (Title of Court and Cause.) "State of Idaho, county of Latah—ss.: I, George Langdon, being first duly sworn, say that between the 4th day of September, 1890, and the 13th day of January, 1891, and at all times between said dates, affiant was the duly qualified, elected, and acting sheriff of Latah county, in the state of Idaho. That in the month of September, 1890, the above-named plaintiffs duly commenced an action against defendants in the district court in and for Latah county to recover the sum of \$565.15, besides interest and costs, against defendants, and duly procured a writ of attachment in said action, and placed the same in the hands of affiant for service and execution. That, pursuant to said writ, affiant, as such sheriff, duly levied upon and took into his possession 172,050 feet of lumber, the property of defendants in said action, and the defendants abovenamed. That said property, when so taken under said writ as aforesaid, was situated in the yard of defendants, at their mill-yard, about eleven miles distant from Moscow, and beyond the personal control of affiant. That affiant could not procure a suitable and reliable person as keeper to care for said property. That said property was so situated as to become mixed and confused with other lumber in said yard, and was so situated as to be greatly in danger of fire, and was in great risk of fire, and could not be insured or made safe without being removed, and, if so removed, it could not be located or placed in a safe situation, without bringing the same to Moscow, so as to be under the personal supervision of affiant. That thereupon affiant, as said sheriff, caused the said lumber to be removed to a place of safety, and brought the same to the town of Moscow. That defendants, and each of them, fully understood that he should and would remove said property, and fully agreed with affiant that it should be removed. That affiant derived no benefit or profit in

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the removal of said lumber, but that the sum charged therefor was actually expended as such expense, and affiant's actions were fully acquiesced in by all parties in interest. That said lumber was duly sold by order of this court, as the records herein will fully verify, and was so sold for the best price which could be procured for such lumber and for lumber of such quality. That affiant experienced great difficulty in selling said lumber at all, by reason of the fact that it was under attachment, and the cloud thereby cast upon the title to said property, and by reason of the quality of the same. That to keep said lumber at the aforesaid saw-mill from the 4th day of September, 1890, until the convening of the district court in and for Latah county, state of Idaho, which said convening was at that time not known or set for any particular date, nor was it at that time reasonable to know when said district court would meet. Said expense would have been reasonably incurred at very great expense for the reason of keeper's fees, which could not have been procured at a less price than \$3 per day for all the time until the convening of said aforesaid court. [Signed] GEO. LANGDON."

The action of the district judge in refusing to consider the affidavit of Langdon, the sheriff, is assigned as error by appellants. Whether this action of the district judge was correct or not, it is not essential now for us to decide. The affidavit is properly before us, and we will consider it. The district judge disallowed the charge of \$688.20 for removing the lumber from the saw-mill of the defendants to the town of Moscow simply for the purpose of a sale, as being an unnecessary expense, and not within the purview of section 2126 of the Revised Statutes of Idaho, which provides as follows: "The sheriff is allowed," etc., "for his trouble and expense in taking and keeping possession of, and preserving property under attachment, or execution or other process, such sum as the court may order: provided, no more than \$3.00 *per diem* be allowed a keeper." We think the ruling of the district judge was entirely correct. The judgment in this case was for the sum of \$588.52, damages and costs. The cost-bill is made up of the following items and amounts, to-wit: Sheriff's fees, \$83.58; clerk's fees, \$10.65; keeper's fees, \$93; for hauling lumber from defendants' saw-mill, 12 miles, from Moscow into Moscow, at \$4 per thou-

sand feet, (172,050 ft.,) \$688.20; total costs and disbursements, \$875.43. The affidavit of defendant McCormick avers that defendants had been offered \$5.50 per thousand feet for the lumber at the mill, and this statement is not attempted to be controverted. The statement of the sheriff in his affidavit that he could not procure a suitable and reliable person as keeper to care for said property is hardly consistent with his charge for a keeper for the entire period from the levying of the attachment to the time of the sale,—43 days, at \$2.16 per day, amounting to \$93. The record in this case is greatly and needlessly incumbered. The appeal was from an order, and the statutes provide what papers are requisite to be taken to the appellate court in such a case, and counsel impose unnecessary labor upon themselves and the court, and useless expense upon their clients, when they fail to follow the statutes. The order of the district judge is affirmed, with costs to appellants.

SULLIVAN, C. J., and MORGAN, J., concur.

WRIGHT v. WESTHEIMER *et al.*

(December 19, 1891.)

ATTACHMENT—SECOND LEVY—EFFECT ON FIRST.

1. The issuance and levy of the second writ of attachment on the same property not an abandonment of the first levy, under the peculiar circumstances of this case.

HOMESTEAD — EXEMPTION FROM ATTACHMENT — LEVY BEFORE FILING DECLARATION.

2. Wright sold and conveyed his homestead, and with a part of the proceeds of such sale purchased another residence, intending it for a homestead. W. & Sons levied an attachment upon the residence so purchased before W. filed his homestead declaration therefor. *Held*, that the purchase of a new homestead with the proceeds of the sale of an old homestead does not exempt such new homestead from attachment or execution, levied prior to filing the homestead declaration for record, as required by section 3071 of the Revised Statutes of Idaho.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. STANDROE, Judge.

Action by David D. Wright against Ferdinand Westheimer & Sons to quiet title. There was judgment dismissing the action, with costs for defendants. From an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

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Hawley & Reeves and M. G. Cage, for appellant.

A new homestead which has been purchased with the proceeds of the sale of the old homestead is exempt in all cases where the old one would have been. *Sargent v. Chubbuck*, 19 Iowa, 37; *Cowgell v. Warrington*, 66 Iowa, 666, 24 N. W. Rep. 266; *Lamb v. McConkey*, 76 Iowa, 47, 40 N. W. Rep. 77; *Whitt v. Kendall*, (Ky.) 11 S. W. Rep. 592; *Maynard v. May*, Id. 806; *Bailey v. Steve*, 70 Wis. 316, 35 N. W. Rep. 735; *Smyth, Homest.* § 194.

The property in controversy having been bought with money received from the sale of the old home, homestead rights had attached, and hence the premises were exempt. *Cowgell v. Warrington*, 66 Iowa, 666, 24 N. W. Rep. 266; *Bailey v. Steve*, 70 Wis. 316, 35 N. W. Rep. 735; *Jewell v. Clark*, 78 Ky. 398; *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. Rep. 854, and 13 N. W. Rep. 310; *Furman v. Dewell*, 35 Iowa, 170; *Smyth, Homest.* § 194.

Changing a writ, or issuing a new one, which amounts to a change, is an abandonment of the first one. *Gile v. Devens*, 11 Cush. 59.

Amendments made after levy will not retroactively make the writ good in relation to other writs of attachment, all against the same property. *Wap. Attachm.* 139, 140; *Danielson v. Andrews*, 1 Pick. 156; *Putnam v. Hall*, 3 Pick. 445, and cases cited; *Denny v. Ward*, Id. 199; *Ohio Life Ins. & Trust Co. v. Urbana Ins. Co.*, 13 Ohio, 220.

Where a writ is amended between levy and judgment, its amendment cannot have retroactive effect so as to make an attachment lien outrank a mortgage given by defendant before amendment, and, *a fortiori*, homestead. *Drew v. Bank*, 55 Me. 450; *Drake, Attachm.* § 217.

T. M. Stewart, for respondents.

The provisions of the homestead law are mandatory. *Ashley v. Olmstead*, 54 Cal. 616; *Ames v. Eldred*, 55 Cal. 136; *Smith v. Richards*, ante, 464, 21 Pac. Rep. 419.

The proceeds of a voluntary sale of exempt property lose exemptions. *Freem. Ex'ns*, p. 717; *Lane v. Richardson*, 104 N. C. 642, 10 S. E. Rep. 189; *Kirby v. Giddings*, 75 Tex. 679, 13 S. W. Rep. 27; *Thomp. Homest. & Ex.* § 750; *Whittenberg v. Lloyd*, 49 Tex. 642; *Schneider v. Bray*, 59 Tex. 670; *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. Rep. 43.

SULLIVAN, C. J. This is an action brought by the appellant for the purpose of quieting title to and removing cloud from the title of certain town lots in the town of Blackfoot, Bingham county. The complaint alleges that the respondents (the defendants in the court below) commenced an action in the district court of Bingham county, Idaho, against this appellant, on the 21st day of November, 1890, to obtain judgment against appellant, on a certain contract theretofore executed by the appellant, and on said 21st day of November caused a writ of attachment to issue out of said court in said cause, and placed the same in the hands of the sheriff of said Bingham county for service; that on said date the sheriff levied said writ of attachment upon lots 12, 13, 14, 15, 16, 17, and 18, in block 55, in the town of Blackfoot, said county; that on the 2d day of December, 1890, said defendants abandoned said levy under said writ, and caused another writ of attachment to issue in said action, and that no affidavit or undertaking was made or given before the issuance of said last-mentioned writ; that said writ was irregularly issued and void; that said writ was levied by the said sheriff on the lots above described; thereafter the sheriff made his return thereon to the court, and also to the recorder of said Bingham county; and that each of the returns, so made by the sheriff, is a part of the records of said county, and appear on said records to be regular on their face; and that said returns and records cast a cloud on the title of the plaintiff. The complaint further alleges that plaintiff is a married man, and the head of a family; that his family resides with him upon said lots as their home, and that he has no other residence or home; that on said 21st day of November, and at all times since said date, the said lots, and the dwelling-house thereon situated, were and are exempt from the claim of defendants; that said property was the homestead of plaintiff, and was not subject to the payment of his debts; and prays that his title to said property be quieted, and that the cloud cast thereon by the levy and return of said writs be removed. The answer specifically denies all of the allegations of the complaint, except the copartnership of plaintiffs; the bringing of the suit mentioned; the issuance, levy, and return of the writ of attachment; and avers that, as appellant had come "into more open and notorious as-

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sertion of rights and ownership in and to said real estate, the respondents caused a second writ of attachment to issue," and to be levied upon said real estate; and avers that on the 31st day of January, 1891, respondents obtained judgment against the plaintiff for \$359.19 damages, and costs taxed at \$19.65, in the action in which said writs of attachment were issued, and claim a lien therefor on said lots and premises. The cause was tried by the court without a jury, and judgment rendered dismissing the action, with costs against the plaintiff. Thereupon a motion for a new trial was interposed, and overruled by the court. From the order overruling said motion the case is brought to this court.

The first error specified by the appellant is that the court erred in holding that the writ of attachment issued in the suit of respondents against appellant, and levied upon the real estate and premises above described, was valid, and created a lien on said premises. This specification of error does not specify which of said writs of attachment is referred to, but, as the record shows that the court below held that the levy of the first writ created a valid lien upon said premises, we presume that that is the writ referred to. We will, however, determine whether said objection or specification of error is fatal to either writ. The appellant alleges in the complaint that the levy of the first writ was abandoned by reason of the issuance of the second writ, and levying it upon the identical property on which the first writ was levied, and that the second writ was invalid by reason of respondents having failed to file an affidavit and undertaking prior to the issuance thereof. The objection to the last writ is, however, not urged in this court. The respondents, by their answer, deny the abandonment of the levy of the first writ, and state in their answer the reason for procuring the issuance of the second writ as follows: "The said plaintiff having at that time come into more open and notorious assertion of rights and ownership in the said real estate, the defendants herein caused a new writ to issue, as provided by law, and procured the same to be levied on all the interest the said D. D. Wright then had in said real estate." The abandonment of the first writ was made an issue by the pleadings, the burden resting on the plaintiff. The record contains no evidence of abandonment. It is, however, contended that the abandonment was established by

the issuance of the second writ, and the levying of the same upon the identical parcel of land on which the first writ had been levied. The answer to this is that the respondents denied any intention of abandoning the lien secured by the first writ, and avers that they procured the issuance of the second writ as a precautionary measure only. The law does not presume or favor abandonments. The issuance having been made by the pleadings, it was incumbent upon the appellant to establish the fact of abandonment, which he failed to do.

The appellant also contends that, under the levy of the first writ of attachment, no lien was created upon said property, for the reason that the law requires the sheriff, after he has made a levy by attachment, to file in the office of the county recorder a notice describing the property levied upon and attached, duly signed by him; and urges that the notice so filed by the sheriff, under and by virtue of said levy, was not so signed. This question was not raised in the court below, and we cannot, for that reason, consider it here; besides, the appellant is estopped by the allegations of the complaint from now denying that the notice so filed in the recorder's office was not signed by the sheriff, and regular on its face. Appellant, after alleging that said writ was duly issued on November 21, 1890, and duly levied upon said property, further alleges as follows: "And made his return thereon to the court, and also to the recorder of Bingham county; each of the returns so made by the said sheriff is a part of the records of Bingham county and of this court, and each of said returns and the records made thereunder by the said sheriff appear on the records to be regular on their face, and that said returns and records cast a cloud on plaintiff's title." This averment is plain and direct, and avers that said return so filed in the office of the county recorder is regular on its face. Parties will not be permitted to urge points in this court which were not raised in the court below, especially when such contentions or points are flatly contradicted by the averments of the pleadings of such party. If a mistake had been made in the pleadings, they should have been amended in the court below. Parties will not be permitted to contradict their sworn pleading in that manner. This disposes of the first specification of error as applied to the first writ.

As applied to the second writ, the rec-

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ord shows that the appellant, at the time of the levy of said writ, was residing upon said premises with his family, and had, prior to such levy, executed and filed his declaration of homestead, as provided by sections 3071 and 3072 of the Revised Statutes of Idaho, claiming said premises as a homestead. Said premises were exempt from attachment and execution, after filing said declaration of homestead. Rev. St. § 3038. The respondents acquired no lien upon said premises by reason of the levy under said second writ. Id. § 3039.

The third and fourth specifications of error will be considered together, and are as follows: *Third.* "The court erred in failing to find that said property was exempt from execution and attachment, and was not subject to the debt sued on by Westheimer & Sons against the plaintiff." *Fourth.* "The court erred in failing to hold that the property in dispute in this action was exempt from seizure, levy, and sale under execution and attachment, because of the fact that plaintiff procured the money to purchase this property from the sale of property on which he had a valid homestead exemption under the laws of the state of Idaho." The contention is that, as the property attached had been purchased with the proceeds of the sale of the homestead of appellant, and that as appellant purchased said property as a home for himself and family, and filed his homestead declaration therefor as soon as he had established his residence thereon, the same is exempt under the homestead laws. The question for consideration, then, is, under the homestead laws of the state of Idaho, can a person sell his homestead, which is exempt from execution and forced sale, and purchase another home with the proceeds thereof, and hold the same, exempt from execution and attachment, without filing in the proper county recorder's office the declaration of homestead required by section 3071 of the Revised Statutes of Idaho? The evidence contained in the record establishes the following facts: That the appellant, with his family, consisting of a wife and eight small children, was residing in the town of Blackfoot, Bingham county; that he was the owner of the home in which he was then residing; that he had filed in the proper recorder's office his declaration of homestead, claiming the said property as a homestead, and that the same was exempt from execution and forced sale; that, being indebted to divers persons, he concluded to sell said home-

stead, purchase another of less value, and pay certain of his creditors with the surplus. He thereupon sold his homestead, paid part of his debts, and invested \$1,000 of the proceeds of the sale of said homestead in the lots and premises in question, for the purpose of making a home for himself and family. He removed his family thereon about December 3 or 4, 1890, and filed his homestead declaration therefor on December 4, 1890. That appellant filed his homestead declaration after the levy of the attachment, on November 21, 1890, and before the levy of the second writ of attachment, December 5, 1890. The second writ of attachment is not a lien upon said homestead, because the homestead declaration was filed prior to the levy of said writ. Rev. St. Idaho, § 3039. The writ of attachment, levied upon said premises on November 21, 1890, is a valid lien thereon, unless the fact of its having been purchased with a part of the proceeds arising from the sale of the former homestead of appellant exempts it from such lien. Section 3070, Rev. St. Idaho, is as follows: "In order to select a homestead, the husband or the head of the family, or, in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as conveyance of real estate is acknowledged, a declaration of homestead, and file the same for record." Section 3071 provides what such declaration must contain. Section 3072 provides that such declaration must be recorded in the office of the recorder of the county in which the land is situated. Section 3073 provides that, after the filing of the declaration for record, the premises therein described constitute a homestead. Section 3038 provides that the homestead is exempt from execution and forced sale, except as provided in title 7 of the Revised Statutes. Section 3039 provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained for certain debts and incumbrances, and, among others, in an action in which an attachment was levied upon the premises, before the filing of the declaration of homestead. This provision applies to the case at bar, unless it is excepted for the reason of its having been purchased with the proceeds of the former homestead. The writ of attachment was levied November 21, 1890, the homestead declaration was filed December 4, 1890. Section 3041 provides that a homestead can be abandoned only by a declaration of

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abandonment, or a grant or conveyance thereof, executed and acknowledged by the husband and wife, if the claimant is married, and by the claimant, if unmarried. From the above provisions it will be observed that to select a homestead in this state, under the homestead law, certain things must be done and performed before it is a homestead, or is exempt from execution and forced sale, and that after a homestead has been once acquired it can be abandoned only as the statute prescribes. The appellant in this case abandoned his first homestead by selling and conveying it to one C. S. Smith. There is no provision in the statutes of Idaho exempting the money for which a homestead may be sold from execution or attachment until it may be invested in another homestead, except in cases of involuntary sales, which provision is not applicable to this case. Our statutes are silent upon the question under consideration. They contain no provisions for an exchange of one homestead for another, nor the purchase of another with the proceeds of the sale of the one exempt, nor for the exemption of the new homestead so purchased.

It is contended that the homestead and exemption statutes should be liberally construed. We concede this proposition. Section 4 of the Revised Statutes declares, among other things: "The statutes of this state, and all proceedings under them, must be liberally construed, with a view to effect their objects and to promote justice." Aside from this provision, we can hardly conceive the necessity or propriety of strictly construing a statute of mercy or benevolence. But, as our statutes are silent upon the question under consideration, this court will not undertake to supply omissions made by the law-making power. This court must distinguish between enacting laws and construing them. Through motives of humanity towards the debtor and his family, exemption and homestead laws have been enacted. Prior to their enactment the law was as cruel as Shylock to the unfortunate debtor, and his wife and children had to suffer. It may be truthfully urged that they sometimes assist unprincipled men to consummate the most cruel frauds. However, in the vast majority of cases, their operation is beneficial and humane. They assure to the family a home. "They mitigate the harshness of the cruel, grasping creditor, and give to the unfortunate

debtor a place of refuge and a gleam of hope." We are of the opinion that an amendment of our homestead laws, exempting the proceeds from a voluntary sale for a reasonable time, would be in the interest of humanity. For, however much such an amendment may be desired, this court will not assume the power to amend the statutes, and thus usurp the legislative functions of a co-ordinate branch of our state government. The statutes of some of the states permit the exchange of one homestead for another, and the sale of one, and with the proceeds thereof the purchase of another, and hold the latter exempt from attachment and execution; but states having such statutes do not require the making and filing of a homestead declaration as a precedent condition to the procurement of a homestead, and its exemption from attachment and execution. We are of the opinion that, under our statutes, a residence purchased with the proceeds of the sale of a former homestead, which was exempt from attachment and execution, does not for that reason become a homestead, and exempt from attachment and execution under our homestead laws. The required homestead declaration must be filed in order to secure the benefit of the exemption laws. The judgment of the court below should be affirmed, and the respondents are entitled to judgment against the appellant for their costs on this appeal, and it is so ordered.

HUSTON and MORGAN, JJ., concur.

HAWKINS v. SPOKANE HYDRAULIC MIN. CO.

(December 19, 1891.)

MINING PARTNERSHIPS—CONTROL—INJUNCTION.

1. The plaintiff is the owner of a seven-eighths interest in a placer mining claim. The defendant is the owner of one-eighth interest in the same claim. *Held*, that the plaintiff has the right to control the means used and the method adopted in working said mine, and is entitled to an injunction to restrain said defendant from working said claim, except in the manner directed by plaintiff.

SAME—ACCOUNTING.

2. An accounting may be compelled by either of the parties holding a majority or minority interest in a mine, of work done and metals extracted.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; J. E. HOLLEMAN, Judge.

Hawkins v. Spokane Hydraulic Min. Co.

Action by W. J. Hawkins against the Spokane Hydraulic Mining Company to restrain defendant from working a certain mine, and for an accounting. From an order refusing an injunction, plaintiff appeals. Reversed.

Woods & Heyburn, for appellant.

A partnership in the working of a mining claim exists whenever, either directly or indirectly, the owners thereof contribute to the expense of working it. *Dougherty v. Creary*, 30 Cal. 300.

Any condition of facts which would warrant the dissolution of the partnership authorizes the appointment of a receiver and the granting of an injunction. High, Inj. § 1351.

Charles W. O'Neil and *Frank Ganahl*, for respondent.

Mere ownership of a property, as joint tenants or tenants in common, between two or more parties, without other acts done by them in reference to the property, cannot constitute them partners. *Story*, Partn. § 82; *Crawshay v. Maule*, 1 Swanst. 518; *Dougherty v. Creary*, 30 Cal. 300; *Settembre v. Putnam*, Id. 490; *Skillman v. Lachman*, 23 Cal. 199; *Henderson v. Allen*, Id. 519; *Bradbury v. Barnes*, 19 Cal. 120.

It is not waste for one tenant in common to work and mine for his own use and benefit in a workmanlike manner. *Irwin v. Covode*, 24 Pa. St. 165; *Findlay v. Smith*, 6 Munf. 142; *Woodward v. Gates*, 38 Ga. 213; *Drown v. Smith*, 52 Me. 143; *Crockett v. Crockett*, 2 Ohio St. 184; *Clemence v. Steere*, 1 R. I. 274.

MORGAN, J. The plaintiff is the owner and possessed of an undivided seven-eighths interest in the Niagara placer mining claim, situated in the Cœur d'Alene mining district, Shoshone county, Idaho. The defendant is the owner of one-eighth interest in the same claim. Defendant, on or about the 15th day of June, 1891, took possession of a portion of said claim. Defendant is also the sole owner of a large stream of water, estimated at 650 inches, with pipes, flumes, and other hydraulic machinery for conveying said water to and upon said placer ground, as well as other ground of the same character adjacent thereto. The defendant company has worked off a section of said claim during the season of 1891, without the consent and against the protest of the plaintiff. It is also admitted that the defendant is by the means

aforsaid extracting the gold from said claim, and converting it to its own use. That the only value of said ground is the gold contained therein, and that said company refuses to sell said water to said plaintiff at any price that can be agreed upon. That the plaintiff, although the owner of an undivided seven-eighths of said ground, is practically excluded from any part or lot in the management of said work; that the defendant company, by its own men, foreman, and superintendent, works said ground to suit itself, without the consent of plaintiff, but invited plaintiff to come in and work with said defendant simply as a worker. It is also admitted that the defendant company has extracted a quantity of gold from said ground, and thereafter Mr. Coulter, superintendent for said defendant, stated to Mr. Whitney, who, he says, is a co-owner with the plaintiff, that he had no objection to said Whitney or the plaintiff coming in, watching, and inspecting the clean-up, seeing what was going on, "but I told him that I did not want him to come into the ground sluices or take any active part in the clean-up." Defendant claims that said company has the right to refuse to sell water to plaintiff, and claims the right to work said ground in its own way, and is doing so, without the permission of plaintiff. Defendant company states that it is willing to account to plaintiff for the gold taken out of said claim, and deliver to him the seven-eighths thereof, whenever the said plaintiff shall pay to said defendant seven-eighths of the expense of extracting said gold. We are furnished with a statement of said expense in the defendant's answer, which is as follows:

Work and labor expended.....	\$2,108 96
Use of tools and appliances.....	50 75
Charge for water.....	1,510 06
Total	\$3,669 77

In his affidavit, filed August 3, 1891, said Coulter furnishes the amount of gold extracted, which he says is a partial clean-up, which amount is \$1,978.67. The record here is largely made up of affidavits of a number of witnesses and experts,—those on the part of plaintiff, introduced for the purpose of showing that the defendant was wasting and losing gold by reason of the bad and expensive manner of defendant's working; those on the part of the defendant were introduced for the purpose of contradicting those of plaintiff,

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and to show that defendant was working said placer mine in an economical and careful manner. The court below, after considering said affidavits and the allegations of the parties, dissolved the temporary restraining order, refused to appoint a receiver, and refused the injunction. From said order the said plaintiff takes an appeal to this court. In the view we take of this case, it is not necessary to sum up the evidence presented in said affidavits. The result of the clean-up and the statement of expenses is a sufficient summing up of the whole matter, as it appears that the amount of gold extracted was \$1,978.67; expenses were \$3,669.77. How much better showing might be made by a complete clean-up we are not informed, nor is it necessary that we should be. The question for this court to determine is, simply, does a mining partnership exist in this case, and does the fact that the plaintiff in this suit owns seven-eighths of this mine, and the defendant owns one-eighth thereof, entitle the plaintiff to control and direct the working thereof, and the means to be used in said working?

Section 3300, Rev. St. Idaho, is as follows: "A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it, and extracting the mineral therefrom, actually engage in working the same." It is not necessary that all the co-owners in a mining claim shall engage in working a mine, together or separately. The partnership exists without an agreement, either express or implied. Section 3301 is as follows: "An express agreement to become partners, or to share the profits and losses, is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the ores therefrom." The relation differs from that of tenants in common, in this: that the co-owners in a mine are partners without agreement to become such, while tenants in common are not, except by agreement. The necessity for this relationship arises from the character of the property, as in working a mine the very life, the substance, the sole value of the property is taken out and carried away, leaving the ground from whence the precious metal is taken barren and worthless for mining purposes, which in this case, as in others of like nature, is its sole and only value. This partnership

is admitted by the defendant, as it admits that the plaintiff is entitled to seven-eighths of the proceeds after paying the same proportion of expenses, and so it is specified in the statute, (section 3302:) "A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares." The mine is the partnership capital, whether purchased with partnership or individual funds, and so says the statute, (section 3304:) "The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property." From the foregoing provisions it follows that those owning a majority of the shares or interests in a mining partnership have the right to control its methods of working, and thus says the statute, (section 3309:) "The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

In *Dougherty v. Creary*, 30 Cal. 300, the court says: "It is indispensable to the conducting of the business of mining that those owning the major portion of the property should have the control, in case all cannot agree." Further on the court says: "It might and often would work great inconvenience and damage to the minority in interest of a mining partnership, if the majority were allowed to do as they might deem to their own advantage, regardless of the rights and interests of the minority. But, notwithstanding the danger of the abuse of power in such cases, what may be necessary and proper for carrying on the business of mining for the joint benefit of all concerned must be determined by those owning and holding in the aggregate the major part of the property;" and, if the power thus held and exercised by the majority is used in a manner that will imperil or disastrously affect the interests of the minority, the latter has the right to resort to the court for redress and protection. It was long since decided by the courts that a mining partnership differed from an ordinary partnership in many of its features, among which are the following: It is formed without any express agreement between the parties, existing from joint ownership in a mine and working the same. One partner may sell his interest without the consent of the others, or die, and the part-

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nership is not dissolved. A new owner may purchase an interest in the mine, or inherit it, and he becomes a mining partner in the working thereof. *Duryea v. Burt*, 28 Cal. 579. It differs from an ordinary partnership in another respect, also, in that, as stated above, the majority in interest have the right to control the method of working and the means to be employed. In these respects, and in its continuity, it resembles a private corporation. To avoid mistakes in the position of the parties thereto and the condition of the property, all of these characteristics have been enacted in a statute as quoted above in this state, and also in California and in other mining states. The case of *McCord v. Mining Co.*, 64 Cal. 134,¹ is largely relied upon by the respondent in this case; but that case does not militate against this opinion. In that case the majority interest was working the mine, and the questions, as stated by the court, were, do the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees, used in working the mine, by one tenant, constitute waste for which his co-tenants may recover treble damages? Do such excavation, and cutting and conversion, constitute waste which should be enjoined? Are the plaintiffs entitled to an accounting? These are entirely different questions from those in the case at bar. In this case the plaintiff owns the majority interest, and asks to be permitted to control the management of the mine and the method of working the same, the means employed, and that defendant be enjoined, and for an accounting. The facts set forth in the answer and in the defendant's own affidavit furnish abundant reason why the prayer of the plaintiff should be granted. The defendant has expended a large amount of money in working the mine, \$2,108; brings, in addition, against the plaintiff a charge for water, \$1,500.06; for use of machinery, \$50.75; and with all this expenditure defendant reports that it has obtained from said claim, in gold, \$1,978.67. The plaintiff is entitled to control the means used and the method adopted in working the mine. The order refusing an injunction is reversed, and the cause remanded, with direction to the court below to grant the injunction to restrain the defendant from working said mine, except in the manner directed by plaintiff, to compel the defend-

ant to pay all the proceeds of the work already done by it into court, and compel an accounting by the defendant. Costs of appeal awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

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(December 21, 1891.)

JUDGMENT—VALIDITY.

1. A judgment which recites that defendant was duly summoned and failed to answer, that evidence was heard, cause submitted, and the court, being sufficiently advised, doth adjudge the plaintiff recover of the defendant the sum of \$82.63, with interest and costs, dated and signed by the justice, is a valid judgment.

EXECUTION — SALE AFTER RETURN-DAY — VALIDITY.

2. An execution having been duly issued, placed in the hands of the sheriff, and by him levied upon property during its life-time, the property so levied upon may be sold after the date when said execution must have been returned had such levy not been made.

SAME—NOTICE OF SALE—POSTPONEMENT.

3. Notice of sale of real estate levied upon under execution may, under our statute, be given by posting written or printed notices, or by publication in a newspaper published in the county, and the sale may be postponed by announcing the fact at the time advertised, and giving notice by writing same on original notice, or putting notice thereof under the original.

SAME—SALE OF SEVERAL PARCELS.

4. When real property consists of several known lots or parcels, they must be sold separately or offered for sale in parcels; and if no bids are received, and the lots or parcels are adjacent, they may then be sold in a lump.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Action by Daniel Ollis against William Kirkpatrick to quiet title. From a judgment for defendant, and from an order overruling a motion for a new trial, plaintiff appeals. Reversed.

Orr & Orr, for appellant.

No evidence was admissible or could properly be considered by the court tending to establish facts not put in issue by the pleadings. *Lillienthal v. Anderson*, 1 Idaho, 673; *Fox v. Fox*, 25 Cal. 588; *Hall v. Polack*, 42 Cal. 218; *Phelan v. Gardner*, 43 Cal. 306; *Bradbury v. Cronise*, 46 Cal. 287; *Norris v. Glenn*, 1 Idaho, 590.

A defendant asking affirmative relief must plead as fully as a plaintiff. *Rose v. Treadway*, 4 Nev. 455.

¹27 Pac. Rep. 863.

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A party claiming under a judgment of a justice of the peace must show every fact necessary to give the court jurisdiction to render judgment. *Rowley v. Howard*, 23 Cal. 403; *Hansberger v. Railroad Co.*, 43 Mo. 196; *Lowe v. Alexander*, 15 Cal. 297; *Paul v. Armstrong*, 1 Nev. 78.

A party has a right to lie until the judgment is set up against him, and then to show that the proceedings were void for want of jurisdiction. *Freem. Judgm. p.* 145, § 134; *Latham v. Edgerton*, 9 Cow. 227; *Mills v. Martin*, 19 Johns. 33.

The law only protects a *bona fide* purchaser for valuable consideration, and a purchaser with notice of irregularities is not such *bona fide* purchaser. *Freem. Ex'ns*, §§ 340-342; *Ror. Jud. Sales*, §§ 864, 871; *Freem. Void Jud. Sales*, § 54; *Stephens v. Denison*, 1 Or. 19.

T. M. Stewart, for respondent.

Errors not against the interest of the appellant are not assignable by him, and afford no ground of reversal. *McCreery v. Everding*, 44 Cal. 284; *Gates v. Salmon*, 46 Cal. 362, 376; *Chase v. Evoy*, 58 Cal. 349; *McGary v. Pedorena*, Id. 91.

A sale *en masse* of well-known and distinct parcels is not void. *Vigoureaux v. Murphy*, 54 Cal. 346; *San Francisco v. Pixley*, 21 Cal. 57; *Cunningham v. Cassidy*, 17 N. Y. 276.

A sale cannot be collaterally avoided for inadequacy of price. *Elston v. Castor*, 101 Ind. 426.

MORGAN, J. This is an action to quiet title. The plaintiff alleges that he is owner and in possession of the following described tracts of land: Lots 3, 4 and 5 in section 21, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and lots 1, 2, and 3 of section 28, all in township 3 S., range 34 E., Boise meridian, in Bingham county, Idaho. That defendant, William Kirkpatrick, commenced suit against H. C. Ollis in the probate court of said county, had a jury trial, and the jury returned a verdict in favor of said Kirkpatrick, and against said H. C. Ollis, for \$110, but alleges that no judgment was entered thereon. That a transcript of said pretended judgment was filed in the district court on the 7th day of November, 1888, and execution was issued thereon. And further avers that Smith and Wright obtained judgment against H. C. Ollis in the justice court of R. H. Hopkins, in said county, but avers that said judgment is void. That a pretended

transcript of said judgment was filed in the district court in said county on the 7th day of November, 1888, and execution issued thereon. The said two executions were levied upon lots 1, 2, and 3 of section 28, in township 3 S., of range 38 E., Boise meridian. That the sheriff intended to describe said land as being in township 34 E. That the latter was the correct description of the land of H. C. Ollis, but, by mistake of the sheriff, it was described as being in township 38 E. of Boise meridian. That said land so misdescribed was sold by virtue of said levy in one body to said defendant, William Kirkpatrick, for the sum of \$260. That Julia and Leonard Giggy brought suit against Daniel Ollis, plaintiff herein, obtained judgment on May 29, 1889, for the sum of \$82.93, and on the same day filed a transcript thereof in the district court of said county. That execution thereon was issued to the sheriff of said county on the said 29th day of May, 1889. Said execution was placed in the hands of the sheriff of said county on said last-named date, and was by him levied on lots 3, 4, and 5, of section 21, in township 3 S., of range 34 E., of Boise meridian, in said county of Bingham. That the sheriff advertised said land by posting up notices or handbills, advertising to sell on the 7th day of August, 1889. That said sale was postponed on the said 7th day of August until the 14th day of said August. That said land was sold on the said 14th day of August, 1889, to the said William Kirkpatrick for the sum of \$160. Plaintiff avers that said tract consisted of three separate lots, either of which was worth many times the sum of \$100. That it was sold in a lump for said sum. Plaintiff asks the court to declare said judgment, transcripts, and sales void; that plaintiff be decreed to be the owner of said lands; and for other relief. Defendant denies that plaintiff ever was the owner of lots 1, 2, and 3 of section 28, in township 3 S., of range 34 E., Boise meridian. Avers the procuring of each of said three judgments; the levy, sale, and purchase thereof by the defendant of the lands hereinbefore described, as set forth; that said judgments, transcripts, and execution sales were valid. Avers that the said H. C. Ollis, for the sole purpose of defeating and defrauding this defendant, and without any consideration, conveyed the said lots 1, 2, and 3 of section 28 aforesaid to plaintiff, Daniel Ollis; that said conveyance is a fraud, and

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void; that said William Kirkpatrick is the sole and legal owner of said tracts of land, respectively; that plaintiff has no interest therein; and prays that said conveyance from H. C. Ollis to Daniel Ollis be adjudged fraudulent and void, that said defendant be declared the rightful owner thereof, for costs, and general relief. Trial was had before the court without a jury, which resulted in a judgment and decree in favor of the defendant as to the following described land, to-wit: Lots 3, 4, and 5, in section 21, township 3 S., of range 34 E., Boise meridian; and, further, the court ordered, adjudged, and decreed that said decree shall and does operate as a full and complete conveyance of the title to said land to the defendant, William Kirkpatrick. The decree also gave judgment against H. C. Ollis, in favor of William Kirkpatrick, for the sum of \$260, being amount paid by him upon execution sale made on December 15, 1888, with interest thereon at 10 percent. per annum till paid, and for costs. Plaintiff moved for a new trial, which being denied, the plaintiff appeals to this court, both from the judgment and the order overruling the motion for new trial. The plaintiff specifies the following particulars in which the evidence is insufficient to justify the findings of fact:

That part of the second finding of fact which says that said conveyance, being the conveyance of H. C. Ollis to plaintiff, on September 7, 1885, is without any consideration, is not supported by any competent testimony, and is contradicted by the testimony of H. C. Ollis. It appears by the pleadings, and by the evidence, that the land attempted to be conveyed by this deed, and which was levied upon, and sold to defendant, William Kirkpatrick, for the sum of \$260, by virtue of the executions in the cases of *Smith & Wright v. H. C. Ollis* and *William Kirkpatrick v. H. C. Ollis*, was described as the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and lots 1, 2, and 3 of section 28, in township 3 S., of range 38 E., of the Boise meridian, in said Bingham county. It further appears that neither H. C. Ollis, nor the plaintiff, Daniel Ollis, has or ever had any interest in the said tract of land whatever. It follows, therefore, that William Kirkpatrick obtained no interest therein by reason of his purchase at said execution sale.

The question as to whether said deed was fraudulent, and without any consideration, and therefore void, can only be de-

termined in a suit in which H. C. Ollis and the real owner of said land and the plaintiff and defendant in this suit are parties, as they would all be interested in the subject-matter of the suit. Without making H. C. Ollis, who had made a deed to the land, and the real owner of the tract in question, parties, the court would not have jurisdiction to consider the question as to the validity of the deed. The findings of fact, conclusions of law, and judgment, so far as they relate to the validity or invalidity of this deed, are without the jurisdiction of the court in this case, and are therefore void. We do not question the correctness of the ruling of the court therein, but said ruling was ineffectual for want of jurisdiction. This plaintiff, however, cannot complain of said findings and judgment in this respect, as he has no interest in the land in question, and his rights in this suit are not affected thereby.

The 3d, 4th, and 5th findings of fact recite that the defendant William Kirkpatrick, on the 30th day of May, obtained a judgment against H. C. Ollis; that *Smith & Wright*, on the 24th day of June, 1887, obtained a judgment against H. C. Ollis; that on the 7th day of November, 1888, a transcript of each judgment was filed in the office of the clerk of the district court for Bingham county, execution issued thereon, and levied upon the land last above described; that the land was sold and purchased by the said William Kirkpatrick. The land so sold was described as lying in township 3 S., of range 38 E., Boise meridian. The plaintiff, having no interest in either said judgments or land, cannot be heard to complain of these findings, as they do not affect him in any way.

The next specification of error is as follows: The findings of fact are not justified by the evidence in the following particulars: The evidence shows that the plaintiff in this action, who was the defendant in the trial on May 29, 1889, did present, by his agent, an account against the plaintiffs in that action. Said agent also made a verbal statement, to the effect that Julia and Leonard Giggy had been overpaid, and that the probate judge who tried the case failed and refused to enter or file such verbal statement or written account as an answer. The judgment attacked in this specification is as follows: "*Julia Giggy et al. v. Daniel Ollis*. Now, on this 29th day of May, this cause came on to be heard, and

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the defendant, having been duly summoned and failed to answer herein, and the plaintiffs, Julia Giggy and William Giggy and Leonard Giggy, being duly introduced and sworn as witnesses, and the evidence being heard by the court, and this cause being submitted to the court for trial without the intervention of a jury, the court, being sufficiently advised, doth adjudge the plaintiff recover of the defendant the sum of \$82.63, with interest thereon from the 29th day of May, 1889, at the rate of ten per cent. per annum until paid, and their costs in this cause expended, taxed at \$7.63, for which execution may issue. Judgment rendered May 29th, 1889. R. H. HOPKINS, Judge."

It will be seen that the probate judge rests his judgment upon the fact that the defendant was duly summoned and failed to answer. The trial was had before the court without a jury; witnesses were introduced and sworn; then the court says: "Being sufficiently advised, the court doth adjudge that the plaintiff recover of the defendant the sum of \$82.63, and their costs in this action expended, taxed at," etc. Here is a judgment of the court in favor of the plaintiffs, and against the defendant, and the sum for which judgment is given is specified. It is, in every sense, a good and valid judgment. *Gray v. Cederholm*, (Idaho,) 3 Pac. Rep. 12.¹ If the defendant had any cause of complaint, by reason that the verbal statement of defendant's agent, H. C. Ollis, was not taken down, or evidence heard, he should have taken an appeal to the district court, where that matter could have been corrected. Having failed to do this in the time given him by law, judgment remains against him in full force and effect.

The next specification is this: The evidence further shows that the execution, under and by virtue of which this tract of land was sold, had expired, and had not been renewed. This execution was issued on the 2d day of July, 1889, and served on the 3d day of July, 1889, by levying upon the following described real property, as the property of Daniel Ollis, to-wit: Lots 3, 4, and 5, in section 21, township 3 S., range 34 E., Boise meridian. The evidence shows that, after making the levy indorsed on the execution, the sheriff advertised said land for sale by posting notices or hand-bills, in due form, advertising said sale to take place on the 7th day

of August, 1889. The sheriff further stated in his testimony: "I adjourned the sale until the 14th day of August, and gave notice of the adjournment by writing under the notices so posted. I did not advertise the sale in the *Idaho News*, or any other newspaper." It will be noticed that the levy was indorsed on the execution on the day after it came into the hands of the sheriff, viz., the 3d day of July, 1889. A levy having been made and indorsed while in the hands of the sheriff, by the sheriff, and property advertised within the life-time of the execution, the sale thereof may be postponed beyond the return-day of the execution, and a legal sale made after said return-day by the sheriff. It is proper, also, for the sheriff to give notice of postponement of sale in writing on the original notice, or by posting notice of postponement under it. An execution, having been levied upon the property, does not die by the sale being postponed a reasonable time after he would have been obliged to have returned his execution, in case levy had not been made.

Objection is also made that the notice of sale was given by posting three notices, and that the notice of sale was not advertised in any newspapers being published in said county. St. § 4482, authorizes notice of sale of real estate levied upon by execution to be made by posting notices, or by publication in some newspaper published in the county. This indicates that either method may be selected, in the discretion of the sheriff or the attorney for the plaintiff in the execution. The attorneys for the plaintiff were doubtless impelled to make this point by reason of the fact that in the *errata* prefixed to the statute it is stated that "or" should be "and." An examination of the enrolled bill shows that this is a mistake in the *errata*; and as the *errata* is not a part of the law, not having been enacted by the legislature, the law is as it is found in the body of the statute. Up to the time of the sale, therefore, all the proceedings connected with this sale were in accordance with law.

The next point made is that the complaint alleges that the tract of land so sold consisted of three separate lots, each of which was worth many times the amount of said execution, or what the land sold for, yet it was sold in a lump or together. This allegation of the complaint is not denied, and is therefore taken

¹ Ante, 41.

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as true. We have, then, the fact, as stated in the complaint, that the land was sold in a lump for the sum of \$100, and that the tract consisted of three separate lots, either of which was worth many times that amount. This is plainly contrary to St. § 4484. This was an error committed by the sheriff which it is impossible for the court to overlook, and for this reason this sale must be set aside.

Plaintiff also specifies as error the reviving of the judgment against H. C. Ollis for the sum of \$260 in favor of the defendant, Kirkpatrick. To give the court jurisdiction, and enable it to revive this judgment, it will be necessary to have the defendant, H. C. Ollis, against whom Smith & Wright and William Kirkpatrick obtained judgments, in court. He was not a party in this suit, and no action can be taken looking to the revival of judgment without having all the parties interested therein served with notice to appear and protect their several rights therein, if any. As all the facts in this case necessary to its final determination are now before the court, and as final judgment can be given herein by this court, it is not necessary to send this case back for new trial. It is therefore ordered and adjudged by this court that the judgment entered by the district court herein on the 26th day of January, 1891, be, and the same is hereby, set aside and annulled, and held for naught. It is further ordered, adjudged, and decreed that the sale of the lots 3, 4, 5, in section 21, township 3 S., of range 34 E., of Boise meridian, is also set aside and annulled, leaving the land subject to liens of the judgment in the case of Giggy et al. v. Daniel Ollis in full force and effect, to be proceeded with in accordance with law. Inasmuch as the judgment of the district court is set aside and annulled by this court upon the appeal of plaintiff, costs of this appeal are awarded to plaintiff.

SULLIVAN, C. J., and HUSTON, J., concur.

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(December 24, 1891.)

IRRIGATION—PRIOR APPROPRIATION.

Under the statutes of Idaho, which provide, (section 3159, Rev. St. Idaho,) "as between appropriators, the one first in time is first in right," held, that H., who, and his grantors, appropriated first all the waters of Gooseberry creek,

and has continually used the same for the purpose of irrigating the lands owned by him, upon and along said creek, is entitled to all of said waters, to the extent of the capacity of his ditches necessary to the proper irrigation of his said lands, as against subsequent locators.

(Syllabus by the Court.)

Appeal from district court, Bingham county; C. H. BERRY, Judge.

Action by Ira K. Hillman against John H. Hardwick and others to determine the right to the use of the waters of a certain creek, and to restrain defendants from interfering with said waters. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiff appeals. Reversed.

T. M. Stewart, for appellant.

Priority in time of appropriation secures priority of right; or first in time is first in right. 11 Sess. Laws, 267-1881; Rev. St. 1887, § 3159.

A transfer of possession of land to purchaser transfers equitable title to the land; and the water-right accustomed to be used with and for the benefit of the land passes as appurtenant to the land. Cave v. Crafts, 53 Cal. 138; Farmer v. Water Co., 56 Cal. 11; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Geddis v. Parrish, 1 Wash. T. 587, 21 Pac. Rep. 314.

George H. Gorman, for respondents.

The capacity of a ditch is to be determined, not by opinions of nonexperts, but by actual measurement at its smallest point. Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Mining Co. v. Carpenter, 6 Nev. 393.

A mere possessor of public lands cannot acquire title to water or adverse rights therein, as against the government or subsequent claimants under title. Ellis v. Improvement Co., 1 Wash. T. 572, 21 Pac. Rep. 27.

The use or appropriation of water will not be recognized unless it be shown to be a reasonable use and for beneficial purposes. Rev. St. § 3156; Barnes v. Sabron, 10 Nev. 217; Dick v. Caldwell, 14 Nev. 167.

A riparian proprietor cannot use all the water of a stream for irrigation. Such use is unreasonable. Lux v. Haggin, 69 Cal. 255, 406, 10 Pac. Rep. 674; Warren v. Quill, 8 Nev. 218.

To acquire right to water from date of diversion, the amount of water must be proportional to the amount of land cultivated, and the water must be used within a reasonable time. Sieber v. Frink, 7 Colo.

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148, 2 Pac. Rep. 901; *Irwin v. Strait*, 18 Nev. 436, 4 Pac. Rep. 1215; *Dick v. Caldwell*, 14 Nev. 167.

HUSTON, J. This is an appeal by the plaintiff from a judgment and decree of the district court for Bingham county, in an action by the plaintiff to establish his right to the waters of Gooseberry creek and its tributaries, and to restrain the defendants from interfering therewith. The case was heard upon pleadings and proofs before the court without a jury, and is brought here upon a statement of the case, containing all the evidence, the findings of the court, and the decree and judgment. The plaintiff, and those under whom he claims, settled upon certain lands lying upon and along Gooseberry creek, in Bingham county, Idaho, in the years 1871, 1872, and 1873. These lands were at the time unsurveyed public lands of the United States. Subsequently, after the lands were surveyed, said parties secured title to their various claims, plaintiff taking 160 acres under the pre-emption laws, and the other parties securing different amounts, under the pre-emption and homestead laws. The said parties at the time of settling upon their said lands made appropriations of all the waters of Gooseberry creek, for the purpose of irrigating the lands so settled upon by them, and title to which was afterwards acquired as aforesaid. Gooseberry creek is a small stream flowing down from the mountains upon and through said lands. The fall of the stream is quite precipitous, until it reaches the lands of the plaintiff. The supply of water in the creek is derived from the melting snows of the mountains, and its quantity is consequently dependent upon the snow-fall in the mountains. Ordinarily, in the spring of the year, and up to June, the flow of the waters in Gooseberry creek will reach from 120 to 150 inches. After June 1st the waters decrease quite rapidly, and the stream is usually nearly, if not entirely, dry by the 1st of September. In the years 1888 and 1889, by reason of the slight snow-fall, the supply of water in Gooseberry creek was very limited. Under their appropriations, in 1872 and 1873, the plaintiff and his grantors had claimed, appropriated, and used, for the purpose of irrigating their said lands, all the waters of said Gooseberry creek since the location of defendants. Occasionally, in the spring of the year, the supply of wa-

ter in the creek would be in excess of the wants of plaintiff and his said grantors; in which event the defendants, or some of them, utilized such surplus waters upon their lands. Plaintiff and his grantors, in 1872 and 1873, for the purpose of so utilizing the waters of said Gooseberry creek in the irrigation of their said lands, constructed two ditches, one taking the water from the south side of said creek, and the other from the north side thereof. Said ditches were of a capacity more than sufficient to carry all of the waters of said creek, and were and have been continuously used by the plaintiff and his grantors for the purpose of irrigating their said lands. None of the defendants claim to have appropriated or claimed any of the water of Gooseberry creek prior to 1877, and from that year to 1885, at all of which periods the plaintiff and his grantors were in the possession and occupancy of all the lands now claimed by plaintiff, and were using all the waters of said Gooseberry creek in irrigating said lands, except in case of surplus, as before stated. The lands, both of plaintiff and defendants, are partly meadow and partly upland; but neither of whose lands, as is conclusively shown by the evidence on the part of both plaintiff and defendants, will produce remunerative crops without irrigation, although at times the meadow lands, by reason of the nature of the soil, become quite wet from irrigation. The lands of the defendants are all located higher upon Gooseberry creek than the lands of the plaintiff. In the years 1888 and 1889 the defendants took so much of the waters of Gooseberry creek as to leave the plaintiff without sufficient water for the proper irrigation and cultivation of his said lands, whereby the plaintiff was greatly injured and damaged in the failure of his crops for want of proper irrigation. Hence plaintiff brings this suit, and prays that his right to the waters of said Gooseberry creek and its tributaries, by reason of his prior appropriation, may be established, and that defendants may be restrained from interfering therewith.

Defendants allege location of lands by defendant Hardwick, of 160 acres in 1877; defendant T. Croshaw, 160 acres in 1887; by defendant B. Croshaw, 160 acres in 1882; and defendant Beckstead, 160 acres in 1877; defendant Cox, 160 acres in 1878; defendant Denny, 160 acres in 1889; and that said lands are valueless for cultiva-

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tion without artificial irrigation. That all of said defendants, except defendants T. Croshaw and Beckstead, claim to have appropriated 160 inches, each, of the waters of Gooseberry creek, at the time of making their land locations or settlements, to-wit: Hardwick, 160 inches; Cox, 160 inches; Denny, 160 inches; B. Croshaw, 160 inches; and defendant T. Croshaw, 160 inches from Chicken creek, a tributary of Gooseberry creek. The defendant Beckstead claims that the water used by him is derived from a source foreign to, and not tributary to, Gooseberry creek, and we think his contention in this regard is sustained by the evidence.

Thus it will be seen that, besides the location, or rather appropriation, by the plaintiff and his grantors, in 1871, 1872, and 1873, of all the waters of said creek, there has since been appropriated by the defendants 800 inches of said water. The plaintiff alleges, and we think his allegation in this behalf is fully borne out by the evidence, that all the waters of the creek are necessary for the irrigation of the lands owned by him, and susceptible of irrigation from the waters of said creek and its tributaries. The only witness who testifies to the amount of water ordinarily flowing in said Gooseberry creek is William H. Homer, who states that in the spring (the season when the water is presumed to be at its highest) of 1871 "there was about 80 or 100 inches of water in Gooseberry creek. I think that would be a fair average of water in the creek for every year except the last two years,"—that is, 1888 and 1889,—which years, the record shows, were exceptionally dry. This evidence is not contradicted, disputed, or sought to be impaired.

We then have this anomalous condition of affairs: A creek or stream flowing 100 inches of water, with appropriations of that water to the amount or extent of 800 inches, in addition to the prior appropriation by the plaintiff of all the waters of the creek and its tributaries. To the ordinary mind, this might, and perhaps does, present a somewhat difficult problem for judicial solution, unaided by the statutes; but the learned district judge found no difficulty whatever in reaching a conclusion as unique as it is unprecedented. We say unprecedented, because this question, under statutes identical with that of Idaho, has been decided so often in favor of the prior appropriator that it has been generally considered, both by professionals

and profanes, as a settled question; as instance, the question had been decided up to 1889 twice by the supreme court of the United States, seventeen times by the supreme court of California, five times by the supreme court of Colorado, six times by the supreme court of Nevada, twice by the supreme court of Montana, once by the supreme court of New Mexico, twice by the supreme court of Utah, once by the supreme court of Oregon, and repeatedly by the supreme court of Idaho. In fact, the decision of the learned district judge in this case stands alone. We have been unable, by the most diligent search, to find a precedent or parallel for it. Heroically setting aside the statute, the decisions, and the evidence in the case, he assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry creek with a beneficent recklessness, which makes the most successful efforts of all the rain wizards shrink into insignificance, and which would make the hearts of the ranchers on Gooseberry dance with joy, if only the judicial decree could be supplemented with a little more moisture. The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How then shall we rank him who, by judicial fiat alone, can cause 400 inches of water to run where nature only put 100 inches? (We veil our faces, we bow our heads, before this assumption of judicial power and authority.)

There was no issue made, it seems from the record, upon the title to the lands of either the plaintiff or any of the defendants. The priority of the plaintiff's appropriation is established beyond question or peradventure; in fact, it is scarcely contested or disputed. It was claimed by the counsel for defendants, upon the argument here, that plaintiff's land did not require irrigation, or, at least, only a small portion of it; but the evidence on the part of the defendants themselves shows that the meadow lands of plaintiff require irrigation, and one of the defendants testifies that the meadow lands will not produce a remunerative crop without irrigation; and this is a matter of such general knowledge with all who are at all acquainted with the lands and soil of this state as scarcely to need testimony to establish it. The following is the tabulated distribution of the waters of Gooseberry creek as decreed by the district court: Ira K. Hillman, (plaintiff,) to

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June 15th, 75 inches; to July 15th, 40 inches; after July 15th, 25 inches. John H. Hardwick, (defendant,) to June 15th, 60 inches; to July 15th, 30 inches; after July 15th, 30 inches. Harry Denny, (defendant,) to June 15th, 60 inches; to July 15th, 30 inches; after July 15th, 25 inches. Len Cox, (defendant,) to June 15th, 40 inches; to July 15th, 20 inches; after July 15th, 15 inches. Ben. Croshaw, (defendant,)—from South Fork,—to June 15th, 20 inches; to July 15th, 10 inches; after July 15th, 8 inches. Same, (from main creek,) to June 15th, 30 inches; to July 15th, 20 inches; after July 15th, 15 inches. T. Croshaw, to June 15th, 45 inches; to July 15th, 30 inches; after July 15th, 20 inches. Alex Beckstead, to June 15th, 40 inches; to July 15th, 25 inches; after July 15th, 15 inches,—and yet the evidence shows that 150 inches is the maximum of water flowing in the creek at its highest stage. It appears from the record that the defendant Beckstead never located, claimed, or used any of the waters of Gooseberry creek; and he claims, and his claim is established by the evidence, that he derives all the water used by him from an entirely different source, and yet, willy-nilly, the court gives him his specified amount of water from Gooseberry creek. Evidently the court assumed that Gooseberry creek was as inexhaustible as the widow's cruse, or else that its decree possessed the potency of Moses' rod. All the provisions of the statute in regard to priority of right incident to priority of appropriation are ignored, as are the sources and volume of supply. Rev. St. Idaho, § 3159, treating of water-rights, provides: "As between appropriators, the one first in time is first in right." Section 3165 of same chapter provides that "all ditches, canals, and other works heretofore made, constructed, or provided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with the

requirement of this chapter." The evidence establishing, as it does, beyond all doubt, the prior appropriation by the plaintiff and his grantors of all the waters of Gooseberry creek and its tributaries, and the continuous use thereof by plaintiff and his grantors for the irrigation of his and their said lands, we are unable to account for the decree rendered by the district court upon any hypothesis which recognizes the principle that it is the province of courts to administer the law as they find it, not to make laws in accordance with their ideas or notions, no matter how beneficent the object sought to be attained may be.

Many of the questions raised by counsel on the argument of this case were not considered or passed upon by the district court, and are not, in the opinion of this court, essential to a decision of the case, and we have not, therefore, considered them. The record fails to show any interest or claim of interest in the waters of Gooseberry creek by defendant Cox, and it, moreover, appears from the record that the defendant Beckstead derives the water used by him from a source other than Gooseberry creek. Still as they, in common with the other defendants, are made beneficiaries under the beneficent decree of the district court, the injunction must run against them also. The decree and judgment of the district court are reversed, and the cause remanded, with directions to the district court to enter a judgment and decree in favor of the plaintiff for all the waters of Gooseberry creek, and the tributaries thereof, to the extent of 125 inches, that being the capacity of the plaintiff's ditches taking water from said Gooseberry creek prior to the attempted appropriation of any of the defendants; and enjoining the said defendants, and each of them, and the agents and servants thereof, from in any manner interfering with said right to the waters of said creek, and the tributaries thereof, to the extent of said 125 inches.

SULLIVAN, C. J., concurs. MORGAN, J., having been of counsel in the court below, took no part in the hearing or decision.

*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.*WASHINGTON & I. R. Co. v. COEUR D'ALENE
RY. & NAV. Co. *et al.*

(December 30, 1891.)

CONDEMNATION PROCEEDINGS — JURISDICTION OF
DISTRICT JUDGE—HEARING IN CHAMBERS.

A district judge in Idaho has no jurisdiction to hear a proceeding for the condemnation of lands, or to enter judgment or decree therein, under the statute, at chambers.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Proceeding by the Washington & Idaho Railroad Company against the Coeur d'Alene Railway & Navigation Company and others for the condemnation of land for railroad purposes. From a decree for plaintiff, defendants appeal. Reversed.

John H. Mitchell, Jr., W. T. Stoll, and Albert Allen, for appellants. Woods & Heyburn, for respondent.

HUSTON, J. This was a proceeding under the statute for condemnation of land for railroad purposes. Plaintiff filed complaint, to which defendant demurred. Record does not show what disposition was made of the demurrer. On September 14, 1888, the district judge, at chambers, heard and determined said cause, and entered the following judgment and decree: "Judgment. [Title of court and cause.] This cause coming on regularly to be heard by the judge of the above-named court sitting in chambers at Wallace in said county, and the said judge having first gone upon the line of railroad of defendant at the point of the proposed intersection near the mouth of Elk creek, as in the complaint herein described, and having viewed the premises, and heard the testimony of the plaintiff, defendant, and the said intervener herein, and being fully advised in the premises, and the said defendant and intervener before said judge consenting, it is hereby ordered, adjudged, and decreed that the above-named plaintiff be allowed to construct at its own expense a road-bed and railroad between the stations named in said complaint near the mouth of Elk creek, as in said complaint proposed, in such a manner as to enable the railroad of plaintiff to be constructed to the southward of the railroad of defendant, said railroad, so constructed for the defendant, to be subject to the approval and acceptance of said defendant, and when said road-bed and railroad shall have been so constructed for defend-

ant as aforesaid the plaintiff shall be entitled to connect the same at either end with the line of defendant now operated, and remove the track of the defendant from the road-bed upon which the same now rests to the road-bed to be so constructed; and that plaintiff shall construct, at its own expense, a culvert of sufficient size, at a point to be designated by the superintendent of the said intervener, so as to enable the flume of said intervener to be constructed under and through the road-bed of plaintiff at such place or places as may be so designated. It is further ordered, adjudged, and decreed that the road-bed now occupied by the said defendant be condemned to the use of the plaintiff as in said complaint prayed for, upon the plaintiff performing the acts hereinbefore mentioned. It is further ordered, adjudged, and decreed that the crossing of the railroad of defendant by the railroad of plaintiff at station 2512 on plaintiff's line—said point being 500 feet eastwardly from Patrick Whalen's ranch, near the Old Mission, in said county; said crossing being at grade, and at angle of 22 degrees—be, and the same is hereby, condemned to the use of the plaintiff. It is further ordered, adjudged, and decreed that the crossing of the railroad of defendant by the railroad of plaintiff at station 2982x98 on plaintiff's line—said point being about 1,800 feet below the mouth of Government gulch, on the south fork of the Coeur d'Alene river, in said county; said crossing being at grade, and at an angle of 32 degrees—be, and the same is hereby, condemned to the use of said plaintiff. JOHN L. LOGAN, Judge." Afterwards, on the 26th day of October, 1889, said district judge, on motion of plaintiff, without notice, made the following supplemental decree at chambers. "Supplemental Decree. [Title of court and cause.] It appearing to me that the above-named plaintiff has completed the construction of the grade at the mouth of Elk creek on which to place the track of defendant's railroad, as provided to be done in the order of this court made September 14, 1888, and that plaintiff has submitted the same to the superintendent of defendant for his approval, and said superintendent having found or made no substantial objection to the manner in which the work of construction was done, and the objection made to said grade by J. R. Stephens not seeming to be based upon any substantial

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objection to the manner of construction of said grade, but to be an attempt to compel certain concessions by plaintiff as a condition to accepting said grade, it appearing by the affidavit of W. H. Bura-ge that said grade as constructed is fully up to the requirements of said order heretofore made in the premises, it is hereby ordered that the plaintiff be allowed to change the track and railroad of defendant from the new road-bed constructed for it by plaintiff under the order of this court: provided, that such change shall be made at such time and in such manner as not to unnecessarily delay or hinder the operation of defendant's railroad at said point in the running of the regular trains thereon on schedule time thereover; and that the sheriff of Shoshone county

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is hereby ordered and empowered to put the plaintiff in possession of the premises, and protect it and its employes while making such change from any interference by defendant or any one. JOHN L. LOGAN, Judge." From both of which decrees the defendant appeals, and alleges as error that the same are void for want of jurisdiction in the district judge to make the same.

A district judge in Idaho has no jurisdiction to hear a proceeding for the condemnation of lands, or to enter judgment or decree therein, under the statute, at chambers. Rev. St. Idaho, §§ 3890-3910; Id. tit. 7. Decrees reversed, and cause remanded; costs awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

JANUARY TERM, 1892.

MCDONALD et al. v. BURKE et al.

(January 6, 1892.)

TAXATION OF COSTS—EXPERTS.

1. Expenses incurred by a party to a suit in the employment of experts are not taxable as costs.

SAME—STENOGRAPHERS' FEES.

2. To entitle a party to tax as costs the fees or charges of a stenographer, it must appear that the same were incurred under the provisions of the statute applicable thereto.

(*Syllabus by the Court.*)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Action by John M. Burke and others against Scott McDonald and others. Judgment for defendants. From an order disallowing certain items in their cost-bill, they appeal. Affirmed.

For former appeals, see ante, 310, 13 Pac. Rep. 351; ante, 646, 33 Pac. Rep. 49.

F. Ganahl and *McBride & Allen*, for appellants. *Woods & Heyburn*, for respondents.

HUSTON, J. This is an appeal from an order of the district court for Shoshone county, made after judgment, taxing costs of defendants as the prevailing party in the suit. The action was brought under the provisions of section 2326, St. U. S. Cause was tried before court with jury. Verdict and judgment for defendants. Judgment was entered on 13th day of August, 1890. Cost-bill filed August 16, 1890. No notice of filing of cost-bill was ever given to or served on plaintiffs or their

attorneys. On 24th February, 1891, plaintiffs made their motion for taxing of the costs in said action before the district court for said Shoshone county, which motion was granted, and thereupon said district court proceeded to tax the costs in said action, and from the defendants' memorandum of the items of costs and necessary disbursements struck out and disallowed the following items, viz.: "Cost on appeal, paid M. E. Thompson, stenographer, for services in transcribing notes and testimony taken upon the trial, and necessarily incurred in the preparation of the papers on appeal, \$345.00; printer's bill for printing briefs for supreme court, reduced from \$105 to \$40, \$65.00; V. M. Clement, for services as surveyor, etc., \$1,000; E. T. Williams, assaying and testifying as an expert, \$250; Frank Dorey, examining ground, making assays, and testifying as an expert, \$500; John H. Hammond, for three trips to said mine, examining the same, and testifying as an expert, \$4,000; W. C. Miller, for services as a surveyor on both trials, \$250." From the action of the district court in disallowing said items, the defendants appeal.

The first position of appellants in support of their appeal is that, they having filed their cost-bill within the time prescribed by the statutes, to-wit, "within five days after rendition of verdict or notice of the decision," and the plaintiffs having failed within the time fixed by statute, to-wit, three days after the filing of the bill of costs, to file a motion to have

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the same taxed by the court, the court had no jurisdiction to tax the same thereafter. Section 4912, Rev. St. Idaho, provides that "a party dissatisfied with the costs claimed may, within three days after filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers." The statute does not provide for the giving of notice to the opposite party of the filing of cost-bill. In this, we think, the law is defective. Does a failure by a party dissatisfied to file his motion to tax within three days after the filing of the cost-bill deprive him of all remedy against an exorbitant cost-bill? We think not. The remedy given by the provision of section 4912, above cited, is not exclusive. It is not mandatory. Under the provisions of section 4229, Rev. St. Idaho, a party may at any time, not exceeding six months after the adjournment of the term, apply to the court or the judge thereof in vacation for relief from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. It certainly would not be construing the statutes "with a view to effect their objects and to promote justice" (Rev. St. § 4) to hold that a party was remediless against an exorbitant cost-bill, of the filing of which he had never had notice. But there is another view of this case, which is discussed at some length in the briefs of counsel, and that is: Were the items of costs disallowed by the district court properly chargeable as costs? All of the disallowed items, except that of \$345, for stenographer's services, and the reduction of \$65 from the charge for printing briefs, were charges for the services of experts. It is contended by appellants that "the statute allows costs and necessary disbursements," but I have been unable to find any such provision in our statute. In section 4912, referring to the filing of the cost-bill, the language used is: "A memorandum of the items of his costs and necessary disbursements in the action or proceeding." If this is the statutory provision upon which counsel rely to support their position, we cannot agree with them. Such a construction would allow the taxing as costs of any disbursements which the party or his attorney might deem necessary. Counsel fees, clerk hire, and any other expenditures necessarily made in the prosecution of the suit or pro-

ceeding, would, under such a view, be equally chargeable as costs. "In the absence of any statutory provision authorizing it, the compensation of experts, beyond the regular witness fees, is not a necessary disbursement, and cannot be taxed as a part of the costs. It is considered as having been incurred for the parties' own benefit, and is no more a disbursement in the cause than the fees paid to an attorney." Lawson, Exp. Ev. p. 270. In *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. Rep. 754, the court says: "If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by and act under the direction of the court. Where, as in this case, he is the employe of one of the parties, the temptation to act in the interest of such party must be apparent. Therefore, in order to secure his fair and disinterested services, he should be appointed by the court, and not by either of the parties, and, if either party sees proper to employ the services of an expert for his own benefit, the court should not require the opposite party to pay for the services so rendered." This we believe to be the correct rule. It does not appear from the record that the fees charged in the cost-bill for the services of the stenographer, and disallowed by the court, were rendered by the court stenographer, or incurred under the provisions of the statute in relation thereto, (Laws 1st Sess. Leg. State of Idaho, p. 234,) and from the fact that they were disallowed by the court it is presumed they were not. The action of the district court is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J, concur.

BARTON v. MOSCOW INDEPENDENT SCHOOL-DIST. NO. 5 OF LATAH COUNTY.

(January 21, 1892.)

SCHOOL DISTRICTS — ESTABLISHMENT — CONSTRUCTION OF STATUTE.

1. The act of the legislature entitled "An act to establish and maintain a system of free schools" (see Sess. Laws 1890-91, p. 131) did not repeal chapter 11, tit. 3, of the Political Code, so far as it re-enacted the provisions of said chapter, but merely continued the re-enacted provisions in force.

SAME—FISCAL MANAGEMENT—ERECTION OF SCHOOL-HOUSES—CONFLICT OF STATUTES.

2. The act entitled "An act to authorize independent school-districts to issue bonds to redeem,

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fund, or refund their indebtedness, and to provide and improve school houses and grounds and furniture and fixtures," which act was approved March 6, 1891, (see Sess. Laws 1890-91, p. 129,) and the act above referred to, became a law on same day, are contemporaneous legislation, are not in conflict, and should be construed together.

(*Syllabus by the Court.*)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by R. H. Barton against the Moscow Independent School-District No. 5 of Latah county to restrain defendant from issuing, selling, and delivering certain bonds. From an order refusing to grant an injunction, plaintiff appeals. Affirmed.

Mitchell & West, for appellant.

As an independent school-district is a creature of the law, created for a specific purpose, whenever the legislature repeals a law which has established it, it ceases to exist as a corporate body. *Galesburg v. Hawkinson*, 75 Ill. 156.

Forney & Tillinghast, for respondent.

Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. *State v. Wish*, 15 Neb. 448, 19 N. W. Rep. 686; *City of Junction City v. Webb*, 44 Kan. 71, 23 Pac. Rep. 1073; *Scheftels v. Tabert*, 46 Wis. 439, 1 N. W. Rep. 161; *Wright v. Oakley*, 5 Metc. (Mass.) 400; *Association v. Ben-shimol*, 130 Mass. 325; *Capron v. Strout*, 11 Nev. 304; *Steam-Ship Co. v. Joliffe*, 2 Wall. 450.

SULLIVAN, C. J. This is an action brought to obtain an injunction to restrain the issuance, sale, and delivery of \$25,000 of bonds, the proceeds of which are to be used in erecting and furnishing a school-house in the Moscow independent school-district No. 5 of Latah county. The court below denied the motion for an injunction, from which order this appeal was taken. An act was passed by the legislature of the state of Idaho at its first session entitled "An act to authorize independent school-districts to issue bonds to redeem, fund, or refund their indebtedness, and to provide and to improve school houses and grounds and furniture and fixtures," which act was approved March 6, 1891. Sess. Laws Idaho 1890-91, p. 129. Said legislature, at said first session, also passed an act entitled

"An act to establish and maintain a system of free schools," which act became a law, over the veto of the governor, on the said 6th day of March, 1891. Sess. Laws Idaho 1890-91, p. 131. We have not been able to ascertain which of said acts became a law first, nor do we consider it necessary to determine that question. Said first-mentioned act provides as follows: "Be it enacted by the legislature of the state of Idaho, that there be added to chapter eleven of title three of the Political Code the following sections." Then follow three sections, directing the procedure to govern the board of trustees of independent school-districts in the issuance of bonds "to redeem, fund, or refund their indebtedness, and to provide and improve school houses and grounds and furniture and fixtures." The second act above referred to provides a plan for the establishment and maintenance of a system of free schools, and contains, among others, the provisions of said chapter 11, tit. 3, of the Political Code, almost *verbatim*. The word "territory" is changed to "state," and a very few other words are changed; but the scope and meaning of the provisions of said chapter remain substantially the same as before the passage of said act.

It is contended by the appellant that section 65 of the last act above referred to repeals all of the provisions of said chapter 11, tit. 3, of the Political Code, and that said first-mentioned act is an amendment of said chapter 11, and for that reason it is also repealed by said section 65, which section is as follows: "Title (3) three of the Political Code, and all acts and parts of acts inconsistent with this act, are hereby repealed." Title 3 of the Political Code was "Public Schools." Said title contains 11 chapters. The eleventh chapter thereof provides for establishing independent school-districts, and none of its provisions are inconsistent with said act containing said section 65. The provisions of said chapter 11 were re-enacted by said second-mentioned act almost *verbatim*, and are contained in said act from sections 57 to 64, inclusive. We think that by the re-enactment of the provisions of said chapter 11 the intention was to continue in force the uninterrupted operation of said provisions, and that such re-enactment was not, in a proper sense, a repeal thereof, but that the new act was a mere continuing in force of the provisions of the former act. *State v.*

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Wish, (Neb.) 19 N. W. Rep. 686. Sutherland, in his work on Statutory Construction, (section 133,) says: "The portions of the amended sections which are merely copied, without change, are not considered as repealed, and again re-enacted, but to have been the law all along;" and in section 134, Id., he says: "When there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal, so far as the old law is continued in force. Offices are not lost, corporate existence is not ended, * * * by such repeal and re-enactment of the law on which they respectively depend." In *Sheftels v. Tabert*, (Wis.) 1 N. W. Rep. 161, the court says: "The rule of construction applicable to acts which revise and consolidate another act or acts is that, when the revised and consolidated act re-enacts in the same words the provisions of the act or acts so revised and consolidated, such revision and consolidation shall be taken to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act." To the same effect is *Association v. Benshimol*, 130 Mass. 325; also *Wright v. Oakley*, 5 Metc. (Mass.) 400; *Capron v. Stout*, 11 Nev. 304; *Steam-Ship Co. v. Joliffe*, 2 Wall. 450. It merely supersedes said chapter 11 by re-enacting the provisions thereof, and thus continues the same in force. The repealing clause of the act which became a law over the veto of the governor clearly indicates that it was not the intention of the legislature to repeal the provisions of said chapter. It repeals only the title of title 3 of the Political Code, and re-enacts the provisions of said chapter, giving it a new title. The act of March 6, 1891, authorizing independent school-districts to issue bonds, is designated as an amendment to chapter 11, tit. 3, of the Political Code; but it has a title of its own, and is complete in itself. Said act of March 3, 1891, which was passed over the veto of the governor, re-enacts all of the provisions of said chapter 11, tit. 3, and is specific in repealing the title only to said chapter, and all acts and parts of acts inconsistent with said act. Both of these acts became a law upon the same day,—the one by the governor's approval, and the other over his veto. It was, unquestionably, contemporaneous legislation, and, as there is no conflict or repugnancy between said acts, both

should be permitted to stand. End. Interp. St. §§ 159, 222; *Smith v. People*, 47 N. Y. 330; *Pond v. Maddox*, 38 Cal. 572; *State v. Babcock*, (Neb.) 36 N. W. Rep. 348; *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. Rep. 761. The order of the court below, refusing to grant an injunction, should be sustained, and it is so ordered, with costs of this appeal in favor of the respondent.

HUSTON and MORGAN, JJ., concur.

JACOBS v. SHENON.

(February 1, 1892.)

REAL-ESTATE BROKER—ACTION FOR COMMISSIONS
—PLEADING.

1. A broker claiming commissions upon an agreement which provides that the party of the first part offers to sell certain mining property at the price of \$175,000, and to pay the parties of the second part \$12,000 for services rendered in selling or placing said property upon terms acceptable to the party of the first part, must allege, in direct and positive terms, that the party of the second part did render services which resulted in the sale thereof, or that he produced a party ready, willing, and able to purchase said property upon the terms named; otherwise it is insufficient.

SAME—PLEADING AND PROOF.

2. The broker must follow such allegation with proof that such services were rendered by him, in order to recover.

WRITTEN CONTRACT—PRIOR PAROL AGREEMENT
—PRESUMPTION OF MERGER.

3. A contract having been reduced to writing and signed by the parties, concluded all the parties thereto at the date thereof; and any contracts made between the same parties prior to that, relating to the same subject-matter, and all conversations and agreements of whatever kind had between them prior to that date, are by law conclusively presumed to be merged in the final contract.

SAME—EVIDENCE.

4. No conversations or agreements had or made prior to that time, tending to vary or dispute the provisions of the writing, are proper considerations for the jury, and could not be given in evidence.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by Martin H. Jacobs against Philip Shenon to recover commissions for the sale by plaintiff's assignor of defendant's mine. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Jacobs v. Shenon.

R. P. Quarles, Texas Angel, and Smith & Smith, for appellant.

One of two joint promisees may release the obligor of a contract, and, if by so doing he injures his co-obligee, his co-obligee must look to him for relief. *Jacomb v. Harwood*, 2 Ves. Sr. 265; *Murray v. Blatchford*, 1 Wend. 583; *Napier v. McLeod*, 9 Wend. 120; *Decker v. Livingston*, 15 Johns. 479; *Kimball v. Wilson*, 3 N. H. 96; *Myrick v. Dame*, 9 Cush. 248.

Evidence of intention of the parties in making a written contract is inadmissible. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. Rep. 830; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. Rep. 1101.

The construction of the contract, it being in writing, was for the court, and to submit it to the jury was error. *Monnett v. Monnett*, 46 Ohio St. 30, 17 N. E. Rep. 659; *Goddard v. Foster*, 17 Wall. 123; *Luckhart v. Ogden*, 30 Cal. 547.

F. E. Ensign, for respondent.

When a person, answerable in contract to two jointly, settles with one of these, so that one has no longer any interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. *Boston & M. R. Co. v. Portland, S. & P. R. Co.*, 119 Mass. 498; *Garrecht v. Taylor*, 1 Esp. Dig. 117; *Kirkman v. Newstead*, Id. 117; *Austin v. Walsh*, 2 Mass. 401; *Baker v. Jewell*, 6 Mass. 460; *Holland v. Weld*, 4 Me. (Greenl.) 255; *New Braintree v. Southworth*, 4 Gray, 304.

A release not under seal and without consideration is void. *Benjamin v. McConnel*, 4 Gilman, 536; *Crawford v. Mills-paugh*, 13 Johns. 87; *Jackson v. Stackhouse*, 1 Cow. 122.

When a contract is ambiguous, and the meaning doubtful, and requires oral evidence to explain it, the question of its meaning should be submitted to the jury. *Ganson v. Madigan*, 15 Wis. 145; *Bedard v. Bonville*, 57 Wis. 271, 15 N. W. Rep. 185; *Philibert v. Burch*, 4 Mo. App. 470; *Hueske v. Broussard*, 55 Tex. 201.

MORGAN, J. The plaintiff alleges that, on the 7th day of June, 1889, the defendant entered into an agreement with E. S. Chase and William Tate Taylor, by which the said defendant agreed to and with said Chase and Taylor that he would pay them the sum of \$12,000 for services rendered by said Chase and Taylor, in selling the property known as the "Shenon"

group of mines, situated in Bannock mining district, in Beaverhead county, Mont., and placing the same in a manner acceptable to the said defendant; and said agreement further provided that the said sum should be paid to the said Chase and Taylor in the following manner, to-wit: That, at each payment made to said defendant by the purchaser or purchasers of said mining property, said Chase and Taylor should be paid by the defendant their *pro rata* share thereof, until the whole of the said sum should be paid to them. That the said mining property, in the sale and placing of which said services were rendered by the said Chase and Taylor, has been sold, and the purchase money therefor has been paid to the said defendant, and that the whole amount of the said sum of \$12,000 has become due and payable to the said Chase and Taylor, one-half thereof to each. That, however it may appear upon its face, as a matter of fact the said agreement is and was not a joint agreement, as the services rendered as the consideration of said agreement were rendered before the date of the agreement, or its execution by defendant, by said Chase and Taylor, and were not performed jointly or in co-operation, and the amount due under said agreement to each of them, to-wit, the sum of \$6,000, was due for separate, distinct, and independent services. That the said William Tate Taylor is now and was at the commencement of this suit a non-resident of this state, and a resident of the state of Montana, and has had, since the commencement of this action, no interest in said agreement; and that, prior to the commencement of this action, the amount due him under said contract had been paid by the said defendant. That on the 1st day of September, 1890, there was due to said E. S. Chase, from the said defendant, on said agreement, the sum of \$6,000, after deducting therefrom the sum of \$35, which sum of \$35 the plaintiff admits to have been paid by the said defendant to the said Chase, on said agreement, on the 10th day of August, 1889. That on the 1st day of September, 1890, the said E. S. Chase sold and assigned his interest in said agreement to the plaintiff. That no part of said \$6,000 had been paid, except the sum of \$35, as before stated; and there is now due thereon from the said defendant to plaintiff the sum of \$5,963, and interest at the rate of 10 per cent. Prays judgment for the above sum and interest.

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To this complaint the defendant filed a demurrer alleging, among others, the following causes, to-wit: (1) The complaint does not show or allege that E. S. Chase and William Tate Taylor had ever rendered any services in selling or placing the said property mentioned in the complaint, either before the date of the alleged agreement, or at any time. (2) It does not allege or show that the sale or placing of the property, alleged in said complaint to have been made, was made before the date of the alleged agreement, or in consequence of any services rendered by said Chase and Taylor. (3) It does not allege or show that the property was placed or sold in a manner acceptable to the defendant. (4) It does not state whether the alleged agreement was verbal or in writing. This demurrer was filed June 16, 1891. On the same day the defendant filed his answer, and admits that, on the 7th day of June, 1889, he entered into an agreement with the said Taylor and Chase, touching the sale and placing by them of the mining property mentioned by them in said complaint; but he denies that he agreed in said agreement to pay the said Taylor and Chase the sum of \$12,000, or any other sum, in consideration of services rendered, prior to said date, by them or either of them, in placing or selling the said property, or any part thereof. Denies that said Chase and Taylor, or either of them, had, on the said 7th day of June, 1889, sold said property, or any part thereof, in any manner. Avers that said agreement is a joint agreement. Denies that the consideration for said agreement is or was services rendered by said Taylor and Chase prior to the date of said agreement, and denies, specifically, each of the allegations of the complaint, except that he admits that said property has been sold; but he denies that said property was sold by the said Chase and Taylor, or either of them, or that they sold any part of said property, or that they, or either of them, were the procuring cause of said sale, and avers, upon information and belief, that, prior to said sale, the said Chase, in bad faith towards this defendant, used his influence trying to prevent said sale by false and slanderous statements. That at the time of the execution of said agreement it was distinctly understood and agreed that said promise to pay said Chase and Taylor the said sum of \$12,000 was upon the condition that they, the said Chase and Taylor, should place and sell the said min-

ing property at the price of \$175,000, upon terms and in manner as should be acceptable to defendant. That said consideration for said promise has wholly failed. The answer contained other alleged defenses not necessary to be here stated. On July 15th, the day the verdict was returned and the judgment rendered, the plaintiff, by leave of the court, filed an amendment to his amended complaint, alleging that the plaintiff, conspiring with the said William Tate Taylor, induced the latter, in order to defraud the said Chase, to sign a release to and for the said defendant, of and from the indebtedness arising from said contract, with the intention to wrong and defraud said Chase. The demurrer to the complaint was overruled, and exception taken by defendant. Trial was had before the court and a jury, resulting in a verdict for the plaintiff and against the defendant for the sum of \$5,107.86, and legal interest from the filing of the complaint. Judgment was entered on the said verdict on July 15, 1891. Defendant moved for a new trial, which being denied, an appeal was taken to this court.

The contract upon which this suit is brought was introduced in evidence, is in writing, and is as follows: "This agreement made and entered into this 7th day of June, 1889, by and between Phil Shenon, of Beaverhead county, Montana territory, party of the first part, and Wm. Tate Taylor and E. S. Chase, of said Beaverhead county, parties of the second part, witnesseth: That the party of the first part offers to sell certain mining property and appurtenances in Bannock mining district, county and territory aforesaid, for the sum of one hundred and seventy-five thousand dollars; and of which amount said party of the first part agrees to pay said parties of the second part the sum of twelve thousand dollars, in consideration of services rendered in selling and placing said property on such terms and conditions as may be accepted by said party of the first part. And it is further agreed by said parties hereto that the said sum of twelve thousand dollars shall be paid *pro rata*, as per purchase price, in cash and stock, if the sale be made, at such time as payments may be made on such sale to the party of the first part. Witnesseth our hands and seals day here first above written. WM. TATE TAYLOR. PHIL SHENON. E. S. CHASE." It will be seen that the complaint

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contains no allegation that the said Chase and Taylor, or either of them, ever, at any time, rendered any services, in selling or placing the property described in the complaint; nor does it show that the property was sold or placed by reason of, or in consequence of, any services rendered by said Taylor and Chase, or either of them, at any time. The only allegation from which the court might infer that services had been rendered by the parties Chase and Taylor are the following words, "That the said mining property, in the sale and placing of which the said services were rendered," and again as follows: "Plaintiff alleges, on information and belief, that, however it may appear upon its face, as a matter of fact the said agreement is and was not a joint agreement, as the services rendered as the consideration for said agreement were rendered before the date of the agreement, or its execution by defendant, by said Chase and Taylor, and were not performed jointly or in co-operation; and the amount due under said agreement to each of them, to-wit, the sum of \$6,000, was due for separate, distinct, and independent services." The foregoing is not an allegation that services were rendered. The allegation that said Chase and Taylor sold or placed said mine for the price named, or were the procuring cause of its being so sold or placed, must be direct, certain, and positive, and cannot be left to inference. No fact material to recovery, as this is, can be left to inference. 1 Estee, Pl. Pr. § 196; Moore v. Besse, 30 Cal. 572. Without allegations of such services the complaint is fatally defective. The demurrer thereto should have been sustained.

The contract, as above set forth, is plain, unambiguous, and certain in its language,—this agreement made by and between Phil Shenon, party of the first part, and Taylor and Chase, parties of the second part. The party of the first part offers to sell, and agrees to pay to the said parties of the second part. Whenever an obligation is undertaken by two or more, or a right given to two or more, it is the presumption of law that it is a joint obligation or right. Words of joinder are not necessary, but words of severance are. 1 Pars. Cont. c. 2, § 1, p. 11. The contract on the part of Chase and Taylor, the parties of the second part, was joint. But it is alleged in the complaint that, prior to the commencement of the action, the

amount due Taylor had been fully paid, and that he had no interest in said contract at the time of the commencement of the action. This gave Chase, or his assignee, the right to sue in his own name. Hawes, Parties, § 94, and cases there cited.

The contract was also to be performed *in futuro*. It states: "The party of the first part offers to sell." The property had not then been sold, and, so far as this contract is concerned, it is the same as if it had never before been offered for sale. It is, then, now offered for sale at the price of \$175,000, and the effect of the further provision is that if the said Chase and Taylor shall succeed in selling and placing said property, at said price, and on such terms and conditions as may be accepted by said Shenon, the party of the first part, then said defendant is to pay said Chase and Taylor the sum of \$12,000, in consideration of said services; and the converse would be equally true, that if the said Chase and Taylor should not succeed in selling and placing said property according to conditions, nor in introducing or procuring parties who were ready and willing and offered to pay such price, upon terms and conditions that were acceptable, then nothing would be due them under this contract. This contract having been reduced to writing; and signed by the parties on the 7th day of June, 1889, concluded all the parties thereto at that date; and any contracts made between the parties prior to that date, relating to the subject-matter, and all conversations and agreements of whatever kind had between them prior to that date, are by law conclusively presumed to be merged in this contract. No conversations or agreements had or made before that time, tending to dispute or vary the contract, were proper considerations for the jury, and could not be given in evidence. There is no evidence in the record of any agreement or contract made by the parties subsequent to the signing of this contract, varying the terms thereof. It therefore stands unchanged.

The above construction of the contract, and the statement of the law relating thereto, it seems to the court, clearly indicates what is and what is not proper evidence.

Mrs. E. S. Chase was permitted to testify, over the objection of defendant, that Mr. Taylor said it would make no difference when the mine was sold, or if it was to those parties, or some others; that the

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contract would still hold good, and that it was for services rendered; presumably meaning that it would make no difference whether the property was sold to parties procured by Chase and Taylor, or to parties procured by others, as the theory of the plaintiff was that the contract was given for services rendered before its making. This evidence was improper, and should have been excluded. One party to a contract cannot, in the absence of the other party, be permitted to give his own construction thereto, varying its terms, and have such construction go to the jury to affect their verdict. If received for the purpose of impeaching the testimony of Taylor, it was improper, as no foundation had been laid therefor. Mr. Taylor was not interrogated with reference to this conversation. The testimony shows that the property was not sold or placed by Taylor and Chase, or either of them, and that they, nor either of them, were the procuring cause of such sale. Taylor swears that he and Chase tried to sell the property, but failed. Again: "Failing to sell the property, I surrendered my copy of the agreement to Shenon." "Mr. Chase and myself tried to sell the property to Mr. E. Probert. Mr. Probert did not buy. We also offered it to William Beck and B. F. White, but failed to sell it." Mr. Chase proposed to bring a purchasing party from Hailey, Idaho, but no party came. And again, Taylor states: "We were to receive \$12,000 in money and stock if we sold the property. If we did not sell the property we were to receive no compensation." These statements were reiterated upon cross-examination. Mr. Shenon, the defendant, testifies: "I never paid Mr. Chase anything on this contract. This credit of \$35 on the contract is not any credit of any payment of mine on the same." "I sold the mines mentioned in the contract, which plaintiff has sued on, to J. Stewart-Wallace through Messrs. Casey, Hammer & Huston, as my agents. Taylor did not have anything to do or assist in any way in this sale, nor did Mr. Chase assist in any way on this sale. At the time the contract of June 7th was entered into, they, Chase and Taylor, claimed to be in possession of a purchasing party who might purchase my property in the event of the Butte parties failing to do so. At that time there was a bond pending with the Butte parties, but there was no deal made until December 17, 1889. The Butte parties were represented by J.

Stewart-Wallace, to whom I sold. I sold the mining property for \$150,000,—\$100,000 payable in money, and \$50,000 payable in stock." Witness Chase claims that the services had been rendered which were the consideration for this contract, before the making of the contract; but the evidence shows that the negotiations for the sale were continued for six months after that time, and the sale was not consummated until December, 1889. It is not such a contract as would be made for services already rendered and completed, but is such a contract as would be agreed upon were the parties Chase and Taylor then undertaking to make the sale. The testimony of Taylor and Shenon that no services were rendered, either by Chase or Taylor, in the sale finally made by Casey, Hammer & Huston, is not contradicted by any testimony in the case, except Chase, and he does not claim that they or either of them did anything after the making of the contract of June 7, 1889.

As appears by this record, the court is forced to the conclusion that there is no evidence therein that would enable the plaintiff to recover. The issues in this case are pointedly laid down, and the law relating thereto briefly and clearly given, in Mechem on Agency, section 965. (1) What did the broker undertake to do? (2) Has he completed that undertaking within the time and upon the terms stipulated? (3) If not, is the default attributable to his own act, or to the interference of the principal? If, upon such an inquiry, it be determined that the broker has performed, within the time and upon the terms agreed upon, he is entitled to his commissions. If he has not, he is not so entitled, unless the performance was prevented by the principal, under circumstance which gave him no right then and so to prevent it. If particular terms and conditions are stipulated for, the performance must be in accordance with those terms, and no performance upon other terms will suffice, unless accepted by the principal. It cannot be seriously contended that Chase and Taylor, or either of them, sold said property, or procured a purchaser ready, willing, and able to purchase the same, at the price named in the contract, and upon terms that were acceptable to the defendant, or upon any terms.

We come now to the consideration of the instructions. The following instructions requested on the part of the plaintiff

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were given by the court, and excepted to by the defendant. "No. 3. The jury are instructed that, even if they should believe from the evidence that E. S. Chase and William Tate Taylor were copartners and joint owners in the contract sued on in this cause, a release by Taylor would not bind Chase if the jury believed, from the evidence, that the said Taylor was guilty of practising a fraud upon Chase in executing the release, or executed the release in bad faith to Chase, or executed the release by a fraudulent connivance or collusion with Shenon, the defendant." There is no evidence in the record that Taylor practiced a fraud upon Chase, or executed the release in bad faith, nor of any fraudulent connivance with Shenon. Without evidence tending to prove fraud or bad faith the instruction is improper. Instructions must be based upon evidence. Instruction No. 4 is bad for the same reason. The same may be said of instruction No. 6. The instructions themselves are so similar to the one here commented upon they are not repeated. Instruction No. 5, requested by the defendant, is as follows: "I charge you, as a matter of law, that the contract, as introduced by the plaintiff in this case, being the contract sued upon, means that the said Chase and Taylor should earn their brokerage by actually selling and placing said group of mines, or being the procuring cause thereof, at the price mentioned in the contract, and upon the terms as to stock and money that the defendant should accept." The instruction is proper as written, without modification, but the court modified it as follows: "Unless you find that the rendition of the services claimed by Chase was to be paid for by the payment of \$6,000." There is no evidence of any modification of the contract by the parties thereto after the contract was signed, and no understanding of any of the parties before the contract was signed can be permitted to prevail against the express terms of the writing; therefore this modification authorized the jury to consider, as evidence, testimony that was not proper. The modification was therefore error. The following clause in the instructions given by the court, upon his own motion, was also excepted to by the defendant, to-wit: "A number of letters and contracts have been introduced and read in your hearing, and are a part of the evidence in this case, and it becomes a part of your duty to analyze each and all of them; and, taken with

the other evidence in the case, you are to determine who should recover in this case." This instruction placed before the jury, for their consideration, evidence of conversations occurring between the parties before the signing of the contract of June 7, 1889, and also contracts existing prior to the above date between them, all of which was improper for the reasons heretofore given. These errors must have prejudiced the defendant before the jury in the trial of this cause. The judgment of the court below is reversed, and a new trial granted, with costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

DILLEY *et al.* v. STATE.

(February 1, 1892.)

BAIL BONDS—LIABILITY OF SURETIES—DEFENSES.

1. In an action upon a recognizance in a criminal case, the fact that an order of the magistrate directing the release of the prisoner after the giving of the recognizance does not appear in the record cannot obtain as a defense by the sureties.

SAME—ATTACKING JURISDICTION OF COMMITTING MAGISTRATE.

2. Nor, in such a case, can the sureties in the recognizance attack the jurisdiction of the magistrate who took the bond or the grand jury which found the indictment.

(*Syllabus by the Court.*)

Appeal from district court, Logan county; C. O. STOCKSLAGER, Judge.

Action by the state against Stephen B. Dilley and Jennie B. Galbraith, as sureties on a recognizance in a criminal cause. From a judgment for plaintiff, entered upon an order sustaining a demurrer to the answer, defendants appeal. Affirmed.

Texas Angel and *T. T. Loy*, for appellants.

The objection that the court has no jurisdiction over the subject of the indictment is not waived by a failure to demur. Rev. St. §§ 7742, 7750; *People v. Mellon*, 40 Cal. 648; *Wells*, Jur. § 66.

Objection to the jurisdiction is available in an action against the sureties on a bond. *Dickenson v. State*, 20 Neb. 72, 29 N. W. Rep. 184; 3 *Crim. Law Mag.* p. 893, par. 1; *Hodges v. State*, 20 Tex. 497; *McGee v. State*, 11 Tex. App. 520; *Williams v. Shelby*, 2 Or. 144; *State v. Nelson*, 28 Mo. 13; *State v. Russell*, 24 Tex. 505; *State v. Woolery*, 39 Mo. 525; *Clark v. Cleveland*, 6

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Hill, 347; *People v. Carroll*, 44 Mich. 371, 6 N. W. Rep. 871.

Jurisdiction cannot be given of the subject-matter of the suit in a criminal case by consent, or by failure to object to the jurisdiction. Wells, Jur. § 66.

George H. Roberts, Atty. Gen., for the State.

The questions of jurisdiction of the justice to examine into the alleged offense should have been raised at the preliminary examination; and after the examination, and upon being held to answer if overruled, the remedy was by *habeas corpus*, if, as alleged, the warrant of the justice shows a conviction of a criminal offense without jurisdiction. *Hamilton's Case*, 51 Mich. 174, 16 N. W. Rep. 327; *Murfree*, Just. Pr. 1032.

It is no defense to an action on the bond against the bail that the accused was illegally in custody at the time the bail was taken. *Littleton v. State*, 46 Ark. 413; *Amer. & Eng. Enc. Law*, p. 25, note.

HUSTON, J. On the 20th October, 1890, at Bellevue precinct, Logan county, Idaho, upon warrant of arrest issued by T. T. REDSULL, a justice of the peace of said precinct, upon a complaint charging him with the crime of grand larceny, one William Ledford was arrested, and brought before said magistrate. The magistrate, after the examination of said Ledford as prescribed by statute, held him to answer said charge, fixing his bail at the sum of \$2,000. Thereafter, on the 22d day of October, said Ledford was by writ of *habeas corpus* taken before the judge of said district, who, upon a hearing on said writ of *habeas corpus*, made an order reducing the amount of such bail to the sum of \$1,000. On the 23d day of October, 1890, the appellants executed and delivered to said magistrate a recognizance, in the form prescribed by the statute, on behalf of said Ledford, in the sum of \$1,000, and thereupon the said Ledford was released. Ledford was indicted for the crime of grand larceny at the next ensuing term (being the June term, 1891) of the district court of said Logan county, made default, and his recognizance was duly estreated. This action is brought upon the said recognizance, for the recovery, by the state, of the amount prescribed therein. The complaint is in the usual form in such cases, but does not allege or state that an order was made by the justice discharg-

ing the defendant from custody, and this omission is urged by appellants as grounds for demurrer to the complaint; and the overruling of the appellants' demurrer is urged here as error, upon said ground. We do not think this position is sustainable. The order admitting the prisoner to bail was regularly made. The recognizance was regularly executed, and thereupon the prisoner, by reason of the giving of such recognizance, was discharged from custody. The object and purpose of the recognizance was served, and that is all the law requires. The making or entry of the order was an immaterial matter, which could in no way affect the liability of the sureties in the recognizance. *San Francisco v. Randall*, 54 Cal. 408. The appellants, in their answer to the complaint, allege, in substance, that the grand jury which found the indictment against Ledford had no jurisdiction to entertain said charge, or to find said indictment, for the reason that the offense charged therein, and no part thereof, was committed in Logan county, nor within 500 yards of the line of Logan county. To this answer a demurrer was filed by the state, which was sustained by the court. The defendants electing to stand upon their answer, judgment was rendered for the state, from which this appeal is taken.

Section 7630 of Revised Statutes of Idaho (Pen. Code) provides that "the grand jury must inquire into all public offenses committed or triable within the county," etc. *Non constat*, from anything in the answer, that the offense for which the defendant was indicted was not triable in Logan county, although not actually committed there. But there is another view of the case which seems to have been overlooked by the counsel for the state in presenting this case. It is that, although this question of the jurisdiction of the grand jury to find the indictment might be raised by the prisoner, had he appeared and answered, it cannot be raised in this action. Ledford is not a party to this proceeding. The agreement entered into by the appellants was that Ledford should appear and answer the charge upon which he was held, "in whatever court it may be prosecuted." Failing to do this, his recognizance was forfeited, and his sureties became liable. The jurisdiction of the grand jury to find the indictment could no more be urged as a defense to this action than could the innocence of the defendant. *State v. Sutcliffe*, (R. I.) 17 Atl. Rep. 920;

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Jones v. Gordon, (Ga.) 9 S. E. Rep. 782; Lee v. State, (Tex. App.) 8 S. W. Rep. 277. State v. Hendricks, (La.) 5 South. Rep. 177. The judgment of the district court is affirmed, with costs to respondent.

MORGAN, J., concurs.

SULLIVAN, C. J. I concur in the conclusion reached.

BONNEY v. STATE.

(February 1, 1892.)

CRIMINAL LIBEL—INFORMATION—SUFFICIENCY.

Under the statutes of Idaho, an information for libel which sets forth the libelous matter *in hæc verba*, prefaced with the words "that is to say," is good, upon demurrer.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

R. C. Bonney was convicted of criminal libel, and appeals. Affirmed.

Hawley & Reeves, for appellant.

The language of a libel must be set out in the indictment or information in the very words of the publication. Maxw. Crim. Proc. p. 317; Coulson v. State, 16 Tex. App. 189; Starkie, Sland. & L. 323; Com. v. Sweney, 10 Serg. & R. 173; Wright v. Clements, 3 Barn. & Ald. 503.

And not only must the very words be set out, but the indictment must profess to set them out. State v. Goodman, 60 Amer. Dec. 132; Com. v. Wright, 1 Cush. 46; Townsh. Sland. & L. § 329, and notes; Starkie, Sland. & L. 323; 1 Chit. Crim. Law, 234; Com. v. Sweney, 10 Serg. & R. 173.

George H. Roberts, Atty. Gen., and *T. M. Stewart*, for the State.

The words used, "in these words," are equivalent to "according to tenor," etc. 1 Bish. Crim. Proc. 559; Odgers, Sland. & L. 649.

It is unnecessary to charge that the paper was circulated or read. Rev. St. § 6741.

It is no defense that the article was published as "rumored" or "it seems." Skinner v. Powers, 1 Wend. 451; State v. White, 7 Ired. 180, cited 2 Bish. Crim. Law, 918; Hart v. Townsend, 67 How. Pr. 88.

HUSTON, J. The appellant was informed against by the grand jury of the county of Bingham, upon a charge of criminal libel, at the June term, 1891, of the district court for said county. The defendant demurred generally and specially

to the information; demurrer was overruled; trial had on plea of not guilty; verdict of guilty; and judgment and sentence thereon. This appeal is from the judgment, and the only point urged here is the overruling by the court of the defendant's demurrer to the information. The defendant contends in support of his appeal that the information "does not profess to set forth the "alleged libelous matter *in hæc verba*." The information charges that the defendant, "on the 11th day of June, 1891, in an issue of said newspaper," (the name of the newspaper, and that the defendant was the editor and manager thereof, etc., having been already stated in the information,) "falsely, willfully, and maliciously did compose and publish, and express by printing, certain false, scandalous, malicious, and defamatory matters concerning the said M. Patrie, that is to say." Then follows the article charged to be libelous. It is contended by appellant that the information "does not profess" to set forth the exact words of the libel; that is, that the libelous matter is not prefaced with the necessary words of identification as "to the tenor and effect following," or the "following words and figures." That the words, "that is to say," in the information, do not supply the required words, or avoid the necessity of their use. In support of this position appellant cites various authorities, English and American, which seem to support his contention; but a reference to section 7687 of the Revised Statutes of Idaho, we think, furnishes a complete answer to appellant's objection. Said section is as follows: "No indictment is insufficient, nor can the trial judgment, or other proceeding thereon, be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." And, again, section 8236 of the Revised Statutes of Idaho provides: "Neither a departure from the form or mode prescribed by this Code [the Penal Code] in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Again, in folios 7 and 8 of the information appear these words: "Which said false, scandalous, malicious, and defamatory libels hereinbefore mentioned and set forth, the said R. C. Bonney did," etc. It can hardly be seriously

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contended that the use of the words, "that is to say," instead of the words, "to the tenor and effect following," or, "in the words and figures following," tended to prejudice any substantial right of the defendant. The rule invoked by appellant, and clearly sustained by the authorities cited in that behalf, has no application, under the forms of pleading prescribed by our statute, however correct it might have been at the time and in the jurisdictions where it obtained. We have not the evidence before us, but we have a copy of the libel, and the record of the conviction of the defendant, and we must say that the judgment and sentence of the court were evidently rendered with a full recognition of the recommendation contained in the verdict. The judgment of the district court is affirmed.

SULLIVAN, C. J., and MORGAN, J., concur.

BLACKFOOT STOCK CO. v. DELAMUE.

(February 8, 1892.)

CLAIM AND DELIVERY—VERDICT—SUFFICIENCY.

In an action of claim and delivery, where neither the ownership or value of the property is put in issue, but defendant claims a lien upon the property (cattle) for the care and keeping of the same under a contract with plaintiff, a verdict that "defendant recover of and from the plaintiff the sum of six hundred seventy-nine and 50-100 dollars for keeping and care of the cattle mentioned in the complaint, and that defendant have a lien on said cattle until said amount is paid," is sufficient, after judgment, under the Statutes of Idaho.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Action of claim and delivery by the Blackfoot Stock Company against Andrew Delamue. From a judgment for defendant, plaintiff appeals. Affirmed.

Hawley & Reeves, for appellant.

In actions of replevin, a counter-claim cannot be pleaded by defendant or considered by the court. *Lovensohn v. Ward*, 45 Cal. 8; *Dole v. McGraw*, 71 Mich. 106, 38 N. W. Rep. 686; *Fairman v. Fluck*, 5 Watts, 516; *Stow v. Yarwood*, 14 Ill. 424; *Keaggy v. Hite*, 12 Ill. 101.

The counter-claim must have existed at the commencement of the action. *Gannon v. Dougherty*, 41 Cal. 661; *Jeffreys v. Hancock*, 57 Cal. 646; *Lyon v. Petty*, 65 Cal. 323, 4 Pac. Rep. 103.

T. M. Stewart, for respondent.

The provision in action for claim and delivery for alternative judgment, for return or value, is made for the benefit of the defendant, and he alone can take advantage of its omission. *Cobbey*, Repl. 1106, 1108; *Boley v. Griswold*, 20 Wall. 486; *Sweeney v. Lomme*, 22 Wall. 208.

A verdict for one party is sufficient to warrant judgment that he was entitled to possession. *Newlien v. Reed*, 30 Iowa, 496.

Defendant admitted that plaintiff was the owner of the cattle. In such case defendant is entitled to judgment for value of his special interest. *Cobbey*, Repl. 1126; *Warner v. Hunt*, 30 Wis. 200; *Knudson v. Gieson*, 38 Iowa, 234.

Error will be disregarded unless it affects substantial rights of appellant or operates prejudicially to his interest. *Cobbey*, Repl. 1105; *Barney v. Brannan*, 51 Conn. 175; *Marix v. Franke*, 9 Kan. 132.

HUSTON, J. On the 10th day of November, 1889, the plaintiff entered into a contract in writing with defendant, by which the plaintiff agreed to and did deliver to defendant the possession of a certain number of cattle, which, by said contract, defendant was to keep and care for until after April 1, 1890, at a price per head, stipulated in said contract. On the 28th day of July, 1890, a portion of said cattle still being in the possession of defendant, plaintiff brought its action of claim and delivery to recover the possession thereof from defendant. The complaint is in the usual form of actions of this nature under the Code. Possession of the cattle was delivered to plaintiff as provided by statute. Defendant, by his answer, admits (by not denying it) the ownership of the cattle by plaintiff, but denies its right to the possession, and sets up the contract, and the fact that there is a large sum due and unpaid to him from the plaintiff thereon for the keeping of said cattle; alleges that he has fully kept and complied with all of the terms and conditions of said contract by him agreed to be kept and performed. The answer of defendant was filed January 7, 1891. The answer sets forth the contract, and the claim of the defendant thereunder as a "defense and counter-claim." The cause was tried by the district court with a jury, and the following verdict was rendered: "We, the jury in the above-entitled action, find that defendant recover of and from the plain-

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tiff the sum of six hundred seventy-nine and 50-100 dollars for the keeping and care of the cattle mentioned in the complaint, and that defendant have a lien on said cattle until said amount is paid." On this verdict the court rendered the following judgment: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said Andrew Delamue have and recover from said Blackfoot Stock Company the sum of six hundred and seventy-nine and 50-100 dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, and the return and possession of said cattle mentioned in complaint, until same is paid, together with said defendant's costs and disbursements incurred in this action, amounting to the sum of two hundred and sixty-seven and 10-100 dollars." The appeal is from the judgment only, and brings here only the judgment roll. The following are the specifications of errors assigned by appellant: "(1) The court erred in overruling the motion of plaintiff to strike out the counter-claims. (2) The court erred in receiving the verdict of the jury. (3) The court erred in entering judgment on the verdict of the jury. (4) The judgment is void."

The plaintiff moved to strike out the counter-claims of defendant, which motion was denied by the court, and such refusal is alleged to be error by plaintiff, and we are, among other authorities, cited to Pom. Rem. § 767, in support of this contention. We might answer this contention of plaintiff by saying that, while the claim set up by defendant in his answer is denominated by the pleader as a "counter-claim," it is really the claim by virtue of which, under his contract with the plaintiff, he asserts his right to the possession of the cattle,—that is, an agister's claim or lien for the care and keeping of the cattle; and neither Prof. Pomeroy, nor any other authority, do we think, has ever announced that such a claim was not a proper defense in an action of replevin, or, as it is denominated in the Code, "an action of claim and delivery;" but this class of defenses are recognized by Pomeroy as an exception to, or not coming within, the general rule. We are required by section 4 of our Revised Statutes to construe the provisions thereof "liberally," "with a view to effect their objects and to promote justice." We should certainly be departing from this injunction were we to look at the name given a pleading, rather

than its substance, in construing it. The defense set up in the answer is a proper one, although it is a misnomer to call it a counter-claim. There was no error in overruling the motion to strike out. Another ground urged by the plaintiff why its motion to strike out should have been allowed is that it contains matter that arose after the commencement of the action. The action was commenced on the 28th of July, 1890. As before stated, the answer was not filed until the 7th day of January, 1891. It does not appear from the record when the cattle were taken from the possession of defendant, and it is but fair and reasonable to presume that they remained in his possession until the 4th day of September, 1890; and there was nothing improper in his including in his answer his claim for their care and keeping up to the time they were taken from his possession by the plaintiff under process.

The second assignment of error by the plaintiff is that "the court erred in receiving the verdict of the jury." It must be admitted that the verdict in this case is very unsatisfactory, and shows a degree of carelessness on the part of counsel that is very reprehensible; but is it sufficient to warrant the judgment rendered thereon? Let us look at the issues in the case for a moment. There was no question made on the ownership or value of the property sought to be recovered. The defendant admitted the ownership of the property to be in the plaintiff, conceded the value, and claimed only that he was entitled to the possession, by virtue of his agister's lien, for the care and keeping of the cattle under the contract aforesaid, and alleged the amount of his claim. What, then, were the issues the jury were called upon to try? Certainly only the validity and amount of defendant's claim. Had the verdict been: "We find the defendant entitled to the possession of the cattle described in the complaint, and that the amount of his claim for the care and keeping of the same is six hundred seventy-nine and 50-100 dollars,"—could it be contended that such a verdict would not support the judgment? We think not successfully. And wherein does the verdict in the record differ from such a one? It does not find the value of the property. It was not necessary it should, for there was no issue on that point; and as the right of possession claimed by defendant went only to the extent or amount of his lien or special property, and the property had

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been delivered to the plaintiff under the process, and as the value of the property, as shown by the record, was largely in excess of defendant's claim, a finding of the value was not called for, nor was it essential to "a complete adjustment of all the equities between the parties in the action." *Hickman v. Dill*, 32 Mo. App. 509; *Boutell v. Warne*, 62 Mo. 350; *Barney v. Brannan*, 51 Conn. 175; *Warner v. Hunt*, 30 Wis. 200. In the last case cited the plaintiff brought replevin for a cow of the alleged value of \$50. Defendant pleaded a lien, as pound-keeper, of \$2.50. The jury found for the defendant; that the plaintiff was not lawfully entitled to the possession of the property; that the same was not wrongfully detained by the defendant; that the defendant was entitled to the possession thereof; and assessed the value at \$40, and damages for the detention 1 cent. Upon this verdict judgment was rendered that the defendant have a return of the property, or, if return could not be had, that the defendant recover from the plaintiff the value thereof, assessed at \$40, and 1 cent damages, and costs. The verdict and judgment were set aside; the court saying that the jury should have found the value of the defendant's special property in the case, as well as the ownership, (which was put in issue by the pleadings in that case.) "In an action of replevin, where the verdict is in favor of the defendant, whose ownership is special, by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the account due him upon his lien if within the value of the property." *Cobbey*, Repl. 540, and cases cited in note 1, p. 541. While the verdict in this case is open to severe criticism, we think it sufficient to support the judgment. Another answer to the contention of plaintiff is that it comes too late. Objections to the form of the verdict should be made before judgment. If a verdict can be understood, it will be sustained, although informal. The language should be so construed as to sustain the verdict if possible. Same authority as last; *Cobbey*, Repl. § 1052, and cases there cited. Judgment of district court affirmed, with costs.

SULLIVAN, C. J., concurs.

MORGAN, J., having been of counsel, took no part in the hearing or decision of this case.

BURKE et al. v. McDONALD et al.

(February 10, 1892.)

JURY—CHALLENGES.

1. Where a juror who is incompetent under the statute swears falsely upon examination on his *voir dire*, and thereby compels the plaintiff to exhaust one of his peremptory challenges to exclude him, and, before the jury is completed, plaintiff discovers that said juror was incompetent, and offers to make proof thereof, he should be permitted to do so; and, upon satisfactory proof being made, his peremptory challenge should be restored to him.

NEW TRIAL—IMPROPER CONDUCT OF PARTY.

2. A judgment in favor of a party guilty of improper conduct, calculated to influence the jury, or any member thereof, in his favor, in rendering the verdict, should be reversed, and a new trial granted, on the ground of public policy.

MINES AND MINING—ADVERSE CLAIMS—INSTRUCTIONS.

3. "A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, with the expectation of finding ore," is a proper instruction; and changing the word "willing" to "justified" radically changes the instruction, and is an improper modification.

SAME—LOCATION OF CLAIM—VALIDITY.

4. Where a discovery is made by a prospector of such a character as to entitle the prospector to make a valid location on the 16th day of September, and he sets his discovery stake on that day, partially stakes and marks his claim on the 17th, and completes his staking and marking of boundaries according to law on the 18th, his discovery and location will date from the 16th day of September.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; WILLIS SWEET, Judge.

Action by J. M. Burke and others against Scott McDonald and others to quiet title to a certain mining claim and for an injunction. There was judgment for defendants. From an order overruling a motion for a new trial, plaintiffs appeal. Reversed.

For former appeals, see ante, 310, 13 Pac. Rep. 351; ante, 646, 33 Pac. Rep. 49; ante, 995, 28 Pac. Rep. 440.

Woods & Heyburn, for appellants. *McBride & Allen*, *W. H. Claggett*, *Frank Ganahl*, and *Albert Hagan*, for respondents.

MORGAN, J. The plaintiffs allege that they, and each of them, are citizens of the United States; that prior to the 6th day of December, 1887, the plaintiffs were, ever since have been, and now are the owners, subject to the paramount title of the

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United States, and in the possession and entitled to the possession, of that certain mine containing a lode of rock in place, bearing gold, silver, and other precious metals, situated in Yreka mining district, Shoshone county, Idaho, called the "Mammoth," and further particularly describing it; "that the defendants, claiming to be the owners of an adjacent mining claim, called the 'Lackawana Mining Claim,' upon the 7th day of December, 1887, wrongfully caused said Lackawana mining claim to be so surveyed as to crop out upon and overlap the said Mammoth mining claim and lode, and included a portion thereof, described as follows, [here follows a description of the part of the Mammoth claim alleged to be included in the lines of the Lackawana,] containing an area of something over eleven acres; that the defendants have made application for a patent in the United States land-office, and given notice thereof; that in said application the defendants wrongfully set up that they are in possession of the whole of that part of the Mammoth claim included in the lines of the Lackawana; that the plaintiffs duly filed their protest in the United States land-office, and adverse claim to said application, and that proceedings are stayed in said office to await the result of this suit; that the said claim for patent is a cloud upon the title of these plaintiffs." The plaintiffs pray that their title to and possession of said mining claim be quieted, for injunction, and for other relief. The defendants deny, specifically, each and all of the allegations of the plaintiffs, claim title and possession in themselves of the whole of the Lackawana claim, and ask for judgment that the suit of plaintiffs be dismissed, that the defendants be adjudged to be the owners of, and in possession of, said claim, and the whole thereof; for injunction and costs. The cause was tried before the Hon. WILLIS SWEET, J., and a jury, resulting in a verdict and judgment in favor of the defendants. The plaintiffs moved the court to set aside the verdict, and for a new trial, which being denied, the plaintiffs bring the cause to this court on appeal.

The plaintiffs assign the following as errors of which this court, in the present condition of the transcript, can take notice, to-wit: "The court erred in refusing to recall Juror Pressey for examination on his *voir dire*, and in forcing plaintiffs to a peremptory challenge of the said juror."

The statement shows that Juror Henry Pressey, when upon examination on his *voir dire*, stated that he did not stand in the relation of debtor or creditor to either party to the action; that he was acquainted with all the parties. He was examined at considerable length, both by the attorneys for the plaintiffs and by the court. He was finally challenged for cause, for the reason that he had indorsed checks and deposited them in the bank, for the payment of which some of the plaintiffs were responsible, and he did not know whether they had been paid or not. The court denied the challenge, and the plaintiffs excepted. The plaintiffs then challenged the said Henry Pressey peremptorily. On the next day, and before the panel for the jury was completed, the attorney for the plaintiffs requested the court to recall said Pressey, and place him in the jury-box, and that plaintiffs be permitted to prove that said Pressey was largely indebted to certain of the defendants in the action, and was so indebted at the time of his examination. This request was made in order that the plaintiffs could secure the exclusion of said Pressey for cause, and not be compelled to exhaust one of their peremptory challenges upon him. This was denied by the court, and the plaintiffs took exception. On the motion for a new trial was produced, among others, the affidavit of W. B. Heyburn, one of the plaintiffs and one of the attorneys for the plaintiffs, in which he testifies to the above facts in relation to the examination of Henry Pressey as a juror, and, further, that, at the time of said examination, he, said Pressey, was indebted to Michael McHale, one of the defendants herein, in the sum of \$200, and to V. M. Clement, one of the principal witnesses for the defendants, and the person who had charge of the preparation and conduct of this cause and trial for the defendants, in the sum of \$1,060, and said Pressey was further indebted to Scott McDonald, defendant herein, in the sum of \$1,702.50; that the defendants herein did not disclose to the court or to the plaintiffs the fact that said juror was swearing falsely, and said challenge for implied bias was denied by defendants and by the court; that, by virtue of said facts and acts of said juror and the defendants, plaintiffs were obliged to use one of their peremptory challenges upon said Pressey; that there was afterwards called, as a juror in said cause, one

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Andrew Larson, who duly qualified under oath as a juror, and who was an unfit and improper person to act in said cause, because of his intimate relationship with Scott McDonald, defendant, and his intimate association with him, calculated to prejudice and bias the mind of said juror against the plaintiffs and in favor of said defendants; that, by reason of these things, plaintiffs desired to challenge said juror peremptorily, but were unable so to do, for the reason that they had been compelled to exhaust their peremptory challenge, so intended to be used, upon said Pressey. The facts stated in this affidavit are not denied by the defendants, and the fact that said indebtedness existed, as stated, is further proven by the fact that said Pressey filed his petition in bankruptcy on the next day after said examination, and that said indebtedness was stated and sworn to in the schedule of debts affixed thereto. This indebtedness was, of course, known to said Pressey at the time of his said examination; and that he committed willful and deliberate perjury is beyond question. That the said indebtedness of this juror was also known to the defendants, this court cannot doubt. By neglecting to disclose the facts or instruct their attorney to confess the challenge, the defendants, if they were present themselves, became morally guilty of the offense, in endeavoring to compel the acceptance of this juror contrary to law, or compel the plaintiffs to exhaust one of their peremptory challenges to exclude him. In the case of *Hopt v. People*, 7 Sup. Ct. Rep. 614, the court say: "When a challenge to a juror for actual or implied bias is disallowed, and the juror is thereupon peremptorily challenged and excused, and an impartial and competent juror is obtained in his place, no injury is done to the defendant, if, until the jury is completed, he has other peremptory challenges which he can use." See, also, *Anarchists' Case*, 8 Sup. Ct. Rep. 22. The converse of this proposition would be equally true. If the plaintiff is compelled to use a peremptory challenge to exclude a juror who is incompetent under the statute, and before the jury is completed the plaintiff desired to use a peremptory challenge, and could not do so, because his peremptory challenges were exhausted, then it works an injury to the party for which a new trial should be granted. In this case the juror Pressey, in order to

force himself upon the jury or compel the plaintiffs to use a peremptory challenge, swore to a deliberate falsehood. When this was discovered the court should have permitted the facts to be shown, and, when shown, should have allowed the plaintiffs another peremptory challenge.

The fifteenth assignment of error, which was passed upon by the court below in the order overruling the motion for new trial, is: "Misconduct of the jury, as shown by the affidavits on file, used in plaintiffs' motion for a new trial." The affidavit of John Smith, filed on August 12, 1890, and used on motion for new trial, states that on the 8th day of August, while the jury were in charge of the sheriff, and, under the direction of the court, were viewing the premises in controversy, they were entertained by the defendants, or some of them, with luncheon and refreshments, beer and cigars; that the defendants procured two cases of beer for that purpose; that the jury drank it freely; that while they were drinking said beer a part of the jury were in a room separate and apart from the officer having them in charge; that V. M. Clement, the superintendent for the defendants, and one of the principal witnesses, and the person who had the general management and preparation of the cause for the defendants, was present with said jurors while so separated, drew the corks, and handed the beer and cigars to the jurors, of which the said jurors partook. George H. Rice also swears that he was one of the jurors on the trial of this cause, corroborates the statement of John Smith, and states that the jury separated, and a portion of them, so separate from the officer having them in charge, were drinking beer with V. M. Clement and John H. Hammond, witnesses on behalf of the defendants. Thomas Argyle, the deputy-sheriff who had charge of said jury, swears that the jury, after arrival at the office, did not separate; but the statements in the affidavits were that the jury separated before arriving at the office; that a part of the jury stopped at the air compressors with the deputy, and the balance went down with Clement to the office, and, when those with the officer went on down to the office, the members of the jury who had preceded them were in the office, drinking beer with Clement. These facts are not denied by Argyle, except in a general way, in closing his affidavit, where he states that he has heard the affidavit of John L. Smith read, and that

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the same is untrue and false. Again, in his affidavit in reply to that of W. B. Heyburn, the said Argyle states that the lunch was furnished by him, (Argyle,) and further states that none of the jury knew where the lunch came from; and, a line or two further on, states that he (Argyle) does not yet know by whom the lunch was ordered to be brought upon the ground, and that he has not yet paid for the same, merely because the bill has not yet been presented. The statement of Mr. Argyle that he furnished the lunch is hardly consistent with his statement that he does not know by whom the lunch was ordered, and that he did not order it himself. The court is forced to the conclusion that the facts stated by Smith and Rice are substantially true. That lunch and other refreshments were furnished the jury is not complained of; but it is the duty of the sheriff to furnish a jury with all proper refreshments, and it is his business to know where the luncheon comes from, and who orders it. He should order it himself, and should not permit either of the parties to order it, and it should be paid for by the county or by the parties equally. The deputy further states that nothing improper was said to the jury; but the jury having separated for a time, a part stopping at the compressors, while the rest went on to the office, and were found there in company with Clement, shows that he does not know what was said to them. John King also testifies that while the jury were sitting in the trial of said cause, and under instructions from the court, Simeon G. Reed, one of the parties in interest therein, did on different occasions drink at the bar of the Osborne Hotel with several of said jurors, and did invite and treat said jurors on several occasions in presence of said affiant, and did buy and pay for, in the presence of said jurors, whisky, beer, and cigars at said bar, and said jurors did accept and receive said beer, whisky, and cigars from said Reed. Other affidavits of similar character, with reference to other defendants, are produced on the motion for new trial. In reply to the affidavit of King, said Reed swears that he never knowingly invited any of said jurors to drink; that he was a stranger, and only knew by name a few of the jurors; that he has no recollection of treating or offering to treat, at said bar, any person whom he knew to be a juror. This does not deny the statement of the said King.

So long as trials by jury obtain in this country, it is necessary that all possible safeguards should be thrown around them. The supreme court of Idaho say, in the case of *Palmer v. Railway Co.*, 13 Pac. Rep. 429:¹ "It is not necessary for us to find that this conduct had any effect upon the verdict, in order to sustain this motion for new trial. It is enough to say that it was calculated so to do." In *McDaniels v. McDaniels*, 40 Vt. 374, the court say: "There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law, and upon the evidence in court." The court should set aside the verdict, in justice to themselves as well as the parties, that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties, and the confidence of the court. In *Cottle v. Cottle*, 6 Greenl. 140, the court say, in case of an alleged attempt to influence the jury: "It may be useful for a party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort; and, to the public generally, to know that it will not be tolerated in any case." See, also, *Cilley v. Bartlett*, 19 N. H. 324. The court is unable to say that any deliberate attempt was made to influence the jury in this cause, but it seems improbable that so many things of this kind should have accidentally occurred. In *Knight v. Inhabitants*, 13 Mass. 218, the court say: "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes; and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will be set aside." *Thomp. & M. Juries*, 406. The conduct of the defendants in this cause, as herein stated, has placed it beyond the power of this court to approve of the verdict. The authorities clearly establish the practice that, whenever the adverse party is guilty of conduct calculated to influence a verdict afterwards rendered in his favor, a new trial will be granted, as a matter of public policy, and to secure a pure administration of justice. *Palmer v. Railway Co.*, supra. It is probably unnecessary for this court

¹Ante, 350.

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to say more upon this subject than that the opinions given in the cases cited are fully approved by this court.

The following instruction was requested by the plaintiffs: "A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only." The court modified the instruction by changing the word "willing" to "justified." The word "justified" radically changes the whole meaning of the instruction. The question whether the miner is willing to spend his time and money is an entirely different one from the question whether he is justified in doing it. The former is a question to be answered by the miner himself, with or without advice, as he may choose. The latter word would present a question for experts and for the jury to determine. The instruction was correct without modification. *Harrington v. Chambers*, (Utah,) 1 Pac. Rep. 375, approved in *Eilers v. Boatman*, 4 Sup. Ct. Rep. 432.

The following instruction, given by the court, is also excepted to by the plaintiffs, viz.: "If you find that all of these acts necessary to a valid location have been complied with by plaintiffs, and, further, that the location was made prior to the 18th day of September, you will find for the plaintiffs," etc. The plaintiffs claim to have made their discovery on the 16th day of September, and to have set discovery stake then, followed this up on the 17th day of September by partially staking and marking the claim, and on the 18th completed the staking and marking boundaries, according to law. If this were proven, then the discovery and location would date from the 16th day of September; and any discovery and location made after that date on the same ground, or covering part thereof, could not prevail against plaintiffs. The jury should have been so clearly instructed. The above instruction was calculated to mislead, and the error was not covered by other instructions. Judgment of the court below is reversed, and new trial granted. Costs

are awarded to plaintiffs against the defendants, including the costs of the part of the transcript stricken out.

SULLIVAN, C. J., and HUSTON, J., concur.

SPARKS *et al.* v. LOWER PAYETTE DITCH Co.

(February 12, 1892.)

CORPORATIONS — PERSONAL LIABILITY OF STOCK-HOLDERS.

1. Under act entitled "An act concerning corporations," (Rev. Laws Idaho 1874-75, p. 618,) the stockholders are individually and personally liable for their proportion of all indebtedness incurred in conducting the business of the corporation, and a joint or several action may be instituted for the collection of the same.

SAME—POWER TO ASSESS CAPITAL STOCK.

2. Title 4 of the Civil Code of Idaho of 1887 supersedes the act above referred to; and a corporation organized under the act of 1875, whose existence is continued under the provisions of said title 4, may by its board of directors proceed to collect, by assessment on the capital stock of the corporation, the legally incurred debts and liabilities thereof, as prescribed by said title.

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3. The liability of the shareholder is in no wise increased by the provisions of title 4 of the Civil Code of Idaho of 1887.

(*Syllabus by the Court.*)

Appeal from district court, Ada county;
J. H. BEATTY, Judge.

Action by S. L. Sparks and another against the Lower Payette Ditch Company to restrain defendant from selling certain shares of the capital stock belonging to plaintiffs. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. Brumback, for appellants.

Injunction is the proper remedy of the stockholders against an illegal assessment. 2 High, Inj. § 1219; *Cook, Stocks & S.* § 502; *Mitchell v. Mining Co.*, 67 N. Y. 280; *Clearwater v. Meredith*, 1 Wall. 41; *Nugent v. Supervisors*, 19 Wall. 249.

Unless the corporate charter or a constitutional statute provide otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable, and cannot be made to pay any sums in addition thereto. *Cook, Stocks & S.* §§ 241, 242; *Railroad Co. v. Copp*, 38 N. H. 124; *Morley v. Thayer*, 3 Fed. Rep. 737; *Chase v. Lord*, 77 N. Y. 1; *Gray v. Coffin*, 9 Cush.

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192; *French v. Teschemaker*, 24 Cal. 518; *Inhabitants of Norton v. Hodges*, 100 Mass. 241; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Green v. Beckman*, 59 Cal. 545; *Terry v. Little*, 101 U. S. 216.

A statute passed subsequent to the granting of a charter, and increasing the liability of a stockholder on his stock for the debts already incurred, is unconstitutional and void, unless the legislature has reserved the right to alter or amend the charter. *Cook, Stocks & S.* § 497.

Material amendments to the charter offered to the stockholders can be accepted only by a unanimous vote. *Cook, Stocks & S.* § 500.

A material and fundamental change in the charter by an amendment to the charter is an unconstitutional violation of the contract rights of any stockholder who does not assent to such amendment. *Cook, Stocks & S.* § 500.

George H. Stewart and W. E. Borah, for respondent.

Corporations are subject to legislative control. *Mor. Priv. Corp.* § 1061.

And are not exempt from future legislation. *Mor. Priv. Corp.* §§ 1062, 1064, 1065, 1075a; *Cooley, Const. Lim.* § 88; *Desty, Fed. Const.* p. 161.

All laws relating to property rights, contracts, or procedure apply to corporations unless the contrary appear. *Mor. Priv. Corp.* §§ 1081-1083, 1091; *Thorpe v. Railroad Co.*, 62 Amer. Dec. 625.

The necessity for a call cannot be questioned by the stockholders of a corporation, but is for the directors to determine. *Budd v. Railroad Co.*, 15 Or. 404, 15 Pac. Rep. 654; *Wood's Field, Corp.* § 133; 19 Cent. Law J. 305; *Railroad Co. v. Fitler*, 100 Amer. Dec. 546.

SULLIVAN, C. J. This action was brought by the appellants, as plaintiffs, against the respondent, as defendant, to obtain an injunction to restrain the officers of the respondent from offering for sale, or selling, shares of the capital stock of said corporation belonging to the appellants. The court below refused to grant the injunction, and entered judgment for the respondent, from which judgment this appeal was taken. It appears from the record that the respondent is a corporation organized for the purpose of constructing and maintaining an irrigating ditch on the Lower Payette river, in Ada county, Idaho, under and by virtue of an

act of the legislature of Idaho entitled "An act concerning corporations," approved January 12, 1875, (Rev. Laws Idaho 1874-75, p. 618.) That the number of shares provided for by the articles of incorporation were 80, of the par value of \$100 each. That in the year 1884 the capital stock of said corporation was increased from 80 shares, of the par value of \$100 each, to 160 shares, of the par value of \$100 each; thus making the aggregate capital stock \$16,000. That the appellant Sparks is the owner of 13½ shares, and appellant Kelly is the owner of 8 shares, of said capital stock; and that said shares have been fully paid up to the par value of \$100 each. That thereafter the proper steps were taken by the board of directors of said corporation to continue its existence under the provisions of title 4 of the Civil Code of Idaho, (Rev. St. Idaho 1887, p. 312.) That neither of the plaintiffs assented to the said action of said board. That thereafter the said board levied an assessment of \$8 per share upon the capital stock of said corporation. That plaintiffs refused to pay said assessment on their said shares; and the respondent, by its proper officers, proceeded to collect the same by advertising plaintiffs' said shares for sale, as provided by title 4 of the Civil Code of Idaho. The complaint alleges that the attempted change of the defendant corporation by the directors, to continue its existence, under the provisions of said title 4 of the Civil Code, was for the purpose of compelling the plaintiffs to pay the said assessments on their said fully paid up shares.

In their specification of errors, the appellants assign two errors. We will first consider the second error assigned, which is that the court made no findings of fact upon many of the material issues made by the pleadings. We have carefully considered the issues made by the pleadings, and also the findings of fact, and are of the opinion that the court found on all of the material issues made by the pleadings.

The first specification of error is as follows: "That the defendant corporation cannot compel plaintiffs to pay any assessments to the corporation upon their shares that have been fully paid up, such assessment being in violation of the obligation of the contract entered into between the plaintiffs and the corporation and the plaintiffs and other shareholders." In the argument of this specification the counsel for appellants contended that un-

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der the act first above referred to (Rev. Laws Idaho 1874-75, p. 618) the board of directors had no authority to levy an assessment upon the fully paid up shares of the capital stock of said corporation. That the action of the board of directors for the purpose of continuing the existence of said corporation, under the provisions of title 4 of the Civil Code of Idaho, was illegal, for the reason that the provisions of said title permits assessments to be made by the board of directors upon fully paid up shares of the capital stock of said corporation, and thus changes the contract between the corporation and its stockholders, and for that reason is in conflict with the provisions of the constitution of the United States. That it changes the obligation of the contract between the corporation and shareholders, by increasing the liability of the shareholders without their consent. It is conceded that a law subjecting the shareholders to a liability to contribute more capital than they originally agreed to contribute would be unconstitutional. 2 Mor. Priv. Corp. § 1078. The question for our determination, then, is, do the provisions of title 4 of the Civil Code of Idaho, under which said corporation continues its existence, subject the shareholders to greater or additional liabilities than the act of January 12, 1875? There is no claim that there is any change except to increase the liability of the shareholder. What, then, are the liabilities of the shareholders under each of said acts? The seventh section of the act approved January 12, 1875, provides as follows: "A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act." Section 16 of said act provides as follows: "Each shareholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted. * * *" Section 2595 of title 4 of the Civil Code of Idaho contains, among others, substantially the same provisions as section 7 of the act approved January 12, 1875. Section 10 prescribes the duties and powers of the trustees to levy assessments for the purpose of calling in the capital stock subscribed. Section 2614 of said title 4 is as follows: "The directors

of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form, and to the extent, herein provided." Section 2615 is as follows: "No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided, as follows: *First*. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount. *Second*. The directors of railroad corporations may assess the capital stock in installments of not more than ten per centum per month, unless in the articles of incorporation it is otherwise provided. *Third*. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper." Section 2616 is as follows: "No assessment must be levied while any portion of a previous one remains unpaid, unless—*First*, the power of the corporation has been exercised in accordance with the provisions of this title for the purpose of collecting such previous assessment; *second*, the collection of the previous assessment has been enjoined; or, *third*, the assessment falls within the provisions of one of the subdivisions of the last preceding section." Section 2609 provides that each stockholder is individually and personally liable for such portions of its debts and liabilities as the amount of shares owned by him bears to the whole of the subscribed capital stock of the corporation. It will be observed from the sections above cited that the liability of the shareholder is substantially the same under each act. Under the act of 1875 the board of trustees were not, in terms, authorized to levy assessments upon the capital stock except for the purpose of collecting or calling in the amount subscribed, but the stockholder was liable for his proportion of all debts contracted during the time he was a stockholder, regardless of whether the shares owned by him had been paid in full or not. Section 16 of said act permits an action to be

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brought for the collection of such debt, while the act of 1887 authorizes the board of directors to levy assessments on the capital stock for the purpose of paying its liabilities, even after the par value of the stock has been paid in full by the shareholder. In *Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. Rep. 661, 802, the supreme court of California has construed sections like our own. The statute of 1887 provides two methods of collecting the necessary funds for the payment of the corporate liabilities, and conducting its business. The liability of the shareholder, under law of 1887, is not increased; only the method of procedure to collect the amounts due from each shareholder enlarged. Debts and expenses of the corporation may be collected either by assessment or by suit. The court below found that the expense or liability created which said assessment was made to pay or liquidate was necessary to make the corporation ditch useful to the shareholders, and that the work so done did not materially change the original plan or design of said ditch, but was done to put it in a condition to carry the amount of water needed for the stockholders, as was originally intended, and to avoid the yearly cleaning out of said ditch. The record shows that all of the shareholders except appellants have paid said assessment. It will be observed that said assessment was made for the preservation and improvement of the corporate property, and was a liability which the directors were authorized to incur. The liability complained of could have been legally created under the law of 1875, and the appellants would have been individually and personally liable for their proportion thereof, and for the recovery a joint or several action might have been instituted. The liability of the stockholder is no greater under the law of 1887 than under the law of 1875; only the method of enforcing payment enlarged, by permitting the directors of the corporation to collect from each shareholder his proportional part of the liability. The authorities cited by appellants are not in conflict with the views expressed herein. The judgment of the court below is affirmed, with costs in favor of respondent.

MORGAN, J., concurs.

HUSTON, J., did not sit at the hearing of this case, and took no part in its decision.

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(February 18, 1892.)

PUBLIC NUISANCE—INJUNCTION—MAINTENANCE BY PRIVATE PARTY.

1. Equity has jurisdiction to enjoin a public nuisance at the suit of private party, if such nuisance is specially injurious to such private party.

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2. The complaint should set forth, by positive averment, facts sufficient to show that the plaintiff has sustained special injury, different in kind from that sustained by the general public. Then the nuisance becomes as to him a private nuisance.

SAME.

3. Section 4529, Rev. St., does not change the rule above stated as to private parties maintaining an action to abate a public nuisance.

(*Syllabus by the Court.*)

Appeal from district court, Ada county; EDWARD NUGENT, Judge.

Action by George F. Redway and others against Jenny Moore to restrain defendant from maintaining a house of prostitution, and for damages. From an order dissolving the temporary injunction, plaintiffs appeal. Affirmed.

George H. Stewart and Edgar Wilson, for appellants.

Though the keeping of a house of prostitution is a public offense, and its operation involves a commission of a criminal offense, this fact does not take away any of the jurisdiction which courts of equity might otherwise exercise. *People v. City of East St. Louis*, 10 Ill. 351; *Minke v. Hopeman*, 87 Ill. 450; *Attorney General v. New Jersey Ry., etc., Co.*, 3 N. J. Eq. 136; *Mayor, etc., v. Jaques*, 30 Ga. 506; *State v. Mayor, etc.*, 5 Port. (Ala.) 280; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *District Attorney v. Lynn & B. R. Co.*, 16 Gray, 245; *Hamilton v. Whitridge*, 11 Md. 129; *Sparhawk v. Railroad Co.*, 54 Pa. St. 401.

The maintaining or keeping of a house of prostitution is a nuisance per se. Rev. St. §§ 3620, 6842.

A court of chancery will restrain by injunction a nuisance which is permanent and serious, and, in determining whether such relief ought to be granted, regard will be had, not only to the comfort and convenience of the occupiers of the land, but also to the perspective effect of the nuisance in reducing the value of the land. *Goldsmid v. Commissioners*, L. R. 1 Ch. App. 349; 35 Law J. Ch. 382.

A private party has a right of action for the abatement of a public nuisance. *Georgetown v. Canal Co.*, 12 Pet. 91; *Rail-*

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road Co. v. Ward, 2 Black, 485; Woodworth v. Mining Co., 18 Fed. Rep. 753.

W. E. Borah, for respondent.

The granting or dissolving a temporary injunction is a matter within the discretion of the court of original jurisdiction, and only becomes error upon a manifest and palpable abuse of that discretion. *Parrott v. Floyd*, 54 Cal. 534; *Payne v. McKinley*, Id. 532; *White v. Nunan*, 60 Cal. 407; *Patterson v. Board*, 50 Cal. 344; *Efford v. Railroad Co.*, 52 Cal. 277.

The function of the writ of injunction is to afford preventive relief only, and not to correct injuries had, or to restore parties to rights of which they have already been deprived. *High, Inj.* (3d Ed.) § 23; *Railway Co. v. Wildman*, 58 Mich. 286, 25 N. W. Rep. 193; *Ewing v. Rourke*, 14 Or. 514, 13 Pac. Rep. 483; *People v. Clark*, 70 N. Y. 518; *Cole v. Duke*, 79 Ind. 107; *Menard v. Hood*, 68 Ill. 121.

Before private individuals can maintain an action to enjoin a public nuisance they must specifically allege and show a special injury, different in kind to that suffered by the public. *Fogg v. Railway Co.*, 20 Nev. 429, 23 Pac. Rep. 840; *Innis v. Railway Co.*, 76 Iowa, 165, 40 N. W. Rep. 701; *Aram v. Schallenberger*, 41 Cal. 449; *Jarvis v. Railway Co.*, 52 Cal. 438; *Bigley v. Nunan*, 53 Cal. 403; *Tibbets v. Blade*, 60 Cal. 429; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. Rep. 1106.

When the nuisance is a moral nuisance, punishable by the criminal law, producing injury to the mental, moral, or spiritual sense, courts of equity will never interfere. *Anderson v. Doty*, 33 Hun, 160; *Sparhawk v. Railway Co.*, 54 Pa. St. 401; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 371; *Wood, Nuis.* § 4788; *Cope v. Association*, 99 Ill. 489; *Cleveland v. Gaslight Co.*, 20 N. J. Eq. 201; *Owen v. Henman*, 1 Watts & S. 550; *Gray v. Ayres*, 7 Dana, 375.

Equity will never interfere by injunction to restrain the maintenance of a public nuisance when the object sought can be attained in ordinary tribunals by abatement under the statute. *Rev. St.* § 3634; *State v. Crawford*, 28 Kan. 726; *Reid v. Gifford*, 6 Johns. Ch. 19.

SULLIVAN, C. J. This is an action brought by the appellants to restrain the respondent for maintaining a house of prostitution, and to recover \$1,000 damages. The complaint is as follows, to-wit: "[Title of court and cause.] The plaintiffs above

named complain of the defendant, and allege: *First.* That plaintiffs are, and at the time of the commission of the grievances hereinafter mentioned were, lawfully seised of an estate in fee in and to real property adjacent to and fronting upon Main street, in Boise City, Idaho, and upon Warm Springs avenue, the same being said Main street, extended from the easterly boundary of said Boise City eastward, which said real property, so owned by the plaintiffs, lies and is located in the immediate vicinity of the property hereinafter described as being occupied and maintained by the defendant, Jenny Moore. *Second.* That said real property, so owned by plaintiffs, as aforesaid, is situated in the residence portion of Boise City, and in a tract of land adjacent thereto, occupied for residence purposes only, and is suitable and valuable for residence purposes only. *Third.* That the defendant was also at the time of the commission of said grievances, as hereinafter stated, and still is, the owner and possessed of certain other premises in the vicinity of the premises owned by the plaintiffs, as hereinbefore alleged. The said premises so owned and occupied by said defendant being described as follows, to-wit: 'Beginning at a point S., 28 degrees 51' E., 228 feet 8 inches, and S., 78 degrees 30' E., 185 feet six inches, and S., 11 degrees 30' W., to north bank of that certain ditch known as "Valley Ditch,"—all the said and above angles being recorded and measured from the $\frac{1}{4}$ section corner between sections 10, 11, and the point now arrived at, on the bank of the ditch, being the place of beginning; thence N., 11 degrees 30' E., back over same course and distance to same point arrived at by the above said measurement of south, 78 degrees 30' E., running 185 feet and six inches; thence N., 78 degrees 30' W., 25 feet; thence S., 11 degrees 30' W., to north bank of said Valley ditch; thence north-east along north bank of said ditch, with all its meanderings, to real place of beginning.' *Fourth.* That on or about the 3d day of October, 1891, the said defendant completed the erection, upon said last above described premises, of a building, and immediately occupied, and has ever since and does now occupy, said building as a house of prostitution, and for the purpose of assignation and prostitution, and does therein maintain and carry on said immoral practices, and maintain said house as a public resort for immoral, lewd, and obscene purposes, and

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as a house of prostitution and assignation; and by reason thereof the real property owned by these plaintiffs as aforesaid is rendered unfit and unsuitable and unsalable as residence property, and thereby greatly depreciated and lessened in value, to plaintiffs' damage, and each of them, in the sum of one thousand dollars. Wherefore the plaintiffs pray judgment: *First*, that the defendant be restrained by injunction from maintaining or using said premises and the buildings thereon as a house of prostitution or other immoral purposes, to the injury of the plaintiffs or either of them, or permitting the same to be so used; *second*, that the plaintiffs recover from the defendant the sum of one thousand dollars damages, and costs of suit." On the date the complaint was filed, the appellants filed seven affidavits, and made application to the judge at chambers for a temporary injunction to restrain the defendant from maintaining a house of prostitution on the premises described in the complaint until the final determination of this action. Upon the complaint and said affidavits the court granted a temporary injunction. On November 10, 1891, the defendant demurred to the complaint, and thereafter moved to dissolve the injunction. The motion to dissolve the injunction was heard upon the complaint, the seven affidavits above referred to, and the affidavit of the defendant. The motion was sustained by the court, and the injunction dissolved, from which order this appeal was taken. The appellants specify two errors claimed to have been made by the court below, and demand a reversal of the order dissolving said injunction. The specification of errors is as follows: *First*, "that the court erred in decreeing a dissolution of the injunction upon the papers filed in the case at the time such decree of dissolution was entered;" *second*, "that the court erred in holding that an equity action would not lie, and that the plaintiffs had an adequate remedy at law in a criminal prosecution; that the court erred in dissolving the injunction prior to the filing of an answer upon the part of the defendant, tendering an issue upon the merits of this case."

We will first consider the second error assigned. The record does not contain the reasons given by the court below for dissolving the injunction, but counsel for appellants maintained before this court that the court below, in its decision upon

said motion, held that the order granting the injunction should be vacated and set aside on the ground "that the acts complained of were criminal in their nature, and that the penal statutes afforded an adequate remedy." It is admitted that the acts charged constitute a public nuisance,—a crime. In the case of *Yolo Co. v. City of Sacramento*, 36 Cal. 193, (a case decided under a statute identical with our own,) the court says: "The point that the remedy is by indictment only is also untenable; for a public nuisance may be a private nuisance, and, if so, the person injured thereby may have his action. If the nuisance only affects the plaintiff in common with the public at large, it cannot have its action; but if, in addition, it obstructs it in the free use and enjoyment of its private property, it is so far a private nuisance also, and it may have its private action." That was a suit to abate a nuisance, which nuisance was a crime. Section 3631 of the Revised Statutes of Idaho of 1887 declares as follows: "The remedies against a public nuisance are: (1) Indictment; (2) a civil action; or (3) abatement." This section makes no distinctions as to the remedy to abate nuisances which are a crime *per se* and those which are not. Section 3633 of the Revised Statutes of Idaho declares as follows: "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." Under the provision of that section a private person may have his action to abate or restrain the continuance of a public nuisance, provided he alleges and shows that such nuisance is specially injurious to himself. See *Yolo Co. v. City of Sacramento*, *supra*; 2 Story, Eq. Jur. § 923 et seq. In *Minke v. Hopeman*, 87 Ill. 450, the court says: "It would be a reproach upon the powers of a court of equity to hold the complainant was bound to endure the wrongs of the defendant until a jury should pass upon the facts in an action at law." We do not think it will be seriously contended that a person may maintain a house of prostitution, and in the midst of a district populated by respectable people, and that a court of equity is powerless to grant relief upon a proper showing. A court of equity has ample power to restrain the continuance of a public nuisance at the suit of a private party when he alleges and shows that such nuisance is specially injurious to himself. When that is shown, then the

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nuisance becomes, as to him, a private nuisance, constituting special and peculiar injury, distinct from that sustained by the public, for the abatement of which he may maintain his action, whether such nuisance is a crime *per se* or not; but in order to avail himself of this remedy he must allege and show special injury. *Hamilton v. Whitridge*, 11 Md. 128; 2 Story, Eq. Jur. *supra*; *Yolo Co. v. City of Sacramento*, *supra*. It is conceded that courts of equity have power to restrain and abate public nuisances, such as tallow factories, lime-kilns, slaughter-houses, and pig-sties, at the suit of a private person, upon proper allegations and proofs; and no reason or authority has been presented to show that courts of equity are powerless to suppress a nuisance so offensive and intolerable as a house of prostitution in a respectable part of a city. The case of *Anderson v. Doty*, 33 Hun, 160, is cited by respondent as an authority in her favor. In that case the court says: "The general rule is well settled that a private individual cannot restrain a public nuisance by his private action unless he suffers damage different in kind from that which the nuisance causes all other people;" and further on says: "In this case there are alleged no offensive sights or sounds from defendant's house." After thus stating the general rule as to private persons maintaining actions to restrain public nuisances, and stating that the complaint alleges no offensive sights or sounds from defendant's house, the court further says: "It is the duty of the plaintiff to apply to those tribunals to which the law has given the power, not only to punish the guilty persons, but to abate the nuisance." We understand from this decision that if the plaintiff had not made out a case which brought him within the rule, showing special injury to himself, he was not entitled to an injunction. Justice BARKER rendered a dissenting opinion in that case, in which he held that the complaint stated facts sufficient to show that plaintiff had suffered special injury, and that he was entitled to an injunction restraining the continuance of the nuisance. Justice BARKER, after citing numerous authorities, says: "The principle established by these decisions is, when the act complained of, or which is apprehended, besides being a public nuisance, would be injurious to a private person, he may maintain an action at law for damages, or a bill in equity for an in-

junction, in his own name;" and holds that the allegations of the complaint are sufficient to warrant the issuance of the injunction. Justice RUMSEY, who delivered the opinion of the court in that case, in commenting upon *Hamilton v. Whitridge*, 11 Md. 128, says: "I do not think it is an authority for the issue of a mandatory injunction to punish a crime already committed, or to prevent the commission of a new crime, or to abate a nuisance which can be abated by the judgment of the criminal court." We think that *Hamilton v. Whitridge*, *supra*, is an authority sustaining the rule that a private party may maintain an action to abate a public nuisance, if it is shown that such nuisance is specially injurious to the person bringing the action, whether the nuisance could be abated by the judgment of a criminal court or not, although that was an action to prevent the opening of a house of prostitution, not to abate one already in operation. It will be observed that the decision in *Anderson v. Doty*, *supra*, turned on the sufficiency of the allegations of the complaint to bring the party within the rule stated, as we understand it.

The right of a private party to maintain an action to abate a public nuisance is given by section 3633 of the Revised Statutes, provided such nuisance is specially injurious to the person who brings the action. If a private person brings an action in a court of equity to abate a public nuisance, and makes the proper allegations to bring him within the provisions of said section 3633, the court cannot say to him: "We will not grant you the relief prayed for. You must resort to the criminal court, because it has the power not only to abate the nuisance, but to punish the criminal." The right to such an action is given by statute, and the courts shall not deprive the party entitled thereto of such right. The principle established by the decided weight of authority is, when the act complained of, besides being a public nuisance, is specially injurious to a private person, he may maintain a suit in equity for an injunction to restrain the continuance of such nuisance in his own name. The appellants contend that this action was brought under section 4529 of the Revised Statutes of Idaho of 1887, which section provides as follows: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so

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as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." That, by reason of the provisions of said section, the general rule as declared in section 3633 of the Revised Statutes of Idaho of 1887 is modified to this extent: that a private person may maintain an action to abate a public nuisance without alleging or showing a special injury different in kind to that suffered by the public. Said section was copied from the statute of California, and prior to its adoption by the legislature of Idaho the supreme court of California had decided that said section did not change the general rule that a private party, to maintain an action to abate a public nuisance, must show special injury to himself. *Blanc v. Klumpke*, 29 Cal. 159; *Yolo Co. v. City of Sacramento*, 36 Cal. 195; *Grigsby v. Water Co.*, 40 Cal. 496; *Fogg v. Railway Co.*, 20 Nev. 429, 23 Pac. Rep. 840; *Innis v. Railway Co.*, (Iowa,) 40 N. W. Rep. 701; *Proser v. City of Ottumwa*, 42 Iowa, 511. Aside from the construction above indicated and adopted, sections 3633 and 4529 of the Revised Statutes of Idaho are contemporaneous legislation, and must be so construed as to give effect to both, if possible.

The second error assigned is that the court erred in dissolving the injunction upon the complaint and affidavits. It is contended by the respondent that the complaint does not state facts sufficient to warrant a court in granting a temporary injunction; that the pleader should set forth the equities on which his application is based, by positive averments; and that argumentative allegations, or inferences drawn from facts stated, will not meet the requirements of the rule. The serious question in this case is as to whether the facts alleged in the complaint, and supported by the affidavits, make a case for granting temporary injunction to restrain the acts complained of until the final determination of the case. The complaint alleges the ownership of certain lands by the plaintiffs, (but not whether such ownership is joint or several,) the ownership of certain premises by the defendant, and the maintenance of a public nuisance thereon by her; that, by reason of the

maintenance of said nuisance, the real property so owned by plaintiffs is rendered "unfit and unsuitable and unsalable as residence property," and thereby greatly depreciated and lessened in value, to the plaintiffs' damage in the sum of \$1,000. There is no allegation of any disorderly or boisterous conduct on the part of the defendant, or on the part of those who frequent her resort, or that any person frequents said resort. They do not allege any offensive sights or sounds from defendant's premises. They do not allege that, by reason of the conduct of defendant, or of the conduct of those who frequent her resort, the comfortable use and enjoyment of said property of plaintiffs is in any manner interfered with, or that plaintiffs have lost any sales or tenants by reason of said nuisance. There is no allegation that either of the plaintiffs, or any person whatever, resides upon the lands of plaintiffs. There is no allegation that defendant threatens to or will continue the maintenance of said nuisance, to the further damage of plaintiffs, unless restrained during the pendency of this suit. We do not say that plaintiffs must make all the allegations above alluded to; but they should allege, by positive averment, sufficient to come within the rule permitting private parties to maintain an action to abate a public nuisance. If the court below for a wrong reason arrived at a correct conclusion, the conclusion will be sustained, regardless of the wrong reason. The action of the judge of the court below in dissolving the injunction is affirmed, with costs in favor of respondent.

HUSTON and MORGAN, JJ., concur.

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(February 18, 1892.)

FORECLOSURE OF MORTGAGE—FAILURE OF TITLE—REVIVAL OF JUDGMENT.

1. W., having made entry and final proof on certain lands under the desert land laws of the United States, mortgaged same. Default having been made in payments secured by mortgage, the same was foreclosed, and at the sale the assignee of the mortgage became the purchaser. Prior to said sale, one R. had instituted proceedings in the proper land-office to contest said desert entry of W., which contest eventuated in the cancellation of said entry of W. by the commissioner of the general land-office. *Held*, that under section 4498 of the Revised Statutes of Idaho the

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plaintiff was entitled to file his petition to revive the judgment entered on the foreclosure of mortgage.

COSTS — WAIVER OF RIGHT — FAILURE TO FILE MEMORANDUM.

2. When the party entitled to costs fails to file his memorandum thereof within the time prescribed by section 4912, Rev. St., he thereby waives his right to costs, and the clerk has no right thereafter to insert them in the record of judgment. In such a case the fact that the costs do not appear in the record of judgment does not constitute an irregularity.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; C. H. BERRY, Judge.

Petition by James Cantwell against M. M. McPherson, administrator of the estate of William Wallace, deceased, to revive a certain judgment and decree. From a judgment dismissing the petition, entered upon an order sustaining a demurrer to it, plaintiff appeals. Reversed.

T. M. Stewart, for appellant.

If title to land sold was in a stranger to the record, such land was not subject to execution and sale, and judgment may be revived by motion under the statute. *Cross v. Zane*, 47 Cal. 602.

In the absence of fraud, a decision of the land department is final and conclusive upon all questions of fact. *Vance v. Burbank*, 191 U. S. 514; *Bear v. Luse*, 6 Sawy. 149; *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 330.

R. P. Quarles, for respondent.

The blank as to costs in the so-called "judgment" renders the same void for uncertainty. *Black*, Judgm. § 118.

The title of the purchaser is subject to all equities of which he had notice. *Freem. Ex'ns*, § 335; *Boggs v. Hargrave*, 16 Cal. 560; *Cromwell v. Hull*, 97 N. Y. 210; *Vattier v. Hinde*, 7 Pet. 252.

HUSTON, J. Plaintiff filed his petition to revive judgment and decree rendered against defendant, as administrator of the estate of William Wallace, and in favor of the plaintiff. Said action was brought to foreclose a mortgage executed by said William Wallace to one John Hogan, and by him assigned to plaintiff. Decree of foreclosure was rendered in said action, order of sale issued, and the incumbered property was sold thereunder, the plaintiff being purchaser at such sale. The lands covered by the mortgage, and sold under the order of sale, were lands which had theretofore been entered by the

said William Wallace under the provisions of the United States desert land laws. Prior to the making of said mortgage, Wallace had made final proof under his desert entry, paid the purchase price, and received register's receipt therefor, but had not received his patent. Sale was made on the 14th day of August, 1886; deed from sheriff executed on 15th February, 1887. On the 18th day of June, 1886, and before any patent was issued, one Samuel Rippey commenced a contest against said desert entry of said William Wallace of the lands before mentioned, as being included in said mortgage, and so as aforesaid sold under the order of sale upon the foreclosure thereof, in the proper United States land-office, alleging fraud in said desert entry by said Wallace; and such proceedings were had thereupon as resulted in the canceling and setting aside of said desert entry of said lands by said Wallace by the commissioners of the general land-office on the 24th April, 1889. Plaintiff brings this action under the provisions of section 4498, Rev. St. Idaho, to revive said judgment so as aforesaid rendered in favor of plaintiff, and against defendant, as administrator of the estate of William Wallace. Defendant filed general demurrer. The demurrer was sustained by the court, by an order entered on October 10, 1889, and, the plaintiff electing to stand upon his complaint, final judgment was entered on September 15, 1891. From this judgment plaintiff appeals.

The petition in this case was filed under the provisions of section 4498, Rev. St. Idaho, which contains the following: "If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice, and on motion of such party in interest or his attorney, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of revival, and no more." The respondent contends that no appeal lies from the judgment rendered by the district court, for the reason that it is not a final judgment, in that the blank for costs in said judgment is not

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filled. The judgment is in the following words: "This action having been brought on to be heard on the demurrer to the petition herein, and the same having been sustained by the court, and the plaintiff having failed to plead further, and elected to stand on the petition, it is therefore adjudged that the plaintiff take nothing by the said petition, and that the same be dismissed absolutely, and that the defendant do have and recover of and from the plaintiff his costs herein expended, taxed at ——— dollars, for which execution is awarded." This judgment, as before stated, was not rendered or entered until September 15, 1891,—nearly two years after the decision,—and then by the successor in office of the judge who heard the cause and made the decision. Section 4912, Rev. St. Idaho, provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, within five days after the verdict or notice of the decision of the court or referee, a memorandum of the items of his costs and disbursements in the action or proceeding," etc. This statute is copied literally from the Statutes of California; and it has been repeatedly held by the supreme court of that state that a party who fails to file with the clerk a memorandum of costs within the time limited was held to have waived his right to costs, whether they were clerk's or sheriff's fees or other costs, and in the absence of such memorandum the clerk had no power to include costs in the judgment. *Chapin v. Broder*, 16 Cal. 403; *O'Neil v. Donahue*, 57 Cal. 226; *Porter v. Hopkins*, 63 Cal. 53. In the case under consideration the decision was rendered on the 9th day of October, 1889; that is, the order of the district court sustaining the defendant's demurrer to the complaint, which is the "decision" referred to in section 4912 of our Statutes. *Porter v. Hopkins*, supra. It will be seen that nearly two years elapsed after the rendering of the decision before final judgment was entered, and more than two years and two months before the taking of the appeal; and no memorandum of costs was ever filed by the defendant. It will be seen from what has been said that the cases cited by respondent in support of this contention are not applicable.

The next contention of respondent is that the case made by the petition of plaintiff does not come within the provisions of section 4498 of the Revised Statutes of

Idaho. The petition states that, by reason of the cancellation of the said desert entry of William Wallace by the commissioner of the general land-office, the plaintiff entirely failed to recover possession of the said lands so as aforesaid sold, and of which he became the purchaser. The purchase was made upon the assumption that the entry of the lands by Wallace was a valid, legal entry; and, he having made final proof thereunder, nothing remained to be done by the government to invest Wallace with the title in fee, except the mere clerical act of issuing patent, which could only be prevented by showing illegality or fraud in the entry, or subsequent proceedings thereunder, by Wallace. The filing of the contest by Rippey, and the proceedings thereunder, resulted in establishing fraud or illegality in the entry by Wallace, and the cancellation of his entry by the commissioner of the general land-office. The cancellation related back to the original entry of Wallace, and rendered null and void all proceedings upon his part thereunder. He never had any right or title to the land. The land was never subject to execution or sale as his. He had neither the legal nor the equitable title thereto, or any interest therein. Hence the sale was not, as stated by counsel for respondent in his brief, a sale of an equitable interest in lands, and therefore a case in which the rule of *caveat emptor* applies. There was a complete and absolute failure of title to the land purchased, and it is to such a case that the statute peculiarly applies, as has been well settled. *Cross v. Zane*, 47 Cal. 602; *Ritter v. Henshaw*, 7 Iowa, 97; *Watson v. Reisig*, 24 Ill. 282. There is no difference under the Statutes of Idaho between a sale on execution and one upon an order of sale upon foreclosure of mortgage. Order and judgment of district court reversed, with costs to appellant.

SULLIVAN, C. J., concurs.

MORGAN, J., having been of counsel, took no part in the hearing or decision of this case.

MURPHY v. MONTANDON *et al.*

(February 19, 1892.)

ATTACHMENT—DEFECTIVE AFFIDAVIT—EFFECT.

1. If an affidavit for an attachment is defective in not stating all the statute requires, or if

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it is false, the court has no jurisdiction to issue the attachment.

SAME—ACTION ON BOND—DEFENSES.

2. If issued upon such false or defective affidavit, the obligors on the bond given to procure the release of the attachment may, under proper pleadings, prove such fact in defense of a suit on the bond.

SAME—AFFIDAVIT AS EVIDENCE.

3. In such suit the affidavit in the original cause may be introduced in evidence for the purpose of showing that it was defective or false.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county; JAMES H. BEATTY, Judge.

Action by John Murphy against A. F. Montandon and another on an attachment bond. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant Montandon appeals. Reversed. Plaintiff's motion for rehearing denied.

A. F. Montandon, in pro. per.

Jurisdiction must appear before presumption prevails in favor of it. *Williamson v. Berry*, 8 How. 495; *Galpin v. Page*, 18 Wall. 350; *Pulaski Co. v. Stuart*, 28 Grat. 879; *Freem. Judgm.* § 123.

One who knowingly, upon false ground, sues out an attachment, though entitled to personal judgment, is not entitled to a judgment foreclosing the attachment if rights have intervened. *Bateman v. Ramsey*, 74 Tex. 589, 12 S. W. Rep. 235; *Fox v. McKenzie*, 1 N. D. 298, 47 N. W. Rep. 386; *Clay v. Tapp*, 79 Ga. 596, 7 S. E. Rep. 256; *Ermeking v. Clay*, 79 Ga. 598, 7 S. E. Rep. 257; *Bailey v. Clay*, 79 Ga. 600, 7 S. E. Rep. 258.

The attachment being void, the sureties on the bond received no consideration, and are not estopped to defend. *Spencer v. Vigneaux*, 20 Cal. 442; *Palmtag v. Doutrick*, 59 Cal. 154, 160; *U. S. v. The Amistad*, 15 Pet. 518; *League v. De Young*, 11 How. 185; *Freem. Judgm.* (3d Ed.) § 337.

Title to mortgaged property vests in the mortgagee, though possession is not changed, and cannot be attached in a suit against the mortgagor. *Berson v. Nunan*, 63 Cal. 550; *Hackett v. Manlove*, 14 Cal. 85; *Moore v. Murdock*, 26 Cal. 527; *Heyland v. Badger*, 35 Cal. 404.

Levy under writ of attachment on property subject to chattel mortgage is obnoxious to collateral attack. *Wells v. Sabelowitz*, 68 Iowa, 238, 26 N. W. Rep. 127.

If some of the issues are left unfound, a re-examination of such issues is necessary,

and a motion for a new trial is proper. *Knight v. Roche*, 56 Cal. 15; *Brown v. Burbank*, 59 Cal. 535.

Selden B. Kingsbury, for respondent.

The sureties on a bond cannot deny the recitals therein. *Smith v. Fargo*, 57 Cal. 157; *McMillan v. Dana*, 18 Cal. 339; *Pierce v. Whiting*, 63 Cal. 538; *McCutcheon v. Weston*, 65 Cal. 37, 2 Pac. Rep. 727; *Goodhue v. King*, 55 Cal. 377.

MORGAN, J. John Murphy brought suit against Edwin S. Bartsch. To secure a lien upon property, the plaintiff therein procured an attachment, and levied upon the property of the defendant, Bartsch. To procure said attachment the plaintiff, Murphy, filed an affidavit, stating, among other things, "that the payment of the debt had not been secured by any mortgage lien or pledge on real or personal property." To release said attachment, the defendants in the present suit, A. F. Montandon and Ernest Cramer, on the 10th day of August, 1887, gave their bond in the sum of \$1,250, conditioned to pay such judgment as the said Murphy should secure against said Bartsch. Upon giving this bond the attachment was released. In the trial of the principal cause, judgment was given for the plaintiff, Murphy, against the defendant, Bartsch, for the sum of \$715 damages and \$34.25 costs. Upon this judgment the sum of \$379.75 was paid, leaving the sum of \$412.40 still due. To recover this sum suit is brought upon the bond of Montandon and Cramer. Montandon only being served with process, judgment was rendered against him. Motion for new trial was made and overruled, and defendants appeal to this court.

On the trial of the principal cause the court made the following finding of fact, being the fourth: "That at the date of said note [being the note given by the defendant, Bartsch, to the plaintiff, Murphy] one T. B. Shaw was indebted to the defendant [Bartsch] on account for goods sold in the sum of \$528.05, and, being so indebted, duly accepted an order drawn on him by the defendant [Bartsch] for the amount in favor of this plaintiff, and that the defendant, as collateral security, delivered the same to the plaintiff." This order was precisely the same as a draft drawn by Bartsch upon Shaw and accepted by him. It is a chose in action, an evidence of debt, and was, therefore, personal property, under section 16, subd. 3,

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Rev. St. Idaho, and was a pledge of personal property to secure the debt of Murphy. This pledge being placed in the hands of Murphy, the presumption is that it still remained in his hands as such security at the time he filed his affidavit for the attachment. This presumption should have been overcome by the statement in his affidavit "that said security has, without any act of plaintiff, become valueless." Without such statement, the affidavit must, under the finding of the court, be held to have been false. Without an affidavit in accordance with the statute, the court was without jurisdiction to issue the writ. Taking the affidavit to be true, it gave the court jurisdiction to issue the writ; but the finding of the court shows the affidavit to be false. Can a false affidavit give the court jurisdiction? Falsehood or fraud vitiates everything founded upon it. The writ was therefore in fact unlawfully issued. In *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. Rep. 669, the court says: "The first step in this jurisdiction is to show, not a writ merely, but a valid writ; and there can be no valid writ of attachment without a sufficient affidavit." We are aware that the supreme court of the United States reversed this case, (3 Sup. Ct. Rep. 126,) but that court simply held that a writ *prima facie* good, although issued upon an insufficient affidavit, would protect the officer in making a levy. The affidavit not being attached to the writ, the officer is not called upon to determine the validity of the same. This writ was procured by an insufficient affidavit or a false one. In either case it would be a perversion of justice to hold that the plaintiff could make two men responsible for a debt they did not owe, by either a false affidavit or an insufficient one, or that he could recover upon a bond which was given to procure the release of a writ which was illegally and wrongfully procured. The respondent cites, in support of his contention that the defendant cannot take advantage of this defective affidavit: *Smith v. Fargo*, 57 Cal. 157; *McMillan v. Dana*, 18 Cal. 339; *Pierce v. Whiting*, 63 Cal. 538. But these cases simply hold that the obligors in the bond cannot deny the recitals therein; that is, as in those cases, the defendants could not deny that the attachment was issued, that it was levied upon property of defendants, nor that the property was released, as these facts were all recited in the bond. The defendant in

the case at bar is not seeking to deny any of these facts. These cases are therefore not in point. The issuance of the writ is authorized by the statute upon certain conditions. These conditions must be strictly complied with in order to give the court jurisdiction to issue the writ. If the writ is executed, the execution cannot possibly validate the illegal issue by giving jurisdiction of such retroactive character as to cure all that went before it, and contributed to the wrongful result. Wap. Attachm. 324. The issuance of the attachment being illegal, the creditor acquired no rights under it, and the bond was without consideration. The affidavit in the original action for the attachment was offered in evidence by the defendant, and, upon objection, was ruled out, to which ruling the defendant duly excepted. The court having found as a fact in the original suit that the plaintiff held, as security for the debt, a pledge of personal property, both this finding and the affidavit were proper evidence for the court to consider, as the affidavit, and that alone, gave the court jurisdiction to issue the writ. The exclusion of the affidavit was therefore error. Judgment reversed, and new trial granted; costs awarded to defendant.

HUSTON, J., concurs. SULLIVAN, C. J., did not sit in the hearing of this case.

ON REHEARING.

(May 18, 1892.)

MORGAN, J. The plaintiff files motion for rehearing in this case, and cites, as an additional authority, *Harvey v. Foster*, 64 Cal. 296,¹ in support of his contention that the obligors in the bond cannot be heard to plead that the attachment was issued upon a false or insufficient affidavit. In that case, however, there was no bond given for the release of the property from the lien of the attachment. The contention was between the attaching creditor and a mortgagee of the property levied on for the amount realized from the sale of the property in excess of the amount necessary to discharge the mortgage decree; the attaching creditor claiming it to satisfy his judgment, and the mortgagee, Kraft, claiming it to satisfy a promissory note which he held against the judgment debtor, defendant in the original suit. The cases are not parallel. There was

¹ 30 Pac. Rep. 849.

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no privity of interest between the attaching creditor and the mortgagee. The latter had no interest whatever in the original suit, and had no rights or obligations growing out of said suit, nor out of any of the proceedings connected therewith. In the case at bar the liability of the defendants Montandon and Cramer grew out of and were dependent upon the issuing of the attachment, and the validity of the attachment depended upon the fact that a true and sufficient affidavit in conformity with the statute had been placed on file. The lien acquired by attachment is an extraordinary remedy, and dependent wholly upon the statute, and the statute must be strictly, or at least substantially, complied with. The defendants Montandon and Cramer were not parties to the original suit, and could not appear therein, and move for a dissolution of the attachment. They have had no day in court. An attachment issued upon a false or fatally defective affidavit stands in the same position as an attachment issued without any affidavit; and can it be successfully contended that a bond executed to release property from the lien of an attachment issued without affidavit, and therefore without any jurisdiction, is supported by a valuable consideration? If the defendants in this suit cannot go back of the naked bond, then they cannot show that their obligation is without any consideration; a position, it seems to us, contrary to the plainest principles of justice. The case of *Porter v. Pico*, 55 Cal. 173, is cited in *Harvey v. Foster*, in which the court say: "Any irregularities in obtaining the attachment were waived by the defendant to the suit when he appeared and answered, without taking advantage of them, by motion or otherwise, in the course of the proceedings." Waived by the defendants in the original suit it may be, but these defendants were not parties to this waiver. The original defendant, Bartsch, owed the debt to Murphy. The method adopted for collecting was not so material to him. These defendants did not owe the debt. The consideration for their promise, if any existed, was the release of the lien of the attachment, which in this case was invalid. In the discussion of this subject in *Wade*, *Attachm.* § 190, the following cases are referred to:

Barry v. Foyles, 1 Pet. 315. In this case the court say: "After the defendant has appeared and [pleaded] answered, no ref-

erence can be made to the attachment proceedings, and the cause stands in court as if no attachment had been issued." This was not a suit upon the bond, and is therefore not in point.

Haggart v. Morgan, 5 N. Y. 422. In this case the defendant was on the bond with his sureties, and the court held that when attachment was issued the defendant had the opportunity of contesting all proceedings to procure attachment. After answer, he could not question the regularity of attachment proceedings.

In *Voorhees v. Bank*, 10 Pet. 473, land was sold and conveyed after judgment obtained by attachment proceedings. The court holds: "When ejectment was brought upon this title, the original judgment is conclusively presumed to be regular, and cannot be questioned in this collateral proceeding." If defendant in the original action neglects the method pointed out by law to remedy errors, (by appeal,) he cannot do so in a collateral proceeding. This case is not similar to the case at bar.

Holding a contrary doctrine, we find, among others, the following cases: In *Homan v. Brinckerhoff*, 1 Denio, 184, attachment was issued upon giving a bond which in its conditions was faulty, and did not comply with the statute. Attachment was levied upon property. Bond was given to release the property. Suit was brought upon the bond, judgment in original suit being given, and not paid. Held, the justice, by reason of defective bond, did not acquire jurisdiction to issue the attachment. The court say: "The court obtained jurisdiction in the attachment suit when the defendant Davis appeared and pleaded to the declaration. Judgment was therefore valid. But that will not aid the plaintiff. He did not hold the property under the judgment, no execution having been levied upon it. Although the plaintiff had got a valid judgment, he had no other hold upon the property than such as the attachment gave him, and that was utterly void for want of jurisdiction to issue it." In *Whiley v. Sherman*, 3 Denio, 185, the above case is commented upon and approved as to above point; decision rendered in July, 1846. In December, 1846, in *Kanouse v. Dormedy*, 3 Denio, 569, the same court, (N. Y. Ct. App.,) in suit brought upon a bond given to release property levied upon by attachment, the court pass upon the question as to validity of the bond. Affi-

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davit for attachment was required to state nonresidence of defendant in attachment suit. Sureties on the bond appeared, and pleaded that defendant was a resident of the state of New York, and therefore that the affidavit for attachment was not true, and the attachment was issued without jurisdiction. The court, WALWORTH, Ch., held that the *onus* of proving that defendant was a resident of the state of New York when attachment was issued was upon the defendants, and not upon plaintiff; in effect holding that, if defendants had made this proof, the bond would have been without consideration and void. WRIGHT, Senator, in his opinion in the same case, says: "In order to obtain the attachment it was necessary for the plaintiff to prove before the officer to whom the application was addressed, affirmatively and distinctly—*First*, that the debtor was a nonresident; *second*, that the creditor was a resident, or, if he was a nonresident, that the demand arose upon a contract made within the state." And "suppose the attaching creditor should omit to state in his affidavit before the judge that his demand arose upon contract, judgment, or decree amounting to one hundred dollars, does any one believe that the proceedings under the attachment issued upon such an affidavit could be sustained for any purpose? The question of jurisdiction must always remain open to the debtor, and, if the officer had no jurisdiction, the whole proceeding was *coram non judice*. If it must always remain open, then it would be competent for the debtor to show upon the trial, as a defense to the bond, by evidence, that the creditor was not a resident of the state, and therefore that the bond and all other proceedings in the matter were void as to him." These cases are precisely similar to the case at bar, and hold squarely to the position taken in this case in the original opinion. We are aware that there are quite a variety of decisions in the several states upon this question, but we think this holding is more in consonance with the spirit of justice, which should be the groundwork of all judicial proceedings. The appeal in this case was from the order denying the defendant a new trial. This court reverses that decision, and the order of the court should be and is that appellants have a new trial. With this change the rehearing is denied.

SULLIVAN, C. J., and HUSTON, J., concur.

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KNOTT v. SAME.

(February 19, 1892.)

MINING PARTNERSHIP—EVIDENCE TO ESTABLISH.

1. While a partnership for the purpose of dealing in mining property may be proven by parol, the evidence to establish such partnership, when denied, must be clear and certain.

SAME—SUFFICIENCY OF EVIDENCE.

2. The evidence in these cases examined, and held to be insufficient to establish such partnership.

(*Syllabus by the Court.*)

Appeals from district court, Shoshone county; J. HOLLEMAN, Judge.

Two actions: One by Charles E. Bruce against John M. Burke to establish a partnership and for an accounting. Before this action came on for trial, plaintiff died, and Alex E. Mayhew, administrator of his estate, was substituted as party plaintiff. The other by Andrew J. Knott against the same defendant to recover an interest in certain mining property. From a judgment dismissing both actions, plaintiffs appeal. Affirmed.

These cases were argued and submitted together, and as the evidence is the same substantially in each case, and the legal questions involved are the same, they are considered together by this court.

McBride & Allen, F. Ganahl, and W. H. Clagett, for appellants.

A partnership in lands or a partnership in mines is not required to be evidenced in the manner of the conveyance of real estate, and is not within the statute of frauds. *Dale v. Hamilton*, 5 Hare, 369; *Chester v. Dickerson*, 54 N. Y. 1; *Fairchild v. Fairchild*, 64 N. Y. 471; *Traphagen v. Burt*, 67 N. Y. 30; *Miller v. Ball*, 64 N. Y. 286; *Welland v. Huber*, 8 Nev. 208; *Murley v. Ennis*, 2 Colo. 300; *Settembre v. Putnam*, 30 Cal. 490; *Holmes v. McCray*, 51 Ind. 358; *Essex v. Essex*, 20 Beav. 449; *Bunell v. Taintor*, 4 Conn. 568; *Hirbour v. Reeding*, 3 Mont. 15; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. Rep. 517; *Sauntry v. Dunlap*, 12 Wis. 404.

Woods & Heyburn, for respondent.

An interest in real property cannot be established by parol. *Bird v. Morrison*, 12 Wis. 138; *Deloney v. Hutcheson*, 2 Rand. (Va.) 183; *Whaling Co. v. Borden*, 10 Cush. 458; *Dewey v. Dewey*, 35 Vt. 555; *Pitts v. Waugh*, 4 Mass. 424; *Hale v. Henrie*, 2 Watts, 145.

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HUSTON, J. The action of *Mayhew v. Burke* was commenced by Charles E. Bruce, plaintiff, against the defendant, John M. Burke, to establish an alleged partnership between plaintiff and defendant, and for an accounting between them of the affairs of the alleged partnership, and a conveyance by the defendant to the plaintiff of certain interests in mines and mining claims standing in the name of defendant, but claimed by plaintiff to be assets of said partnership. The complaint is, in substance, as follows: "[Title of court and cause.] The plaintiff in the above-entitled action complains of the above-named defendant, and for cause of action alleges: (1) That heretofore, to-wit, on or about the 1st day of June, 1884, at the town of Murray, Shoshone county, Idaho territory, the plaintiff and defendant entered into and formed a copartnership for the purpose of carrying on a mercantile business in the said town of Murray, and for the further purpose of acquiring mining property, to-wit, quartz and placer mining property, by location and purchase, in their own names, or either of their names, in what was then and now is known as the 'Coeur d'Alene Mining Region,' in the county and territory aforesaid, under the firm name and style of John M. Burke & Co.; and that thereafter they entered upon and continued to transact such copartnership business under their firm name. (2) That since the commencement of the said copartnership they continued to transact a mercantile business in the town and county aforesaid, until they discontinued their mercantile business in said town, on or about the 15th day of February, 1888, without dissolving said copartnership, or having any settlement of the same. (3) That it was mutually (verbally) agreed, by and between said plaintiff and defendant, that the said plaintiff was to take charge of the mercantile business aforesaid, and to pay his entire attention to the same, and that the said defendant, in consideration of the plaintiff attending to the mercantile business, was to attend to the acquiring mining property by location and purchase as aforesaid. (4) That the said plaintiff did, under the said agreement between said parties, take charge of the said mercantile business in said town, and did give and devote his entire attention to the same, until the same was discontinued by mutual consent of said parties. (5) That said defendant has, since entering into

said copartnership, acquired and accumulated a large number of quartz mining claims, and certain undivided interest therein, in his own name, and that the said defendant is now the holder of a certain undivided interest in and to all that certain named and described quartz mining claim hereto attached and made a part of this complaint, marked 'Exhibit A.' (6) That the said defendant, during the continuance of the said copartnership, acquired in his own name, by location and purchase, and sold and disposed of for a large sum of money, the amount being wholly and entirely unknown to this plaintiff, an interest in and to all those certain quartz mining claims named and described in the list hereto attached, marked 'Exhibit B,' and made part of this complaint. (7) That the said defendant has, during the continuance of said copartnership, acquired in his own name other real property, to-wit, an interest in the town-site of Milo, (the amount of said interest being unknown to the plaintiff,) which the said defendant has sold and disposed of for a large sum of money, the amount of which is unknown to this plaintiff. (8) That the defendant has received a large amount of stock or shares in different corporations for mining properties which said defendant has sold to said corporations, the amount of said stock or shares, and the value thereof, being unknown to this plaintiff. (9) That this plaintiff, by the said agreement of copartnership, is entitled to an undivided one-half interest in all of the said quartz mining property before mentioned and described in Exhibit A, and is entitled to one-half of the proceeds of the sales of all the said mining properties mentioned and described in Exhibit B, and to one-half of all the stock and shares, or the value thereof, that the said defendant has heretofore received, or now holds, in the different corporations aforesaid, for mining properties sold to said corporations as aforesaid, and is entitled to one-half of the proceeds of the sale of defendant's interest in the town-site of Milo. (10) That since the commencement of the said copartnership the defendant has wrongfully, and without the assent of the plaintiff, applied a large sum of money, or receipts and profits of the said business, to his own use, and by reason thereof has become indebted to the said plaintiff, and impeded the business thereof. (11) That the plaintiff has repeatedly requested the defendant to pay to the said plaintiff his

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interest and share of equal copartnership as aforesaid, or to account to said plaintiff therefor; but that the defendant has heretofore neglected and refused, and still does neglect and refuse, so to account, and has threatened to continue to collect and appropriate the copartnership money to his own use. Wherefore the plaintiff prays that the said copartnership may be dissolved, and an accounting taken of all dealings and transactions thereof; (2) that the said defendant be required, by this honorable court, to convey, by good and sufficient deeds, to this plaintiff, the undivided one-half interest of all the said mining property mentioned and described in Exhibit A; (3) that the remaining property of the firm be sold, and the firm's debts and liabilities paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests,—and that the plaintiff may have judgment for such amount as may be found due this plaintiff, and for such other relief as may be just in the premises, together with costs of this suit. And the plaintiff will ever pray," etc. "A. E. MAYHEW, Atty. for Plff." Then follows, as an exhibit, a list of the various mining and other real properties claimed by plaintiff to belong to said alleged partnership. The answer denies specifically and generally all the allegations of the complaint. Bruce, the plaintiff, having died pending the suit, on suggestion A. E. Mayhew, administrator of the estate of Bruce, was substituted as plaintiff. The case was heard by the court without a jury, and, after the introduction of the evidence on the part of plaintiff, the defendant moved the court to strike out all the testimony introduced by plaintiff, which motion was granted by the court, upon the ground that it is incompetent to prove a partnership in lands by parol evidence. The defendant then moved for judgment, which motion was granted by the court, and judgment was thereupon entered in favor of the defendant, and against the plaintiff, and from this judgment this appeal is taken.

The appellant assigns six specifications of error, only two of which were urged at the hearing here,—the first and second. The first specification of error is that "the court erred in sustaining the plaintiff's motion to strike out the testimony introduced by the plaintiff in support of his cause of action;" and the second, "The

court erred in dismissing the plaintiff's action."

The plaintiff alleges a verbal partnership entered into, by and between plaintiff and defendant, on or about the 1st day of June, 1884, at the town of Murray, in the county of Shoshone, Idaho territory, for the purpose of carrying on a mercantile business in said town of Murray, and for the further purpose of acquiring mining property, to-wit, quartz and placer mining property, by location and purchase, in their own names, or either of their names, in what was then known as the "Coeur d'Alene Mining Region;" that the name and style of the firm was John M. Burke & Co. No other terms or conditions of said contract of partnership are alleged, except what is contained in the third subdivision of the complaint: "That it was verbally agreed, by and between said plaintiff and defendant, that said plaintiff was to take charge of the mercantile business aforesaid, and to pay his entire attention to the same; and that the said defendant, in consideration of the plaintiff attending to the mercantile business, was to attend to the acquiring of mining property by location and purchase, as aforesaid." Not a word is said in the complaint as to the amount of capital to be employed in the transactions of this firm, nor in what proportion the capital was to be furnished as between the partners. A mercantile business was carried on for nearly four years, as is alleged in the complaint; and yet it is not alleged, nor is it shown by the testimony in this case, that either of the partners ever furnished a dollar of capital. This complaint was by Charles E. Bruce, verified by him, and he must certainly have known the amount of capital, if any, (and we are not at liberty to infer that such a business could be carried on without some capital,) that was invested in said business, and the amount furnished by each one. As the terms of the partnership are set out in the complaint, the labor of Bruce in running the store was to stand off the work and labor of Burke in acquiring mining property by location and purchase. If Bruce furnished the capital, or any portion of it, either to carry on the mercantile business, or to pay the expense of purchasing or prospecting for mines, would he not have so stated? His silence upon this matter is painfully suggestive. On the other hand, if

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Burke furnished all the capital to be, or that was, used in the transactions of the firm, and Bruce furnished nothing but his services in the store, and was to be equally interested with Burke in all mining operations, it would present such a novel contract of partnership as would require very clear proof, in the face of a denial by one of the alleged partners, to establish it. Where a party comes into a court of equity seeking to establish a partnership, and the trust resulting therefrom, by parol evidence, he should be most clear and explicit, both in the setting forth of his cause of action and in his proofs. Even those courts which have held that a partnership in lands, or rather in the purchase and sale of lands, may be proven by parol, have uniformly held that the proofs must be clear and certain. While we concede that a partnership, for the purpose of dealing in mining properties, may be proved by parol, still the proof of such partnership must be clear and certain, and, after a most careful and scrutinizing study of the evidence in this case, we are compelled to say that neither the pleadings nor the proofs present such a case as would warrant a court of equity in decreeing a partnership established.

There is nothing in the evidence, nor in the allegations of the complaint, which even intimates that any of the property sought to be subjected to the partnership was purchased or procured by partnership funds; and certainly it will not seriously be contended that the statement of the terms of the copartnership, as set forth in the complaint, will warrant any such presumption. The plaintiff does not allege, or attempt to prove, that he ever furnished or put into the partnership one dollar of money or property. All of the property set forth and described in the complaint, it is shown by the evidence, was acquired by the defendant, and, in the absence of any proof to the contrary, presumably by the use of his own means. The books of the firm of John M. Burke & Co. were introduced in evidence, but they failed to furnish the slightest proof of a partnership between the plaintiff and defendant, beyond the mercantile business, and these books were kept and controlled by Bruce. The only evidence offered by the plaintiff in support of his complaint, or to establish the alleged copartnership, was certain admissions or

statements of the defendant made to, and in the presence of, certain witnesses. All the authorities unite in pronouncing this the least satisfactory of any class of evidence. We doubt if a case can be found where a partnership of this character has ever been permitted to be established upon this kind of evidence alone. Some letters of defendant to the plaintiff were introduced, but they do not even tend to prove the partnership alleged in the complaint. The preponderance of authority is in favor of the rule that, to take a case out of the operation of the statute of frauds, it must appear that the lands were purchased, or to be purchased, with the funds of the partnership. 1 Bates, Partn. § 302, and cases cited in note.

The two cases were heard together in this court, and with one exception involved the same questions, and we may therefore look at the evidence of the two cases together. The pleadings are substantially the same in both cases. In the case of *Mayhew v. Burke* there was no evidence offered by the defendant. In the case of *Knott v. Burke* the evidence of the defendant is given. Examining this evidence, we find that none of the property mentioned in the complaint was purchased or procured by partnership funds, but wholly by means furnished by defendant. It moreover appears that all of the funds with which the mercantile business was started, and the credit upon which it was sustained, were supplied by the defendant. The paper writing signed by the defendant, and which purported to be an admission by defendant that Bruce was a full partner with him in his mining operations, and which writing was introduced by plaintiff in both cases, and stricken out by the court upon the ground that it was inadmissible under the pleadings, the testimony of the defendant explains, and is corroborated by an examination of the paper itself. We have examined with a great deal of care the cases cited by the appellant's counsel in their brief, and we are unable to see the applicability of any one of them to the cases under consideration here. In *Fairchild v. Fairchild*, 64 N. Y. 471, the plaintiffs and defendants were acknowledged partners. One of the partners purchased real property with partnership funds, and, as the court finds, with the intention and understanding, by all the members of the firm, that said property so purchased belonged to the firm as-

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sets, and all payments, expenses, etc., were kept upon the firm books,—a palpable difference, we apprehend, between that case and the cases at bar, in which it is neither alleged nor proved that any of the property in question was purchased or procured with the funds of the partnership. The case of *Traphagen v. Burt*, 67 N. Y. 36, was another case where the land was both purchased and improved by the joint funds of plaintiff and defendant, who were acknowledged partners. The question of partnership did not arise either in this case or the case in 64 N. Y. The question in both of those cases was whether certain realty purchased in the name of one partner, with funds of the copartnership, should be considered partnership property. *Miller v. Ball*, 64 N. Y. 286, deals solely with the question of part performance. Says the court in *Fairchild v. Fairchild*, supra: "Proof of partnership, for the purpose of buying and selling land, presents a different question from that which arises when an existing partnership purchases land for its use or benefit;" and the same distinction is recognized by Judge STORY in *Smith v. Burnham*, 3 Sum. 435. In the case of *Welland v. Huber*, 8 Nev. 203, the partnership was not contested. *Settembre v. Putnam*, 30 Cal. 490: The owners of a mine agreed with another party, if he would devote his labor and skill in exploring and developing the mine, they would furnish him with tools and provisions, and give him a share in the mine, if it proved valuable, and the action was brought to enforce this contract.

In *Knott v. Burke* the plaintiff seeks to recover from the defendant certain interest in mining property alleged to have been conveyed to him by Charles E. Bruce in his life-time. Said deed purports to have been executed by Charles E. Bruce, and John M. Burke by Charles E. Bruce, his attorney in fact, dated May 5, 1890, and recorded on May 23, 1890, the same day the suit was commenced. The power of attorney from Burke to Bruce bears date November 27, 1886, and contains the usual power of revocation. It was recorded December 7, 1886. This power of attorney was revoked by an instrument in writing, duly executed and acknowledged by John M. Burke on the 20th day of April, 1888, and recorded in proper office on April 23, 1888. It is claimed by counsel for the appellant that this power of attorney was irrevocable, being coupled with an interest, to-wit, the interest of Bruce,

as the partner of Burke, in the property purporting to be conveyed. The plaintiff failing to establish the partnership, of course this contention fails. We have been unable to find any authority or precedent which would justify the finding of a partnership upon the evidence in this case. Conceding all that is claimed under the authorities which follow *Dale v. Hamilton*, 5 Hare, 381, we would still be without support in such a conclusion. The defendant admits the copartnership in merchandising, and the instrument executed by him, and introduced by plaintiff, made a distinction between the merchandise business and the mining operations. The testimony of Judge Mayhew, while given with characteristic frankness and candor, utterly fails to sustain the allegations of the complaint, and the same may be said of the testimony of Judge Claggett and of the other witnesses on the part of the plaintiff. It is made up entirely of the recollection, by witnesses, of expressions of defendant made in desultory talks and conversations which took place several years ago; as instance, in the case of the witness Rutherford, (he was a sort of general clerk about the store of John M. Burke & Co.,) referring to conversations between Bruce and the defendant, he says: "I have heard them talking there, sir, and my business was working around the store, and I stayed there, and couldn't pay attention to everything that was said. Sometimes I wasn't busy, and would hear some of the conversations expressed between them; but all the facts I don't know." Further on, this witness testifies, in answer to a question to that intent: "My hearing has always been affected, more or less, ever since I was twenty odd years of age." "Whenever I catch cold it's worse than at other times." And against this sort of testimony we have the clear, lucid statements of the defendant, Burke, as to all the transactions and dealings between himself and Bruce; which, while they would appear extremely erratic and heterodox to the conservative "gold-bug" of the land of the rising sun, are, nevertheless, most familiar to the "bare-footed silver baron" of the Pacific slope. It is clearly shown by the evidence that Burke furnished all the capital used in the mercantile business, as well as in the mining operations; that Bruce was brought to the country by Burke to look after the store, and had a half interest therein for his services. This is what the

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evidence clearly establishes, and upon this evidence we think the conclusion of the district court was clearly correct, although we are not fully in accord with the reasons he gives, or the grounds upon which he bases his decision. The judgment of the district court in the cases of Mayhew, Adm'r, etc., v. Burke and Knott v. Burke are affirmed, with costs to the respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

MAHONY v. MARSHAL *et al.*

(February 23, 1892.)

DISMISSAL OF APPEAL—FAILURE TO FILE TRANSCRIPT.

Time for filing transcript expired November 19, 1891. On January 16, 1892, respondents moved to dismiss appeal, no transcript having been filed, no sufficient cause being shown to excuse laches of appellant. Motion allowed.

(*Syllabus by the Court.*)

Appeal from district court, Cassia county; C. O. STOCKSLAGER, Judge.

Action of conversion by B. F. Mahony against G. S. Marshal & Co. From a judgment for plaintiff, defendants appealed. Plaintiff moved to dismiss the appeal. Motion allowed.

Hawley & Reeves, for appellants. J. Brumback and Chas. Cobb, for respondent.

HUSTON, J. The motion to dismiss the appeal in this case is based upon the provisions of paragraph 7 of rule 4 of the rules of this court, and the non-compliance by appellant therewith. Appellant meets this motion with an application to the court to extend the time for filing transcript, thus, as it were, admitting the case made by respondents, and seeking to avoid the consequences by appealing to the provisions of paragraph 9 of rule 4. Judgment was rendered February 28, 1891. Notice of appeal was served and filed March 9, 1891, undertaking on appeal filed March 13, 1891, statement on appeal settled and allowed by the judge of district court September 15, 1891, and filed with the clerk on September 19, 1891. Under the rules of this court the time for filing transcript on appeal herein expired on November 19, 1891. On January 16, 1892, respondents moved this court for leave to place the case upon the calendar, and then moved to dismiss the appeal on the ground that no transcript has ever been

filed. Affidavits are presented by appellant in support of his request for further time within which to file transcript, and in excuse for his delay and apparent laches. These are met by counter-affidavits on the part of the respondents, specifically and unequivocally denying the statements made in the affidavits on the part of the appellant. It is impossible for this court to say which are true and which are false. One fact, however, is undenied,—that the attorney for the respondents, as soon as the statement on appeal was filed in the clerk's office, immediately sent written notice of the fact to the attorneys of appellant. The laches of the appellant in this case are too palpable to be overlooked. The rules of the court, while subject to modification when the promotion of justice demands it, must not be considered as mere scarecrows of the law. The proposition of counsel that the rules of the court are in contravention of, or any way inconsistent with, the statutes, is simply idle. The motion to dismiss the appeal is allowed, with costs.

SULLIVAN, C. J., and MORGAN, J., concur.

GEERTSON v. BARRACK *et al.*

(February 24, 1892.)

WATER RIGHTS—APPROPRIATION.

1. The prior appropriator of water for irrigation purposes is entitled to the water so appropriated, necessary to the irrigation of his land, as against subsequent appropriators.

SAME—PRIORITY OF RIGHT—DETERMINATION.

2. The court must determine the date and amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by section 3159 of the Revised Statutes of Idaho of 1887, to-wit: "As between appropriators, the one first in time is the first in right."

(*Syllabus by the Court.*)

Appeal from district court, Lemhi county; C. H. BERRY, Judge.

Action by Lars C. Geertson against John Barrack and others to determine plaintiff's right to the use of part of the water of a certain creek, and to restrain defendants from diverting said water. From a judgment for defendants, plaintiff appeals. Reversed.

Miller & Terrell, for appellant.

If the court fails to find on a material issue, judgment cannot be supported.

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Traverso v. Tate, 82 Cal. 170, 22 Pac. Rep. 1082; Swift v. Canavan, 52 Cal. 417-419; Billings v. Everett, Id. 664; Shaw v. Wandersforde, 53 Cal. 300.

Findings outside the issues must be disregarded. Green v. Chandler, 54 Cal. 627, 628; Robinson v. Railroad Co., 57 Cal. 419; Morenhout v. Barron, 42 Cal. 605; Marks v. Sayward, 50 Cal. 59.

There being a specific finding of fact, and a general finding of fact inconsistent therewith, a judgment based on the general finding cannot stand. Geer v. Sibley, 83 Cal. 1, 23 Pac. Rep. 220.

If findings are inconsistent, and cannot be harmonized, it is ground for reversal. Manly v. Howlett, 55 Cal. 95; Harris v. Harris, 59 Cal. 622; Sloss v. Allman, 64 Cal. 47, 30 Pac. Rep. 574; Gillman v. Curtis, 66 Cal. 116, 4 Pac. Rep. 1094.

Hawley & Reeves, for respondents.

SULLIVAN, C. J. This is an action brought to determine the right of appellant to the use of 200 inches of the waters of Geertson creek, situated in Lemhi county. The complaint alleges that the plaintiff is the owner and in the possession of over 300 acres of land situated in said Lemhi county, and, for the purpose of irrigating said land, the plaintiff, during the spring of 1868, and while he was in the possession of said land, appropriated 200 inches of the water of said Geertson creek; that said appropriation was the first made of the waters of said creek; that at frequent times during the three years prior to the commencement of this suit the defendants had, without plaintiff's consent, diverted the waters from said creek to such an extent as to wholly deprive plaintiff of the water so appropriated by him,—and demands that defendants be restrained from in any manner interfering with plaintiff's right to the use of the water of said creek so claimed and diverted by him. Upon the application of Delos Simons, one of the original defendants, the court ordered James Beattie, John McGuigan, and the Wah Sing Mining Company to be brought in as parties defendant; and thereupon the plaintiff was permitted to and did file his supplemental complaint, alleging that said defendants Beattie, McGuigan, and the Wah Sing Mining Company had diverted a large amount of the water of said Geertson creek, without the consent of plaintiff, to his damage, and demanded that they

be perpetually restrained from interfering with the rights of plaintiff to the use of said water. The defendants, except the Wah Sing Mining Company, answered, and by cross-complaint allege their right to the use of water from said creek under divers appropriations. The cause was tried to the court without a jury, and the court filed its decision in writing, and judgment was entered thereon. This appeal was taken from the judgment. The appellant specifies two errors, and demands that the case be reversed and remanded for a new trial. The respondents consent to a reversal. All parties seem anxious for a new trial.

The first specification of error is, in substance, that the findings of fact do not conform to the issues made by the pleadings. Upon an inspection of the findings of fact, we observe that they contain many findings upon issues not made by the pleadings, and that they do not find on all of the material issues made by the pleadings.

The second error assigned is "that the judgment herein entered is against law, for the reason that said judgment does not decree or adjudge any priority of rights to the waters in controversy." The pleadings put in issue the rights of the parties to the use of the waters of said creek, according to the priority of appropriation; and the court should have determined the rights of the parties upon that issue, and entered judgment accordingly. Findings of fact and conclusions of law similar to those entered in the case at bar were commented on at some length by this court in its opinion rendered at this term in the case of Kirk v. Bartholomew, 29 Pac. Rep. 40.¹ The law, as therein laid down, governing that case, is also applicable to the case at bar, so far as it applies to the issues to be determined and the judgment to be entered. Under the pleadings the court below must determine the date of each appropriation through which the several parties claim their rights, the amount of water appropriated by each party for a useful or beneficial purpose, and order judgment to be entered, giving the parties first in time the superior right, to the extent of their appropriation for a useful or beneficial purpose. The judgment is reversed, and the case is remanded for a new trial in accordance with this opinion. Three-fourths

¹Post, 1087.

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of the costs of this appeal is awarded to the appellant.

HUSTON, J., concurs.

MORGAN, J., having been of counsel in the court below, took no part in the hearing or decision of this case.

BRAMWELL v. GUHEEN, Assessor.

(February 24, 1892.)

TAXATION BY SCHOOL-DISTRICT — VALIDITY OF LEVY—STRICT COMPLIANCE WITH STATUTE.

1. Where the statute provides for the levying of a special tax by a school-district, and prescribes the manner in which such levy must be made, a literal compliance with the requirements of the statute is necessary to the validity of the tax.

INJUNCTION—REMOVING CLOUD FROM TITLE—ILLEGAL TAX.

2. Injunction will lie to restrain the collection of an illegal tax, where it creates a cloud upon title to real estate.

(Syllabus by the Court.)

Appeal from district court, Bingham county; H. W. SMITH, Judge *pro tem*.

Action by F. S. Bramwell against John J. Guheen, assessor and tax collector, to restrain defendant from collecting a school tax assessed against plaintiff. From a judgment for defendant, plaintiff appeals. Reversed.

Hawley & Reeves, for appellant.

If the collection of a tax would lead to a multiplicity of suits, or produce irreparable injury, or if the property be real estate, and the tax throws a cloud upon the title of the complainant, a court of equity will interfere by injunction, and prevent the collector from enforcing the collection of the tax. *Dows v. City of Chicago*, 11 Wall. 110; *Society v. Austin*, 46 Cal. 488; High, Inj. § 500.

S. C. Winters, for respondent.

HUSTON, J. This action was brought by the plaintiff to enjoin the defendant, who is the assessor and tax collector of Bingham county, from collecting a school tax assessed on certain real estate of plaintiff by the board of trustees of school-district No. 15 of said county.

The ownership and description of the real estate is set forth in the complaint, as are, also, the facts constituting the claimed illegality of the levy and assessment and the complaint further alleges

that such tax constitutes a cloud upon the title to said real estate of plaintiff, etc. A general demurrer was filed to the complaint, which, after argument, was overruled by the court; the court holding that the complaint stated facts sufficient to warrant the relief prayed for. This ruling was correct, we think.

From this point the case seems to have been heard and determined by "H. W. SMITH, *pro tem*. Judge," as he is styled. The case was heard before said *pro tem*. judge without a jury. After hearing the proofs and the argument of counsel, the said judge *pro tem*. rendered his findings of fact, wherein nearly, if not all, the facts are found as set forth in the complaint. The court then finds as conclusion of law "that plaintiff is not entitled to the relief prayed for, or to any relief, in this action; that defendant is entitled to judgment for his costs,"—and judgment was thereupon rendered for the defendant and against plaintiff for costs, and from this judgment appeal is taken. His honor, the judge *pro tem*., also files an opinion, which appears in the record, and from which we learn the grounds upon which he based his conclusions of law and judgment; and it seems he reverses the decision made by the district court upon the demurrer, in holding that an injunction will not lie to restrain the collection of an illegal tax, where it is alleged that such tax creates a cloud upon title. This question has been so long settled that it does not require the citation of authorities to show the error of the conclusion to which the learned judge *pro tem*. arrived. 1 High, Inj. § 524, and cases cited in note. "Where, by statute, a tax-deed is made *prima facie* evidence of regularity [as in this state] of all proceedings incident to the assessment and sale, if the tax has been imposed contrary to law, such a cloud upon the title will result as to warrant the interference of equity." 1 High, Inj. § 525, and cases cited in note 3. As to the illegality of the tax, the findings of fact of the judge *pro tem*. are quite full, and serve to present us with all the facts essential to be considered in passing upon the question of the legality of the tax, the collection of which is sought to be enjoined.

Subdivision 7 of section 667 of the Revised Statutes of Idaho provides as follows: "They [the trustees] may, by giving ten days' notice in writing, posted in three conspicuous places in their district, call,

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at any time prior to the second Monday of September, an election of the legal voters of their district, for the purpose of deciding whether or not a special tax, specifying the rate proposed to be collected, which must not exceed ten mills on the dollar of the taxable property, be levied on said district for the building or repairing of school-houses or for the support of public schools in the district; and they may appoint two judges and a clerk of said election. The voting at each election must be by ballot, on which ballot must be written or printed 'Tax, yes,' or 'Tax, no;' and none but actual freeholders or heads of families of said district are entitled to vote at such election," etc. The notice of the meeting, as the same appears in the record, is as follows: "Notice. There will be a school-meeting held in the district school-house in the 15th district on May 17th, 1890, at 12 o'clock sharp, to take into consideration the voting of a tax of ten mills. W. H. DYE, Clerk of the Board of Trustees. N. W. McMILLAN." The court then finds that "on the 17th day of May, at about 15 minutes before 12 o'clock, about twenty-five persons assembled at the school-house in district No. fifteen, pursuant to this notice of the trustees. W. H. Dye was present, and considerable discussion occurred, but the meeting was not called to order, nor were any officers of any election appointed; and at about half-past twelve all of the persons then present left the room. Immediately afterwards, about eight persons came into room with N. W. McMillan, who called the meeting to order, appointed officers of election, who were duly sworn; and the polls opened at about 15 minutes to one o'clock. The parties present proceeded to vote by ballot upon the question of levying a tax for building a school-house, all present voting in favor of said tax. A certificate in the following form was duly transmitted to the auditor and recorder of Bingham county, and also to the assessor and collector of said county: 'Kaintuck, Bingham county, Idaho, May 17th, 1890. School-meeting of district No. 15 met pursuant to call of trustees, given as per notice posted, to take into consideration the voting of a tax for the purpose of building a school-house. Meeting called to order by Neil W. McMillan, chairman of the board, who; after stating the object of the meeting, appointed Andrew McMillan and Miles R. Cahoon

judges of said election; J. C. Brandon, clerk. The amount of the tax next being taken under advisement, it was moved and carried that the rate of tax be ten mills on the dollar, and that said tax be assessed and collected from each property holder in school-district No. 15, Bingham county, Idaho, for the year 1890. The vote then being taken, the judges reported as follows, to-wit: Tax, yes—eight; tax, no—none. We hereby certify that the above is a true and correct copy of the minutes and proceedings of the meeting called for the purpose of voting a tax for the building of a school-house in district No. 15, Bingham county, Idaho. W. H. DYE, N. W. McMILLAN, Trustees.' The persons voting at the election were all legal voters in said school-district, and householders or heads of families therein." Other findings of fact were made; but, as they are not essential in the consideration of the case, we omit them.

Where the statute provides for the levying of a special tax, all the requirements of the statute in regard to the making of such levy must be strictly followed. *Burroughs, Tax'n*, p. 396, and cases cited; *Cooley, Tax'n*, p. 334 et seq. The notice was not for an election, but for a meeting "to take into consideration the voting of a tax of ten mills." Nothing is said in the notice as to the purpose for which the tax is to be raised, nor is there anything said in the notice about an election. Twenty-five persons met at the place and at the time indicated, and informally talked and discussed the subject; and this seems to have been all that was contemplated by the notice "to take into consideration the voting of a tax of ten mills." Having, as they doubtless thought, sufficiently considered the matter, they dispersed. Thereafter eight other persons convened at the same place, organized a meeting, appointed officers of election, and proceeded to hold what is claimed to have been an election. The court finds that a vote was taken by ballot, but this finding is not sustained by the record of the meeting. The certificate of the trustees states "that it was moved and carried that the vote of tax be ten mills on the dollar;" and, further on, "the vote then being taken, the judges reported as follows, to-wit: Tax, yes—eight; tax, no—none." It does not appear that any vote by ballot was taken. While, in considering the acts of boards and meetings of this char-

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acter, considerable latitude should be given, in this case there was such a complete disregard of the plain provisions of the statute as to make it imperative upon the court to hold the proceedings to levy the tax in question invalid, and the tax levied thereunder void.

We desire here to call the attention of the judges of the district courts and the members of the legal profession to the fact that section 12 of article 5 of our constitution does not authorize the appointment of a non-resident of the state as judge *pro tem*.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter judgment in accordance with opinion. Costs to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

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(February 26, 1892.)

JUDGMENT ON PLEADINGS.

When any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings.

(*Syllabus by the Court.*)

Appeal from district court, Kootenai county; J. HOLLEMAN, Judge.

Action by W. H. Johnson against Charles F. Manning and Fred M. Manning on a replevin bond. From a judgment on the pleadings for plaintiff, defendants appeal. Reversed.

Albert Hagan and Mark Musgrove, for appellants.

Where an answer contains a denial of any material allegations in the complaint, it is error for the court to render judgment on the pleadings. Such denial raises an important and material issue, which must be tried like any other issue. *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. Rep. 942; *Prost v. More*, 40 Cal. 347; *Nudd v. Thompson*, 34 Cal. 47; *Siter v. Jewett*, 33 Cal. 92; *Reich v. Mining Co.*, 3 Utah, 254, 2 Pac. Rep. 703; *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. Rep. 610.

A verdict, to serve as a basis for a judgment, must be complete and certain; otherwise, both the verdict and judgment entered thereon are errors, and reversible. *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. Rep. 605; *Campbell v. Jones*, 38 Cal. 509; *Dough-*

erty v. Haggin, 56 Cal. 522; *Kelly v. McKibben*, 54 Cal. 192.

Robert E. McFarland, for respondent.

SULLIVAN, C. J. This is an action upon a replevin bond. The complaint alleges that one Lindley commenced an action in the probate court of Kootenai county against the respondent to recover possession of two certain horses, or, in case the possession could not be had, their value, alleged to be \$300. That the appellants herein executed the undertaking required by the statute in such cases. That after filing said undertaking the said horses were delivered to said Lindley, and were thereafter delivered by Lindley to the appellants. That thereafter the court proceeded to try said action with a jury, and the jury returned the following verdict: "S. T. Lindley, Plaintiff, vs. W. H. Johnson, Defendant. We, the jury impaneled in the above-entitled case, find for the defendant \$5. Foreman, LOUIS FILERT;" and thereupon judgment was entered against the said Lindley in pursuance of said verdict. That neither said Lindley nor the appellants have returned said property, or paid said judgment and costs in said action. That the appellants have converted to their own use and benefit said horses so delivered to them by said Lindley, to respondent's damage in the sum of \$300, and costs of said replevin suit,—and demands judgment for the value of said property, and the amount of the judgment in the probate court, amounting in all to \$353. The answer of the defendants denies that said property ever came into the possession of the defendants. Denies that the defendants, or either of them, ever converted the whole or any part of said property to their own use or benefit. Denies that upon the return of said verdict, or at any time, judgment was entered against said Lindley in pursuance of said verdict, and alleges that no judgment whatever was ever made or rendered upon said verdict. Denies that plaintiff has been damaged by reason of the premises in the sum of \$353, or in any sum whatever. Denies that said property is of the value of \$300, or of any value to exceed the sum of \$100. And avers that at the time of the return of said verdict in the said probate court said court then and there made the following entry in said cause, to-wit: "In the probate court, Kootenai county, Idaho territory. S. T.

Fahey v. Belcher.

Lindley, Plaintiff, vs. W. H. Johnson, Defendant. We, the jury impaneled in the above-entitled case, find for the defendant \$5. Foreman, LOUIS FILERT. Costs: Court, \$7.00; sheriff, \$14.00; jury, \$20.00; witness, \$30.00. HENRY HELDER, Probate Judge;" and that no other or different judgment entry, or entry of any kind, has been made in said case. The answer further avers that, within one week after making said entry, Lindley offered to pay the five dollars found to be due by said verdict, and the costs of said case; and the said court refused to receive the same, and ever since has and still refuses to receive the same. The record shows that a motion was made by plaintiff for judgment on the pleadings, which motion was granted, and judgment entered in favor of the plaintiff for the sum of \$353, damages and costs of suit, from which judgment this appeal was taken.

The respondent contends that the points raised by appellants cannot be considered here, for the reason that no exception was taken to the ruling of the court below, and cites *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. Rep. 243; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. Rep. 1063; *Warner v. Darrow*, (Cal.) 27 Pac. Rep. 737; *Malone v. Beardsley*, (Cal.) 28 Pac. Rep. 218. These cases are not in point. They hold that an order granting a nonsuit cannot be reviewed on appeal if no exception was taken in the court below. In the case at bar no nonsuit was granted, but a judgment on the pleadings was entered. The appellants contend that the court erred in granting judgment on the pleadings. As will be observed from the pleadings, many, if not all, of the material allegations of the complaint are denied by the answer. When any material allegation of the complaint is denied by the answer, it is error for the court to render judgment on the pleadings. It is only where an answer admits, or leaves undenied, the material allegations of the complaint, that a judgment can be rendered on the pleadings. *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. Rep. 942; *Prost v. More*, 40 Cal. 347; *Nudd v. Thompson*, 34 Cal. 47; *Reich v. Mining Co.*, (Utah,) 2 Pac. Rep. 703; *Miles v. McCallan*, (Ariz.) 3 Pac. Rep. 610. The court erred in granting judgment on the pleadings. The case is reversed, with costs in favor of appellants.

MORGAN and HUSTON, JJ., concur.

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(February 26, 1892.)

DISMISSAL OF APPEAL — REINSTATEMENT — SUFFICIENCY OF AFFIDAVIT.

Appeal perfected September 14, 1891. Transcript not filed within 60 days after appeal was perfected, as required by paragraph 7, rule 4, of this court. Motion was made by respondent, under rule 2 of this court, to dismiss the appeal. Appeal dismissed January 12, 1892. Under rule 2, appellants, on January 25, 1892, move to restore cause on affidavit, showing that transcript was placed in hands of attorneys for appellants in October, 1891. On account of pressure of business and inadvertence, they failed to file the same in time. *Held* showing not sufficient; motion denied.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. W. STANDROD, Judge.

Action by Jeremiah Fahey and others against Byron Belcher. From a judgment for defendant, plaintiffs appeal. Appeal dismissed. Motion to reinstate the appeal denied.

Hawley & Reeves, for appellants. *R. P. Quarles*, for respondent.

SULLIVAN, C. J. This appeal was dismissed upon the application of the respondent, under rule 4 of this court, January 12, 1892. Said rule declares that a cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party. The appellants made their motion to replace this cause on the calendar. As the transcript does not contain the notice of appeal, we are not informed whether this is an appeal from the judgment only or not; however, the certificate of the clerk shows that no bill of exceptions or statement has been settled. This fact, together with the transcript presented, would indicate that the appeal is from the judgment, and to be heard on the judgment roll. The judgment was rendered by the court below on the 29th day of May, 1891, and this appeal perfected on the 14th day of September, 1891. The affidavit shows that the transcript was prepared and placed in the hands of appellants' attorneys in October, 1891; and that, through inadvertence and pressure of business, they neglected to file the same in this court. The transcript was in the hands of the attorneys some three months before the opening of this term, and no effort was made to have the same filed until long after the opening of

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this term. We are of the opinion that no good cause has been shown for replacing this cause on the calendar. The motion is denied.

HUSTON and MORGAN, JJ., concur.

PEOPLE *ex rel.* O'NEILL, District Attorney,
v. BANCROFT *et al.*

(February 29, 1892.)

MUNICIPAL CORPORATIONS—POWER OF TRUSTEES
TO DISSOLVE.

1. There is no method provided, under our statute, whereby the trustees of a town can dissolve the corporation or effect a disincorporation, and it is not within the power of such trustees to abandon such incorporation, and procure a re-incorporation.

SAME—POWER OF COUNTY COMMISSIONERS TO RE-
INCORPORATE.

2. The board of county commissioners cannot reincorporate a town having already a valid corporate existence.

SAME—ABANDONMENT—VALIDITY.

3. All acts done by a board of trustees of a lawfully incorporated town, in an attempt to abandon or disincorporate such municipality, and set up a new government, are without authority of law, and void.

(*Syllabus by the Court.*)

Appeal from district court, Kootenai county; J. HOLLEMAN, Judge.

Action in the nature of *quo warranto* by the people, on the relation of Charles W. O'Neill, district attorney of the first judicial district, against H. L. Bancroft, R. R. Smith, A. H. Buller, John Curry, James Harte, Fred L. Burgan, G. P. Mims, E. A. Noble, and the town of Coeur d'Alene, to oust the individual defendants from certain offices, and to set aside a pretended new incorporation of defendant town, and to enjoin further proceedings. From a judgment dismissing the action, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

R. E. McFarland and Albert Hagan, for appellant.

When these defendants accepted the offices of the several trusts of the town of Coeur d'Alene, they thereby admitted the existence of the incorporation, its legality, and were presumed to perform their duties and execute their trusts as such officers. They cannot be held to say that the incorporation under which they were elected and acting was illegal; that they were elected such officers, and had accepted

such trusts. Board v. Serrett, 33 Amer. Rep. 229; Johnson v. Kissler, 76 Iowa, 411, 41 N. W. Rep. 57; Close v. Cemetery, 107 U. S. 466, 2 Sup. Ct. Rep. 267.

The court alone can pass upon the validity of any *de facto* incorporation. State v. Bank, 41 Amer. Dec. 109; State v. Turnpike, 1d. 692; Regents v. Williams, 31 Amer. Dec. 72; Glass Co. v. Langdon, 35 Amer. Dec. 292; Moore v. Mayor, etc., 29 Amer. Rep. 134; Wienman v. Railway Co., 118 Pa. St. 192, 12 Atl. Rep. 288; Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. Rep. 680; Branch v. Jessup, 106 U. S. 468-476, 1 Sup. Ct. Rep. 495.

Since all our incorporations come from the legislature, a municipal corporation cannot dissolve itself or surrender its franchise. Dill. Mun. Corp. § 167; Brennan v. City of Weatherford, 53 Tex. 330; Morris v. State, 65 Tex. 53.

Fred L. Burgan and Kent & Fogg, for respondents.

When the real object of the *quo warranto* against an officer is to test the validity of the charter, it will not be granted. Queen v. Taylor, 11 Adol. & E. 949; 4 Amer. & Eng. Enc. Law, 293, note 1.

A change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions or the substitution of a new charter in the place of an old one, embracing substantially the same corporators and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the amended or new charter, and different officers administer its affairs. Broughton v. Pensacola, 93 U. S. 266; Dill. Mun. Corp. §§ 85, 171.

Having made the town of Coeur d'Alene defendant, the people are estopped from denying the fact that it possesses a corporate franchise. State v. Bank, 33 Miss. 474; State v. Coke Co., 18 Ohio St. 262.

MORGAN, J. This is an action brought by Charles W. O'Neill, district attorney for the first judicial district, against H. L. Bancroft, R. R. Smith, A. H. Butler, John Curry, James H. Harte, Fred L. Burgan, G. P. Mims, A. E. Noble, and the town of Coeur d'Alene. The complaint alleges that on the 6th day of April, and a long time prior thereto, there existed a

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municipal corporation known as the "Inhabitants of the Town of Coeur d'Alene." That said town was incorporated under the laws of the territory of Idaho, and as such had its town trustees and other officers duly elected and qualified, and acting as such. That on the 6th day of April, 1891, an election was held in said town for five trustees. At such election H. L. Bancroft, J. H. Harte, R. R. Smith, A. H. Butler, and John Curry were duly elected as such trustees. That they were duly sworn, and qualified as such trustees, and accepted the trust thus placed in their hands, and entered upon their duties as such trustees. That said trustees held a regular meeting of their board on the 27th day of April, 1891. That at said meeting said trustees of said town directed the committee of street surveying to employ a competent surveyor to fix the boundaries of the town preparatory to reincorporation, and thereupon adjourned. That on the 18th day of May following, at an adjourned meeting, the plat and field-notes of A. D. Robinson, surveyor, were laid before the board of trustees as the report of the committee having been charged with the resurvey, and more strictly defining the metes and bounds of the town of Coeur d'Alene. The report was accepted, and the committee continued. By order of the board, Mr. Burgan was instructed to formulate a petition to the county commissioners of Kootenai county, petitioning them to incorporate the town of Coeur d'Alene in accordance with the survey and plat of said Robinson, survey and plat accompanying the petition. That said proceedings were void, and beyond the jurisdiction and power of said board and the members thereof, and a violation of their trust, and unlawful, and submits the same to this court for review. That said board of trustees, and the said defendants above named, and divers other persons in the town of Coeur d'Alene, filed a petition, which was headed by the defendants above named, in which they, the said petitioners, petition the board of county commissioners of said county to declare that henceforth the inhabitants, within the boundaries described and hereinafter mentioned, be a body politic and corporate, under the name and style of the "Inhabitants of the Town of Coeur d'Alene," and by that name they and their successors shall be known in law, have perpetual succession to sue and be sued,

implead and be impleaded, etc., in all courts of law and equity; with the further request that said town might be empowered to buy and sell and own real estate for the benefit of the town, have a common seal, etc. That at the meeting of the county commissioners held on the 28th day of May, 1891, the board of county commissioners of said Kootenai county declared said town to be incorporated as per petition on file under the name and style of the "Town of Coeur d'Alene," Kootenai county, Idaho, with boundaries as follows, (here follows description in full of all lands in said town,) and appointed the said H. L. Bancroft, R. R. Smith, A. H. Butler, John Curry, and James H. Harte trustees of the new town. That said persons so appointed trustees were the same persons that have heretofore been elected trustees of the old town or municipality known as the "Inhabitants of the Town of Coeur d'Alene." That thereupon the said trustees, to-wit, H. L. Bancroft, R. R. Smith, A. H. Butler, John Curry, and James H. Harte accepted said appointment, and entered upon the discharge of their duties, as trustees of the newly incorporated town mentioned in said order, and now claim to be exercising the functions, powers, and duties of officers and trustees of said town so incorporated. That the said territory so described and incorporated contains other and distinct territory and taxable property and inhabitants than were included in the original corporation of the said town of Coeur d'Alene. The complainant further alleges that all of the said acts and proceedings are void, and in violation of the trusts reposed in the board of trustees of said town of Coeur d'Alene. That said trustees are false to their trusts, and have attempted to reincorporate said town, and have abandoned the former incorporation, as shown by said proceedings,—all of which complainant alleges is illegal and void. The complaint further alleges that, in pursuance of the acceptance of the appointment, the said trustees have held meetings of their alleged board, and among other things passed motions and resolutions. Here follows a statement *in haec verba* of the motions and resolutions adopted by the said board on the 4th day of June, 1891, on the 6th day of June, 1891, and on the 9th day of June, 1891, being three several meetings of the board. That the said defendants, trustees as aforesaid, are

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proceeding to allow, audit, assume, and pay the debts and liabilities, warrants and evidences of indebtedness, of said former town of Coeur d'Alene, known as the "Old Incorporation of the Inhabitants of the Town of Coeur d'Alene," and have been and are ignoring its ordinances, to-wit, the ordinances of the said old incorporation, and in divers ways are proceeding illegally, and contrary to the rights and privileges of the citizens of said town; that they have been unfaithful to their trust, in this: That they are seeking to levy taxes and carry on the town or municipal corporation in the name of the "Town of Coeur d'Alene," by ignoring the old incorporation, and the territory so incorporated, and assume to incorporate new and other territory, levy taxes, impose fines, appoint salaried officers, fix their compensation, and have in all things unfaithfully exercised, and are unfaithfully exercising, the duties pertaining to the office of trustee of the town of Coeur d'Alene. And, furthermore, that the said board of trustees have no authority whatever given them by law, or delegated to them in any manner, to make any appointments of officers, or to transact any business under the alleged new incorporation. That the said trustees, pretending to act as officers of said town, have appointed one Burgan corporation counsel, and appointed J. Mims treasurer, all of which is illegal and contrary to law. Complainant further alleges that he is informed and believes, and so charges, that the said pretended trustees and officers have usurped and unfaithfully intruded themselves into said pretended offices, and unfaithfully hold said offices, and exercise the functions and duties thereof. That the said defendants, nor either of them, have no right, title, or legal claim to any of the said respective offices. That, as a consequence, the rights and constitutional privileges of the citizens of said incorporated town of Coeur d'Alene have become and are neglected and impaired, and being daily ignored, by such unfaithful usurpation and unfaithful claim to hold office. Complainant further alleges that such claim to hold said offices, and each of such claims, is without right or title in law or otherwise; alleges that he is district attorney of the first judicial district of the state of Idaho; that he brings this information for the benefit of the people, that the title of said offices may be settled, and in this behalf alleges that such

officers, and each of them, should be declared to hold the said pretended offices without right or warrant; and that all such proceedings by which the old town of Coeur d'Alene was forced to surrender its organization, and to assume new territory and new liabilities, are void and illegal. That all and singular of said proceedings of said board, pretended to be had and made since the said illegal appointment by the board of county commissioners, are void, and, if enforced, will deprive the citizens of said town of their legal incorporation, and of their legal right to taxes for internal improvements. That, at the time of the making of such order by said board of county commissioners, they, and each of the said commissioners, had full notice in all things of the existence of the corporation of the town of Coeur d'Alene, and their efforts to create a new corporation, including the old, and other territory, were, and have been ever since, illegal. That by said acts the said defendants have not been able to acquire or obtain any legal title to the offices so pretended to be held by them. Wherefore the complainant, and relator in his behalf, asks that judgment of this court be had in favor of the people of the state of Idaho; that is, to rule that the said defendants, and each of them, are not entitled to the said pretended offices, and they, and each of them, be ousted therefrom; and that it be ordered and declared that the old incorporation of the town of Coeur d'Alene be held intact, and that the present board of trustees and municipal officers, pretending to act under the said pretended new corporation and appointment, be enjoined herein from further proceeding, from the date of the filing of this complaint, and pretending, to act as said board in any manner or matter touching the affairs of the people or the property, or the citizens of said territory, known as the "Old Incorporation of the Town of Coeur d'Alene." That a decree of ouster be declared accordingly.

To this complaint the defendants filed a general demurrer. The court sustained the demurrer. The plaintiff declined to amend, and relied upon his complaint. Thereupon the court entered judgment dismissing the action, to which ruling the plaintiff excepted, and the cause is brought to this court by appeal.

The respondents claim that the complainant must affirmatively allege, by di-

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rect and positive averments, the facts that the defendants have usurped, and at the time of the filing of this complaint were in the possession of and claiming to hold, some office or franchise without authority of law. It appears to us that this is precisely what the complaint does state. Our statute (section 4168) says: "The complaint must contain the title of the action, the name of the court and county where the action is brought, and the names of the parties. (2) A statement of the facts constituting the cause of action, in ordinary and concise language. (3) A demand of the relief claimed." The complaint first alleges the existence of the municipality known as the "Inhabitants of the Town of Coeur d'Alene," and that the defendants on April 6, 1891, were duly elected trustees of said town, qualified, accepted the trust conferred upon them by the people, and entered upon the performance of their duties as such trustees. That on the 27th day of April, 1891, at a regular meeting of the said trustees, they passed a resolution directing one of the trustees, J. H. Harte, to employ a surveyor to fix the boundaries of the town preparatory to reincorporation. Then follows a report of the committee having in charge the survey of the town, which includes the plat and field-notes of A. D. Robinson, the surveyor. The complaint then alleges that the survey, as made by A. D. Robinson, was adopted by the board, and J. H. Harte was instructed to formulate a petition to the commissioners of Kootenai county, petitioning them to incorporate the town of Coeur d'Alene. Then follows a statement that said petition was formed and signed by said trustees, and by other parties, and presented to the board of county commissioners. That said board of county commissioners on the 28th day of May, 1891, declared the said new town incorporated. That all this was contrary to law, illegal, and void. Then follows the statement that H. L. Bancroft, R. R. Smith, A. H. Butler, John Curry, and James H. Harte are appointed trustees for said town of Coeur d'Alene; that they qualified and entered upon their duties as such trustees of such new town, and have been and now are claiming to be exercising the functions, powers, and duties of officers and trustees of said town so described in the order of the board of county commissioners. Then follows a brief statement of all the acts and doings of the said alleged board of trustees

during the three meetings that occurred thereafter, being on June 4, June 6, and June 9, 1891, with allegations that all of said acts are void and contrary to law. It would seem that there could scarcely be a better statement of complainant's cause of action than he has made in this complaint. After stating the election of these men as trustees of the old town, and their acceptance of the duties under said election, he goes on to show that almost the first act performed by them, after said election and qualification, was an attempt to abandon the old town organization, and incorporate and establish a new town organization. This was clearly not within the powers and duties devolving upon them under the law. The powers and duties of trustees of towns and villages are well defined in section 2230 of the Revised Statutes of Idaho, namely: "To pass by-laws and ordinances, to prevent and remove nuisances, to prevent and restrain and suppress bawdy-houses, gambling-houses, opium dens, and other disorderly houses within the limits of said town or village." In short, to do any and every act to promote the welfare, good order, and health of the people living within the municipality. Their powers are arranged in this section under 36 different heads, forming a complete municipal government providing for the safety, peace, and happiness of the people. The trustees, as such, have no right or power to dissolve, or attempt to dissolve, the corporation. They may resign their offices, but, while they remain and attempt to exercise the duties of trustees, they can only do so in accordance with the laws of the state. If it was desired or the intention of these trustees or other inhabitants of the town to add more territory to the municipality, there is a way provided for them to do so in the law of the last session of the legislature entitled "Towns and Villages," which will be found on pages 161, 162, Sess. Laws 1890-91. If it was desired to change the name of the corporation from the "Inhabitants of the Town of Coeur d'Alene" to "Coeur d'Alene," there is a method provided for that also in the act in relation to towns and villages, First Session of the State Legislature, p. 127. If it was desired to extinguish the old town, and create a new one, consisting of the same territory, it is not within the power of the trustees nor of the people of said town to do so. Towns and villages are created by authority of the legis-

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lature, and the only manner in which such municipal corporations can be dissolved is by act of the legislature. Section 1, art. 12, Const.; Dill. Mun. Corp. §§ 170, 173. Dillon on Municipal Corporations (section 167) says: "Since all our charters of incorporation come from the legislature, a municipal corporation cannot dissolve itself by a surrender of its franchise. The state creates such corporations for public ends, and they will and must continue until the legislature annuls and destroys them, or authorizes it to be done." *Morris v. State*, 65 Tex. 53. When the method pointed out by the statute for the incorporation of towns and villages is adopted by the inhabitants of a certain district, a municipal corporation results; and all of the acts of said inhabitants which are had in accordance with the law, and the act of the board of county commissioners in organizing the town, become and are, as to such inhabitants, a part of the law of the state. Dill. Mun. Corp. § 308. If there could be any such thing as the surrender of a charter and authority or privileges of the said town, it would, from necessity, have to be made to the legislature, and its acceptance would have to be manifested by appropriate legislative action. *Brennan v. Bradshaw*, 53 Tex. 330. Municipal corporations, incorporated under a general act, which contains provisions for their dissolution, can be disincorporated in the method prescribed in the act, and by that means only. In our law for the incorporation of towns and villages, there is no method prescribed for the dissolution of these incorporations; therefore they cannot be dissolved either by the trustees or by the inhabitants.

The respondents contend that the complaint alleges that the trustees claim to hold and exercise the rights of a body politic and corporate, to-wit, an incorporated town, under the provision of title 13 of the Political Code of Idaho, and does not allege in any part of the complaint that the said town, or any of its officers, hold or exercise, or claim to hold or exercise, any of the rights, powers, and privileges beyond those conferred upon it by said title; and contend, also, that the franchise and charter that the complaint admits and alleges the said old town of Coeur d'Alene possessed, and the offices which in said complaint it is admitted that the said defendant trustees lawfully hold, are iden-

tical with the charter, franchise, and offices it is alleged they usurped; but the said trustees claim to hold office, and to exercise their powers and duties, under the new incorporation, erected by the board of county commissioners out of the same territory which was organized into a town, and the said board of trustees was elected by the people, and before any action was taken by the board of county commissioners. It is impossible for the board of county commissioners, or any other power, to wipe out one town, or dissolve its incorporation, and erect a new town out of the same and additional territory, or out of the same territory, or any part of the same territory. It follows, therefore, that the old town still exists, with all its powers, duties, and obligations; that the only thing needed is to set its machinery in motion by means of the proper officers. Dill. Mun. Corp. § 168; *Schriber v. Town of Langlade*, 66 Wis. 616, 29 N. W. Rep. 547, 554.

Respondents also claim that the old corporation has simply been merged in that of the new. This cannot be done. The respondents also contend that the real object of the trustees in applying to the board of county commissioners was not for the purpose of surrendering any franchise they held in trust for the people, nor to ask for new power or an extension of territory, but simply to put on record a definite and accurate statement of the boundaries; but it is clear, from the allegations of the complaint, that they did attempt to abandon the old town, and to organize a new one, taking more territory and changing the name. Not only that, but they accepted office by appointment of the board of county commissioners in the new town. If they were still exercising their duties as trustees of the old town, they needed no appointment from the board of county commissioners. They had all been elected, and were duly qualified. If they desired simply to put on record a more definite and accurate statement of the boundaries of the town, they could have done so by directing a surveyor to make a survey and mark the boundaries.

It is claimed, also, that there is no allegation in the complaint that the said trustees asserted any claim or performed any act in any way inconsistent with their full knowledge of the legal corporation under which they were elected; but they

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have ignored the incorporation entirely under which they were elected, and accepted an appointment to office under a new and different incorporation, and this is fully set forth in the complaint. The complaint shows that the appointment of the trustees and the reorganization of the town was illegal and void, simply by setting forth the facts attending its pretended reorganization and the appointment of its officers, and alleging the illegality thereof. The board of trustees, as trustees of the new town, all the proceedings for the incorporation of which are declared to be void, have no power to make any appointment of any officers under the new organization, and all such alleged appointments or attempted appointments are void. Dill. Mun. Corp. § 89. We think that the complaint states a complete cause of action, and the judgment of the court below is reversed, and the cause remanded for further proceedings. Costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

KIRK *et al.* v. BARTHOLOMEW *et al.*

(February 29, 1892.)

WATER-RIGHTS—APPROPRIATION—PRIORITY.

1. The prior appropriator of water for irrigation purposes is entitled to the water so appropriated, necessary to the proper irrigation of his land, as against subsequent locators.

SAME—DETERMINATION OF PRIORITY.

2. The court must determine the date and amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by section 3159 of the Revised Statutes of Idaho of 1887, to-wit: "As between appropriators, the one first in time is the first in right."

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3. In determining the amount of water appropriated for useful or beneficial purposes, the number of acres of land claimed or owned by each party, and the amount of water necessary to the proper irrigation of the same, should be taken into consideration.

(Syllabus by the Court.)

Appeal from district court, Cassia county, C. H. BERRY, Judge.

Action by Lee Kirk, R. C. McCormack, the Raft River Land & Cattle Company, Stephen Keogh, and J. W. Keogh against A. Bartholomew, N. Bartholomew, the Durham Land & Cattle Company, Sweetser Bros., and Pierce, and others, to determine the right to the use of the waters of a certain river. Judgment for defendants.

Plaintiffs the Raft River Land & Cattle Company, Stephen Keogh, and J. W. Keogh appealed both from the judgment and from an order overruling their motion for a new trial. Defendants A. and N. Bartholomew and the Durham Land & Cattle Company moved to dismiss the appeal. Motion to dismiss denied, and judgment reversed.

T. M. Stewart, Charles Cobb, and C. S. Varian, for appellants.

The first appropriator of water from a natural stream upon the public lands for a beneficial purpose has a prior right thereto to the extent of such appropriation. *Basey v. Gallagher*, 20 Wall. 670; *Ditch Co. v. Vaughn*, 11 Cal. 143; *Schilling v. Rominger*, 4 Colo. 100; *Coffin v. Ditch Co.*, 6 Colo. 443; *Lobdell v. Simpson*, 2 Nev. 274; *Barnes v. Sabron*, 10 Nev. 217; *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313; *Irrigation Co. v. Doyle*, 4 Utah, 327, 9 Pac. Rep. 867.

Arthur Brown, S. B. Kingsbury, Hawley & Reeves, and Smith & Smith, for respondents.

If any settler used the waters of a river, and settled upon the public domain, his appropriation would not date from the time when a squatter before him had used water upon the same land, but from his own appropriation. *Smith v. O'Hara*, 43 Cal. 371; *Chiatovich v. Davis*, 17 Nev. 133, 28 Pac. Rep. 239; *Pom. Rip. Rights*, § 58.

A subsequent appropriator has the right to take the entire stream out of its bed, and use it as he pleases, provided that in doing that he does not diminish the amount that flowed down to a prior appropriator below. *Barnes v. Sabron*, 10 Nev. 217.

The use of a prior appropriator must be a reasonable one. *Basey v. Gallagher*, 20 Wall. 670; *Barnes v. Sabron*, 10 Nev. 217.

SULLIVAN, C. J. This is an action brought by Lee Kirk, R. C. McCormack, the Raft River Land & Cattle Company, Stephen Keogh, and J. W. Keogh against A. Bartholomew and numerous other defendants, to determine the priority of right to the use of the waters of Raft river, situated in Cassia county, Idaho. The complaint sets forth the rights under which each of the plaintiffs claim, and alleges that each of the defendants claim an appropriation of some of the waters of said Raft river, and that the appropriations under which defendants claim are subsequent in time to the appropriations made

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by the plaintiffs. The complaint further alleges that the defendants have deprived the plaintiffs of the use of the water of said river without their consent, to their great damage. The plaintiffs demand judgment determining the priority of plaintiffs' rights to the use of the water so appropriated by them, and demand that defendants be perpetually restrained from interfering with plaintiffs' rights to the use of the waters of said river to the extent of their several appropriations. The defendants answered, and by cross-complaint set forth the rights claimed by them to the use of a part of the water of said river, by reason of their appropriations. The case was tried by the court without a jury, and judgment entered. A motion for a new trial was overruled, and thereafter the plaintiffs the Raft River Cattle Company, Stephen Keogh, and J. W. Keogh appealed from the order overruling said motion for a new trial, and from the judgment.

The appellants, in their specifications of error, assign three errors, and by reason thereof demand a modification of said judgment. The first error assigned is the insufficiency of the evidence to justify the decision. The evidence is wholly insufficient to justify the decision; and no evidence could be given, under the pleadings in this cause, that would justify the decision, under our laws governing the appropriation of water.

The second and third errors assigned are as follows, and will be considered together: (2) "Errors of law in denying appellants' superiority of right, in view of found priority in time of appropriation." (3) "Errors of law in scaling down amount of water to which appellants were entitled after June 15th of each year."

The evidence clearly shows that the appropriations made by the various parties (plaintiffs and defendants) extended over a period of about 17 years, commencing in 1870 and ending in 1887. The court failed to find the amount of water actually appropriated, for a useful or beneficial purpose, by each of the parties or their grantors, (in case a party claimed by purchase,) and also failed to determine the priority of right of each appropriation over each subsequent appropriation, but simply allotted to each party a certain number of inches of water every season up to June 15th, and a certain number of inches to each from June 15th to July 15th of each year, and a certain number of

inches to each party every year after July 15th, by a decreasing scale, regardless of the amount of water actually appropriated by each party, and regardless of priority of appropriation. The appellants contend that priority of appropriation gives priority of right, and cite the following authorities in support thereof: *Basey v. Gallagher*, 20 Wall. 670; *Ditch Co. v. Vaughn*, 11 Cal. 143; *Schilling v. Rominger*, 4 Colo. 100; *Coffin v. Ditch Co.*, 6 Colo. 443; *Lobdell v. Simpson*, 2 Nev. 274; *Barnes v. Sabron*, 10 Nev. 217; *Strickler v. Colorado Springs*, (Colo. Sup.) 26 Pac. Rep. 313; *Irrigation Co. v. Moyle*, (Utah,) 9 Pac. Rep. 867. The authorities cited sustain the proposition contended for; but we need not go beyond our own statutes, and the decisions thereunder, for authority upon that proposition. The first act passed by the legislature of the territory of Idaho concerning the appropriation of water was an act entitled "An act to regulate the right to the use of water for mining, agriculture, manufacturing, and other purposes," approved February 10, 1881. See Sess. Laws 1880-81, p. 267. The first section of said act is as follows: "The right to the use of water flowing in a river, creek, canyon, ravine, or other stream may be acquired by appropriation; and, as between appropriations, priority in time shall, subject to the provisions of this act, secure the priority of right." Section 8 of said act secures to persons who had made appropriations of water prior to the date of said act all of the water so appropriated, and is as follows: "Sec. 8. All ditches, canals, and other works heretofore made, constructed, or provided, and by means of which the waters of any stream have been diverted and applied to any beneficial use, shall be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with the requirements of this act." Thus the rule that, as between appropriations of water, priority in time secures priority of right, became a statute law of the territory of Idaho on the 10th day of February, 1881, and has remained a statute law ever since. Rev. St. Idaho 1887, § 3159, declares as follows: "As between appropriators, the one first in time is the first in right." See *Hillman v. Hardwick*, (Idaho,) 28 Pac. Rep. 438,¹ and au-

¹ Ante, 983.

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thorities therein cited,—a decision rendered by this court at its last term. Regardless of the statutes and the decisions of this court thereunder, and the decisions of the supreme court of the United States, and of the highest courts of states having statutes similar to our own, governing the appropriation of water, the learned district judge, in the sixth finding of fact, finds as follows: "I also find that said appropriations and use, as herein stated, were not only according to the custom of the place, but were each and all of them reasonable and just to the public, and to all claimants of water from Raft river, and that a greater claim by each would be unreasonable and unjust; also, that a claim of the same amount of water at all times of the year, or in years of extraordinary drought, would be unreasonable, not according to said customs or laws, and unjust to other settlers on or claimants to the use of the waters of said stream or streams. I further find that the volume of water which is the subject of these findings should be and is hereby held to be a common right in those so accustomed and entitled to their use, in the proportions herein declared." The court then proceeded to distribute the water thus held to be common property, or the right to the use thereof a common right, regardless of priority of appropriation. The parties who appropriated water in 1870 are not given priority of right over appropriations made in 1887. The court failed to determine the priority of right of any of the parties litigant, but, on the unstatutory theory of the use of water being a common right, decrees, by a sliding scale, the amount of water which each shall be entitled to at specified periods of the irrigating season, and, by some abstruse mathematical calculation, reduces, as the supply decreases, one party's amount one-third and another two-thirds for the same dates. The court then declares as follows: "These findings, and judgment to be entered in accordance herewith, to be subject to review, and with special reference to the provisions of the proposed constitution for the future state of Idaho, and the laws operative thereunder." The court thus sets at naught the positive statutes controlling the appropriation of water, and the decisions thereunder, and enters a judgment which he declares subject to review, and with special reference to a constitution not yet in existence, and statutes to be enacted under

such proposed constitution. Five days after the findings of fact in this case had been filed, upon an *ex parte* application by one of the attorneys in the case, made by letter, the learned judge, at chambers, proceeded to review said findings, and directed the clerk to change one of the findings by awarding to one of the parties 10 inches more water than the findings originally gave him. If the finding of facts and judgment in this case can be reviewed and changed upon an *ex parte* application made to the judge at chambers, the decree and judgment are not as final as the law intends they should be.

Mr. Freeman, in his work on Judgments, (section 96,) in referring to a judgment like the one under consideration, says: "The interest of society demands that there should be a termination to each controversy. Courts have no power, after fully deliberating upon a cause, and ascertaining and settling the rights of parties, to add clauses to their judgments, authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them from term to term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress." The statutes of this state in regard to water-rights evidently did not meet with the approval of the learned judge who tried this case. He brushes them aside, and evidently undertakes to make the judgment herein conform to his ideas of what the law ought to be, and in some future time to make it conform to a constitution and laws thereafter to be adopted and enacted. "As between appropriators, the one first in time is the first in right." The law is thus written. The law-making power, only, has the power to repeal or amend it. It cannot be repealed or amended by the court, but must be enforced as long as it remains the law, even if harsh and unjust. The court below should have determined the amount of water appropriated for a useful or beneficial purpose by each of the parties, and, in case any of the parties were not the original appropriators, the court should have determined the amount of water appropriated by the party from whom he deraigned

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title; should also have determined the date of each appropriation, and the priority of right of each of the parties, as the statute directs, to-wit: "As between appropriators, the one first in time is the first in right." In determining the amount of water appropriated for a useful or beneficial purpose, it is proper for the court to take into consideration the number of acres of land susceptible of irrigation by the water so appropriated, claimed, or owned by each of the parties, and the amount of water necessary to irrigate the same. The case is reversed, and remanded to the court below for a new trial in accordance with the views expressed in this opinion; and it is ordered that the appellants have and recover from respondents four-fifths of the costs of this appeal.

HUSTON, J., concurs.

MORGAN, J., having been engaged as counsel in the court below in this case, did not sit at the hearing, and took no part in this decision.

ON MOTION TO DISMISS.

Motions to dismiss the appeal were interposed by respondents the Durham Land & Cattle Company, appearing by their attorney, Arthur Brown, and by A. and N. Bartholomew, appearing specially by their attorney, S. B. Kingsbury. The court, not passing upon the same before the case was called for hearing upon its merits, announced that it would consider said motions and the case together.

HUSTON, J. The motion to dismiss the appeal in this case is moved upon several grounds by the attorneys of the various groups of defendants. We have examined them with considerable care, in connection with the transcript; and while some of the grounds might appear to be well taken, under a technical adherence to the rule of strict construction, we are advised by our statutes that we are to construe the same liberally, for the promotion of justice, and, acting under that injunction, we feel compelled to overrule the motions. It is urged that the notice of appeal was not served on all the adverse parties or their attorneys. The transcript shows that there were 50 parties to this action, —5 plaintiffs and 45 defendants. The defendants were represented by some 8 or 10 different attorneys, several of whom resided outside of this state. It is evident

the counsel for appellants made most strenuous efforts to make service on all proper parties or their attorneys, and, we think, succeeded, to the extent of bringing their case within the provisions of the statute. The courts of Idaho have been very liberal in extending license to practice to non-resident counsel, and it may well be questioned whether the provisions of our statutes in regard to service of papers extend beyond the territorial limits of the state. Be that as it may, the service in this case was, in our opinion, sufficient. It is objected that the bond on appeal is insufficient. This defect has been cured by the filing of a sufficient bond, as provided by statute. Various other objections were urged, most of which have been withdrawn, and none of which, we think, were of weight to warrant a dismissal of the appeal.

STATE v. O'BRIEN *et al.*

(March 4, 1892.)

MURDER—SUFFICIENCY OF EVIDENCE.

Evidence sufficient to sustain verdict.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

John Bestone, James Mike, and one O'Brien were indicted for murder. Defendant O'Brien was not apprehended. Verdict of guilty of murder in the second degree, and judgment thereon against said Bestone and Mike. From this judgment, and from an order overruling a motion for a new trial, they appeal. Affirmed.

E. P. Blickensderfer and *T. M. Stewart*, for appellants.

Where there is no evidence to support an instruction, the giving of such is an error. *Ellis v. Jeans*, 7 Cal. 417; *People v. Byrnes*, 30 Cal. 208; *Dowell v. Williams*, 33 Kan. 319, 6 Pac. Rep. 603; *Feineman v. Sachs*, 33 Kan. 621, 7 Pac. Rep. 225.

In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. *Wills, Circ. Ev. p. 449*; *Greenl. Ev. p. 22, note*.

If evidence is entirely circumstantial, each independent circumstance forming a link in the proof must appear beyond a reasonable doubt. *People v. Phipps*, 39 Cal. 326; *People v. Anthony*, 56 Cal. 397;

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People v. Shuler, 28 Cal. 490; *People v. Strong*, 30 Cal. 151; *People v. Diek*, 32 Cal. 213; *People v. Foley*, 64 Mich. 148, 31 N. W. Rep. 94.

George H. Roberts, Atty. Gen., for the State.

If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict. *Kile v. Tubbs*, 32 Cal. 332; *Doll v. Anderson*, 27 Cal. 250.

While courts may set aside a verdict as against the weight of evidence, they will rarely disturb the finding of a jury upon the facts. The refusal of the court to do so is not reviewable here when there is any evidence to sustain the charge. *Harley v. State*, 6 Ohio, 399-405; *State v. Cruise*, 16 Mo. 391; *Wolf v. State*, 11 Ind. 231; *Giles v. State*, 6 Ga. 276-286; *State v. Elliott*, 15 Iowa, 72-79; *State v. Crytes*, 24 Ark. 183, 184.

A conspiracy may be proved by circumstances, among which are the acts of the parties in doing the injury which is the alleged object of the conspiracy. *Wood*, Pr. Ev. p. 236; 2 Bish. Crim. Proc. § 227; *Ochs v. People*, 124 Ill. 421, 16 N. E. Rep. 662; 1 Whart. Crim. Law, § 860, 118.

MORGAN, J. The three defendants were indicted for the murder of David Stoddard. Defendant O'Brien not having been apprehended, defendants Mike and Bestone were tried before the court and a jury. The jury found the two defendants guilty of murder in the second degree, and they were sentenced to 10 years each in the penitentiary. The defendants appeal from this judgment and from the order overruling the motion for a new trial. The following errors are assigned: First, the giving of the following instruction, viz.: "If the jury believe from all the evidence, beyond a reasonable doubt, that it was understood by and between the defendants and said O'Brien, after said O'Brien had been struck by Stoddard, if the jury believe that he was so struck by Stoddard, that the defendants at bar should watch Stoddard, and prevent his leaving the saloon, or detain him while on his way from said saloon, and thus enable said O'Brien to provide himself with a weapon, and give him an opportunity to kill Stoddard, or inflict serious bodily injury on him, and that in pursuance of said understanding or agreement the defendants did stop Stoddard after he left

the saloon, and detain him, and thereby gave O'Brien an opportunity to kill him, the jury should find the defendants, or whichever of them did so act, guilty of murder." The defendants object to this instruction, on the ground that there is no evidence tending to prove that defendants, or either of them, stopped Stoddard on the street.

B. W. Nelson swears: "I was at Beaver Canon, and was running the work train on the 24th of August last. Knew these defendants, and had seen O'Brien. These men were working under Mr. Whalen, and I had charge of the train. O'Brien was an Italian, I think. Know where Poulsen's saloon is in that town, and was there on the night of the 24th of August. Went in about 8 o'clock in the evening. There were several in the saloon, among whom were these defendants O'Brien and Collier. When I went in, the larger man of these two was kicking the other man's hat, and O'Brien was talking to the brakeman. Stoddard came in while Bestone was kicking the hat about. Stoddard appeared just as Bestone was kicking the hat to the door, and he kicked Stoddard on the hand. Stoddard asked what was the matter, and Pestone said something in reply. Stoddard told them not to make so much noise. O'Brien then went up to Stoddard and said, 'Who are you?' Stoddard said, 'I am an officer, and want you to keep still.' O'Brien then made a very vile and insulting remark to Stoddard, and then turned to go towards the brakeman. Stoddard then hit him over the head with a gun, (meaning a revolver.) O'Brien then turned and asked what was the matter. Stoddard asked, 'What was that you said?' O'Brien said, 'I didn't say anything.' O'Brien then went over and had some beer. Stoddard asked us all to have a drink. All came up and took something. I took a cigar. Just at the same time O'Brien and these two defendants stepped out doors, and the three were standing there talking half a minute, and then O'Brien went towards the outfit car, and these two went the other way by the stone store. I mean by the 'outfit cars' the place where they live. There were four or five cars. Don't know which cars these defendants slept in. After O'Brien started I did not watch him. After I got outside I went over to the office, and sent a message to find out where we were to work next day. I think I was gone to the office 15 or 20 minutes. I then walked

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over to Poulsen's saloon. Saw Stoddard standing on the plank walk, talking to these two defendants. I spoke to Stoddard, and then told these two defendants it was time they were going home. They said, 'Yes; but come and have some more beer.' I said, 'No; you must go to bed, for you will have to work to-morrow.' They said, 'All right,' and then asked Stoddard to have a drink. They both then shook hands with Stoddard. I then put my hand on Bestone's shoulder, and he turned off to one side and again shook hands with Stoddard. Their conversation was directed to Stoddard. Don't know where these two defendants were while I went to the depot. I was about 35 feet from them when I first saw them. From Poulsen's to railroad track was about 70 or 100 feet. The stone store is 4 or 5 feet from the sidewalk. These defendants were facing the saloon, and Stoddard was facing the railroad track. I was facing defendants, and had a good view of saloon and what was in front of it. I turned around, and started to go towards the track. Had got several steps, and heard a scuffle and turned around. I saw two persons scuffling, and saw some one fall. I started towards them. Before I could get there I heard Collier say, 'Good God! He is dead.' As he said that O'Brien stepped off the platform. I stepped down. O'Brien started towards me, and I picked up a railroad link. O'Brien started off and got 25 or 30 feet. I threw the link at him. Struck him on the shoulder, and knocked him down. He struggled to his feet, and started towards the depot. I made a pass at him. He dodged and struck at me, missing me about eight inches. As he passed by the light I saw something shining, and said to myself, 'That is a razor.' I stepped back on the platform and asked what was wrong. There were two or three there then. They said Stoddard was dead. We carried him into the saloon. I think he took about one breath after we got him into the saloon. His head was nearly cut off. There had been two cuts, and there was nothing but the bone holding the head on. I did not see these defendants after that, and don't know where they went. When the scuffle commenced they were right ahead of me, and together. Stoddard resided across the railroad track, west from saloon, and from where he was killed. He was dead when we got him in the saloon." On cross-examination witness said: "I did not see

defendants go behind the stone store, but saw them stop on the sidewalk, going west. When I left the saloon the first time there was no one in the saloon but Stoddard, Collier, and two brakemen."

E. V. Collier was then called as a witness. Collier's testimony corresponds substantially with that of Nelson's down to the time that O'Brien was struck. He swears that at the time that O'Brien was struck he asked Stoddard what that was for, and then turned away, and said that he was going to bed, and walked over to the two defendants, and they went to the door. They were talking outside the door two or three minutes. I could see them through the opening in the door. After this conversation, one went south-east and the others went west. About 20 minutes after the Italians had the talk at the door Stoddard said that he would have to go to bed, and went out and started to the railroad track, west. I started with Stoddard, and about 100 feet from Poulsen's we met these men. Stoddard was ahead of me. They came down the plank walk, and made a loud noise with their feet, and came up in front of Stoddard, and Stoddard said, 'Now what, boys?' They said, 'Me one more beer, you one more beer.' Stoddard said, 'No;' that he had beer enough. One of them had his back turned towards the building and the other was facing. Just at this time O'Brien jumped out from the buildings and cut Stoddard down. I was there only five minutes. They were directing their conversation to Stoddard, but none to me, and they asked Stoddard to drink, and shook hands with him, but not with me or Nelson. One of them shook hands with him twice, the other once. I think we were 16 to 18 feet from where he sprang to where we stood, and when he came he came as fast as he could. I was about five feet from him. He used a razor with about three motions, and Stoddard fell, and he went down on him. I grabbed him by the collar, and he made several cuts at me. He got loose and ran, with Nelson after him. I do not know where the defendants were at the time, or where they went. We then carried Stoddard into the house, and he died in two minutes." Collier further testified that just as O'Brien sprang out they (the defendants) turned and went away. "I did not see anything of O'Brien until he sprang out, and when he sprang these others went on."

W. H. Bassett swears that he heard of the trouble, and went into Burnside's. "I

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saw two Italians in front of the store talking. I don't know what about. The larger one was one of them. As I passed the door of the saloon the second time I saw them on the platform with Stoddard. Then I went away."

Poulsen swears that he knew O'Brien and these two defendants. They were all Italians. Saw them in the saloon. Heard O'Brien's insulting remark to Stoddard, and saw Stoddard strike him. After this O'Brien went and talked to these two in their own language. They were by the door, and talked in a low tone, and were close together, and then went away. In about 10 minutes O'Brien came back, and had something in his hand, shining. He came in, looked around, and then went out. I heard no noise, but some one came in and said Stoddard was bleeding to death. The testimony of one of the brakemen was to the same effect.

The defendant Bestone was sworn in his own behalf and that of the other defendant, and testifies that they did not talk to O'Brien at the door of the saloon. States that they left the saloon, and did not stop to talk to anybody. Went down and went to bed. States that when they left O'Brien was in the saloon, talking to some one; that they did not shake hands with Stoddard.

What took place in the saloon, and the conversation at the door between the three Italians, was sworn to by four witnesses. It is unquestionably true. Yet Bestone denied it positively on two occasions, and denied shaking hands with Stoddard, and stated that they did not talk to O'Brien in the saloon nor outside the saloon. Never saw him again that night. "We talked to no one except Nelson after we left the saloon." Did not talk with Stoddard, and repeats that he shook hands with Nelson, no one else. It is evident that these two defendants and O'Brien talked together at the door of the saloon just after O'Brien was struck; that O'Brien left the saloon at the same time they did; that he went for the razor, and these two went up the sidewalk the other way, and stayed 10 to 20 minutes, lingering about, and did not come back towards the saloon until Stoddard came out to go home; that they then met him, and had some conversation with him, and shook hands with him twice,—every circumstance of which was denied positively by the defendants at each of the two trials. The excuse is made that they could not talk English well, but one who does not

talk English well can tell the truth as easily as he can tell that which is false, in broken English. No circumstance that took place that night could be forgotten, as Stoddard was killed, and they were arrested the next day for the crime. Every fact would be burned into their memories. A man can recollect as well in the Italian language as he can in English. It is evident that the defendants deliberately and intentionally testified falsely with reference to every material inculcating fact that occurred at the door of the saloon, in the saloon, and on the walk where Stoddard was killed. It was contended with much earnestness by the counsel for appellants that every circumstance could be reasonably explained in a manner consistent with the innocence of the defendants. It is not explained, and it is difficult to explain, why these two defendants remained on the walk, or up at the track, one to two hundred feet of the saloon, all the time O'Brien was gone in the other direction for his razor. They talked with O'Brien at the door of the saloon. Why did they not go straight across to the outfit cars with O'Brien if they were going to bed, instead of going to near the railroad track, and remaining there while he was gone? These things are difficult to explain, but the falsehood of the defendants in regard to all these facts cannot be explained. It is unexplainable, and the fact that they could only talk in broken English is no sort of excuse for falsehood. Truth agrees with every circumstance perfectly. Falsehood agrees with nothing, is the companion of nothing except guilt. Truth is always seized upon by the innocent as a sure defense, by the guilty never. The jury saw all the witnesses upon the stand, and could judge of their truthfulness. They were carefully and fully instructed in the law by the court. The judge who tried the cause also doubtless carefully noted the testimony, and certainly would not permit a judgment of this kind to stand if there was reasonable doubt of guilt. The instruction complained of was given in view of this testimony, and the testimony is so strong and the evidence of guilt so complete that we cannot but approve of the judgment. The testimony related is a sufficient answer to the second assignment of error, which was that the evidence was insufficient to support the verdict. We think it is sufficient. Judgment affirmed.

SULLIVAN, C. J., and HUSTON, J., concur.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

MARCH TERM, 1892.

SPOKANE & P. RY. CO. v. LIEUALLLEN.

(April 1, 1892.)

CONDEMNATION PROCEEDINGS—MEASURE OF DAMAGES—EVIDENCE.

1. In proceedings for the condemnation of land for railroad purposes under the statutes of Idaho, the value of the land at the time it is taken is the measure of damages, and it is error to admit evidence of value at time of trial. Where, however, one witness stated the basis of his estimate of damages to be the value of land at the time of the trial, and several others stated that their estimate was based upon the value at the time of the taking, and the court repeatedly charged the jury that the value of the property at the time of the taking was the true basis, the refusal of the court to strike out the testimony of such first witness *held* not to be reversible error.

SAME.

2. It is error to estimate damages, in such a case, upon what has been paid by the corporation seeking the condemnation of land to owners of adjacent property.

(*Syllabus by the Court.*)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by the Spokane & Palouse Railway Company against A. A. Lieuallen to condemn a certain piece of defendant's land for a roadbed and right of way for plaintiff's railway. From a judgment entered on a verdict awarding defendant damages, and from an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

Hyde, McBride & Allen and *Forney & Tillinghast*, for appellant.

The value of the land at the date of the

summons, and not the present value, must be taken in determining the value by the jury. *Railroad Co. v. Mayne*, 83 Cal. 566, 23 Pac. Rep. 522; *Railroad Co. v. Kimball*, 61 Cal. 91; *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673.

James W. Reid, for respondent.

Improper admission of evidence, to justify reversal of judgment, must appear to have injuriously affected the party objecting to its admission. *Latterett v. Cook*, 63 Amer. Dec. 428; *Barton v. Kane*, 84 Amer. Dec. 728; *Kisling v. Shaw*, 91 Amer. Dec. 645; *City of Ripon v. Bittel*, 30 Wis. 620.

Error in admitting evidence, if same result must have been reached had the evidence been excluded, is no ground of reversal. *Rockhill v. Spraggs*, 68 Amer. Dec. 607; *Sims v. Boynton*, 70 Amer. Dec. 540; *Ganson v. Madigan*, 82 Amer. Dec. 659.

Judgment will not be reversed by reason of improper admission of testimony if the facts sought to be proven by such testimony had been clearly established by other evidence. *Spencer v. Railroad Co.*, 84 Amer. Dec. 758.

HUSTON, J. Plaintiff, a railroad corporation organized under the laws of the state of Washington, brings this action to condemn certain real estate situate in Latah county, state of Idaho, belonging to defendant, for railroad purposes. The action is brought under the provisions of title 7, Rev. St. Idaho. Complaint was filed and summons issued on September

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26, 1890. Answer filed February 2, 1891. The only issue raised by the pleadings is the amount of damages assessable against plaintiff corporation for the land sought to be condemned. The cause was tried before a jury at the June term, 1891, of the district court for Latah county. Verdict and judgment for the defendant for \$900. Motion for new trial overruled, and appeal by plaintiff from both order and judgment. Section 5220, Rev. St. Idaho, provides that "the court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess (1) the value of the property sought to be condemned, and all improvements thereon pertaining to the realty," etc.; "(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff; (3) separately, how much the portion not sought to be condemned, and each estate or interest therein, will be specially and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff," etc.; "(4) if the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards, when fence may cross the line of such railroad; (5) as far as practicable, compensation must be assessed for each source of damages separately." Section 5221 provides: "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases when such damages are allowed, as provided in the last section," etc. The jury rendered the following verdict: "(1) We find that the value of the property sought to be condemned, and all improvements thereon pertaining to the realty, is the sum of six hundred dollars. (2) We find that the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned and the construction of

the railway in the manner proposed by the plaintiff, amount to three hundred dollars. (3) We find that the portion not sought to be condemned will be specially and directly benefited by the construction of the railway proposed by the plaintiff in the sum of — — — dollars."

Several witnesses were examined on the part of plaintiff and defendant as to the value of the property sought to be condemned, and the damages. The testimony is conflicting, the witnesses varying in their estimates from \$300 or \$400 to \$2,000. It is urged by appellant, as a ground for reversal, that one of the witnesses for defendant, upon his cross-examination, testified that he based his estimate of damages upon the present value of the property, while the statute fixes the value of the property at the time it was taken as the rule. We think the court erred in allowing this testimony to stand against the plaintiff's motion to strike it out, but we think such error was rendered harmless by the reiterated charge of the court to the jury that they were to find from the evidence the value of the property on September 27, 1890, the time of the taking. It is also objected by appellant that one Campbell, a witness on the part of the plaintiff, upon cross-examination, stated that the basis of his estimate of damages was that the plaintiff corporation had allowed \$800 for right of way over property adjacent to that of defendant, and that he considered the damage of defendant double that of the party to whom the \$800 was allowed. But an examination of the record shows that this was only one of various grounds upon which this witness based his estimate of damages, and, while we think it would have been eminently proper for the court to have stricken out that part of the witness' testimony wherein he gave as one basis of his estimate of damages the price paid by the plaintiff corporation to another party, still the rest of his testimony must stand, and that would fully support the finding of the jury, corroborated, as it was, by the testimony of several other witnesses. From a careful consideration of the record we are satisfied that there is not such error shown therein as would justify this court in reversing the judgment. Judgment of district court is affirmed, with costs to the respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

*State v. Doherty.*STATE *v.* DOHERTY *et al.*

(April 21, 1892.)

STATUTE—ENACTMENT—TITLE.

1. An act entitled "An act to regulate the sale of intoxicating liquors in less quantities than one quart" was passed by the house of representatives, and transmitted to the senate. By the senate amendments to said act, all of that part of said act referring to the sale of intoxicating liquors in quantities less than one quart was stricken out. Thereafter the bill was returned to the house as amended by the senate, which amendments were concurred in by the house. Thereafter the title of the act was amended by the house by striking out the words following, to wit, "in less quantities than one quart." After said title was so amended the bill was not transmitted to the senate for its concurrence in said amendment, but was properly enrolled with the title as amended by the house, and thereafter approved by the governor. *Held*, that the amendment of the title as made by the house was not one of substance, and did not invalidate said act.

SAME.

2. The subject of said act is fairly indicated by the title, and said title is comprehensive enough to include the provisions contained in said act in regard to a license tax.

CONSTITUTIONAL LAW—UNIFORMITY OF TAXATION—LIQUOR LICENSE.

3. The provisions of sections 2, 5, art. 7, Const. Idaho, requiring equality and uniformity of taxation upon the same class of subjects, is not applicable to the license tax imposed by section 4 of an act entitled "An act to regulate the sale of intoxicating liquors." 1 Sess. Laws Idaho, p. 34. Said act is a police regulation.

SAME—POLICE REGULATIONS.

4. As a police regulation, the price of licenses may be graduated by some standard, provided such standard is reasonably fair and just.

SAME.

5. The standard of graduation provided by section 4 of said act is reasonably fair and just. (*Syllabus by the Court.*)

Appeal from district court, Shoshone county; J. HOLLEMAN, Judge.

Action by the state against James Doherty and Michael Meagher to recover a sum alleged to be due for a license for selling intoxicating liquor. From a judgment for plaintiff, defendants appeal. Affirmed.

Jones & Harkness, for appellants.

The only limitation upon the taxing power of the legislature is equality and uniformity. *People v. Burr*, 13 Cal. 343; *People v. Seymour*, 16 Cal. 332; *Beals v. Amador Co.*, 35 Cal. 624; *Railroad Co. v. Stockton*, 41 Cal. 148; *People v. Brooks*, 16 Cal. 11.

Uniformity requires that the law affect alike all person or things of the same class. *People v. Coleman*, 4 Cal. 46; *Brooks v. Hyde*, 37 Cal. 367; *Ex parte Smith*, 38 Cal. 710; *Ex parte Lichtenstein*, 67 Cal. 359, 7 Pac. Rep. 728.

The word "taxes" embraces all impositions made by the government upon the person, property, principles, enjoyments, and occupations of the people for the purpose of a public revenue. 7 Lawson, Rights, Rem. & Pr. § 3879.

A license fee for the transaction of business is a tax. *City of Santa Barbara v. Stearns*, 51 Cal. 499; *License Tax Cases*, 5 Wall. 462.

Ordinances fixing a higher rate of license for sample sellers than for other merchants is invalid. *Ex parte Frank*, 52 Cal. 606.

The legislature cannot designate one class of persons because of their race as special objects of taxation. *Lin Sing v. Washburn*, 20 Cal. 534.

Discrimination in favor of or against any classes of property or persons whatsoever must be precluded. *Primm v. Belleville*, 59 Ill. 142.

Charles W. O'Neil, for the State.

Regulation is the object of the constitution in granting the power to impose license taxes. *Cooley, Tax'n*, (2d Ed.) p. 597.

Hawley & Reeves, amici curiæ.

A license tax upon a business, and which is required for the sale of goods, is a tax upon the goods themselves, in effect. *Welton v. State of Missouri*, 91 U. S. 275-278; 1 *Desty, Tax'n*, p. 300 et seq.; *Burroughs, Tax'n*, p. 146 et seq.

Uniformity is as necessary to a tax levied or collected to aid the police power as it is in taxation for any other purpose. *Durachs' Appeal*, 62 Pa. St. 491; *Sacramento v. Crocker*, 16 Cal. 119; *Wiley v. Owens*, 39 Ind. 429; *Slaughter v. Com.*, 13 Grat. 767; 1 *Hare, Const. Law*, 296 et seq.; *Pleuler v. State*, 11 Neb. 558, 10 N. W. Rep. 481; *Burroughs, Tax'n*, § 54.

SULLIVAN, C. J. This is an action brought to recover from the defendants the sum of \$125, alleged to be due the state for a license for selling intoxicating liquors for the quarter commencing October 1, 1891, and involves the constitutionality of an act entitled "An act to regulate the sale of intoxicating liquors," approved Feb. 6, 1891. See 1 Sess. Laws Idaho, p. 33. The case was tried upon an agreed

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stipulation of facts, and judgment rendered by the court below in favor of the plaintiff, from which judgment this appeal was taken. The appellants contend that the court below erred—*First*, in holding that section 4 of said act approved February 6, 1891, was constitutional; and, *second*, in case said section is constitutional, then the court erred in rendering judgment against the defendants for more than \$75.

After the case was submitted to this court, Messrs. Hawley & Reeves having been retained to present to the district court of the third judicial district, and from that court to this court, for final decision, a case involving the constitutionality of said act, approved February 6, 1891, upon their application were permitted to present their printed brief in this case, to be considered by this court in the final determination of the case. In addition to the two points raised by appellant's specification of errors, Messrs. Hawley & Reeves contend that said act is void, for the reason that it was not legally passed or enacted by the legislature; that the legislature in its pretended enactment thereof violated the provisions of article 3 of the constitution of Idaho, in this: that the house of representatives amended the title of said act after it had passed the senate, and failed to return said bill, with its amended title, to the senate for its concurrence thereto.

We will first consider the point as to whether said act was legally enacted by the legislature. The passage of the act in question occurred as follows: The bill was introduced in the house of representatives, January 5, 1891, and designated as "House Bill No. 24," and entitled "An act to regulate the sale of intoxicating liquors in less quantities than one quart," (see House Jour. 1891, p. 45,) and was thereafter passed and transmitted to the senate. The senate passed the bill, with amendments, February 3, 1891. The bill was then returned to the house, with the senate amendments, and on the 5th day of February, 1891, the bill, with the senate amendments, was taken up by the house, and adopted and concurred in. It was then moved to amend the title to said bill by striking out the following words, to wit, "in less quantities than one quart," which amendment was agreed to, and said words stricken out. See House Jour. pp. 114, 115. The bill was not returned to the senate for its concurrence in the house amendment of the title, but was referred to the

committee on enrollment, and thereafter reported as correctly enrolled, and presented to the governor for his approval, with the title as amended, on February 6, 1891, and approved by him on that day. The provisions of section 4 of said bill, when first introduced in and passed by the house of representatives, related to the sale of intoxicating liquors in less quantities than one quart, but when amended by the senate related or applied to intoxicating liquors to be drank in, on, or about the premises where sold, regardless of the quantity. The senate, after so amending the bill as to strike out all provisions contained therein in regard to the quantity of intoxicating liquors sold, omitted or failed to strike out of the title that part thereof referring to quantity. That failure or omission may be regarded as a mere oversight or clerical error. After the senate amended said bill, that part of the title referring to the quantity of liquor sold was mere surplusage, as no part of said act contained any provisions referring to the quantity. The amendment of the title, as made by the house of representatives, was not one of substance, and did not invalidate the act. *Plummer v. People*, 74 Ill. 361; *Ballou v. Black*, 17 Neb. 389, 23 N. W. Rep. 3; *Binz v. Weber*, 81 Ill. 288; *Johnson v. People*, 83 Ill. 435.

It is also contended that said act is in contravention of section 16, art. 3, Const. Idaho, in this: that the subject-matter of the act is not embraced in the title thereof, so far as the license tax is concerned; hence that part of the act relating to the license is void for that reason. Judge Cooley, in his work on Constitutional Limitations, (6th Ed.) pp. 171, 172, states the purpose of constitutional provisions, such as we have in said section 16, art. 3, as follows: "It may therefore be assumed as settled that the purpose of these provisions was—*First*, to prevent hodgepodge or 'log-rolling' legislation; *second*, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the title gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted; and, *third*, to fairly apprise the people, through such publication of legislative proceeding as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." He further says: "The general purpose of

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these provisions is accomplished when a law has but one general object, which is fairly indicated by the title. To require every end and means necessary and convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible." *Id* 172. Section 16, art. 3, of the constitution must be given a reasonable construction. It is sufficient if the act treats of but one general subject, and that subject expressed in the title. To hold that each subdivision of the subject, and each and every of the ends and means necessary for the accomplishment of the object of the act, must be specifically mentioned in the title, would greatly embarrass legislation, and accomplish no legitimate purpose. The title to said act is comprehensive enough to include all provisions necessary and convenient to regulate the sale of intoxicating liquors. It is comprehensive enough to include the provisions of said act in regard to a license tax, that being one of the means usually employed for the purpose of regulating the sale of intoxicating liquors.

It is contended that section 4 of the act in question is in conflict with the provisions of sections 2 and 3 of article 7 of the constitution of Idaho, requiring equality and uniformity of taxation upon the same class of subjects. Section 4 of said act provides as follows: "The amount to be paid by each applicant for such license shall be the sum of \$500 per year, or a proportionate amount for each fraction of a year, in any city, town, village, or hamlet where, at the last general election next preceding the date of the application for license, the total vote for governor exceeded 150 votes, and \$300 per year in all other cities, towns, villages, or hamlets: provided, that all persons engaged in retailing liquors in connection with an hotel or tavern where meals and lodgings are kept and furnished in good faith for the entertainment of travelers, at any point distant three miles or more outside of the limits of any city, town, village, or hamlet, shall pay a license therefor of \$100 per year, or a proportionate amount for each fractional part of a year: and provided, further, that no license issued under the provisions of this act shall be for a less time than three months, and no license shall be granted for a longer period than one year." Section 2, art. 7, of the constitution, is as follows: "The legislature

shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax both upon natural persons and upon corporations, other than municipal, doing business in this state; also a *per capita* tax: provided, the legislature may exempt a limited amount of improvements upon land from taxation." Section 5 of said article 7 is as follows: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory shall continue until changed by the legislature of the state: provided, further, that duplicate taxation of property for the same purpose, during the same year, is hereby prohibited."

We are of the opinion that the provisions of said sections of the constitution requiring equality and uniformity of taxation upon the same class of subjects do not apply to the license tax provided for in said section 4 of said act. No one can doubt (who reads the act in question) that the intention of the legislature, in its passage, was to regulate a traffic which was believed by them to be pernicious in its effects upon society, and not for the purpose of raising revenue. The principal object was to regulate such traffic, not to raise revenue. The constitutional provision in regard to equality and uniformity of taxation has reference solely to "taxation," pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue only. It does not apply to those impositions made under the police power of the state, as a means of constraining and regulating a business that may be regarded as evil in its effects upon society. In *Burroughs on Taxation* (page 147) it is stated that the provisions of the constitution as to equality and uniformity of taxation do not apply to licenses. See, also, 1 *Desty, Tax'n*, 305, note 5; 2 *Desty, Tax'n*, 1385 et seq.; *Fahey v. State*, (Tex. App.) 11 S. W. Rep.

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108; Allentown v. Gross, 132 Pa. St. 319, 19 Atl. Rep. 269; Pleuler v. State, 11 Neb. 547, 10 N. W. Rep. 481; East St. Louis v. Wehrung, 46 Ill. 392; People v. Thurber, 13 Ill. 554; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560; Distilling Co. v. Chicago, 112 Ill. 19; New Orleans v. Railroad Co., 41 La. Ann. 519, 7 South. Rep. 83.

The contention that said section 4 is unconstitutional, for the reason that the license tax is not the same on each person engaged in selling intoxicating liquors, is fully answered by the authorities last above cited. Under said act the license tax is graduated by the number of votes cast for governor at the last general election next preceding the date of the application for a license. If the total vote cast for governor at such election exceeds 150 votes, then the applicant is required to pay a license of \$500 per annum; and if such vote did not exceed 150 votes, then the applicant must pay \$300 per annum. The act in question is a police regulation, and, as such, the price of licenses may be graduated as indicated therein. In *Ex parte Marshall*, 64 Ala. 266, Justice STONE, delivering the opinion of the court, says: "Inasmuch as the price of a license may be graduated by the populousness of the community in which the privilege is to be exercised, and by the profitableness of the employments, amusements, games, etc., it authorizes, this assessment is not obnoxious to the objection that it is not levied equally throughout the taxable district." See, also, *East St. Louis v. Wehrung*, supra; *State v. O'Hara*, 36 La. Ann. 93; *New Orleans v. Railroad Co.*, 41 La. Ann. 519, 7 South. Rep. 83; *Allentown v. Gross*, 132 Pa. St. 319, 19 Atl. Rep. 269. In *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. Rep. 288, the court holds that a license tax may be graduated by some standard, provided such standard is fair and just. We are of the opinion that the intention of the legislature was to graduate the license tax for selling intoxicating liquors by the populousness of the community in which the business was carried on, and the method of ascertaining such fact was by referring to the vote cast for governor at the election next preceding the application for a license. The standard for graduating the license tax, prescribed by the act in question, is reasonably fair and just. The judgment of the court below is affirmed, with costs of this appeal.

MORGAN and HUSTON, JJ., concur.

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(May 18, 1892.)

MORTGAGE—WHAT CONSTITUTES—DEED ABSOLUTE ON FACE.

1. A deed absolute on its face, and a separate agreement by the grantee for reconveyance of the same tract of land to grantor, upon payment of consideration named in the deed, with interest, taxes, etc., by specified time, bearing same date as deed, constitute together a mortgage.

SAME—RIGHTS OF GRANTOR—EJECTMENT.

2. In such case ejectment will not lie by grantee to obtain possession of land from grantor.

SAME—FORECLOSURE.

3. The remedy is foreclosure, under section 4520, Rev. St. Idaho, et seq.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. PIPER, Judge.

Ejectment by Madison A. Kelley against Samuel S. Leachman. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

E. O'Neill, for appellant.

A deed absolute in form may be a mortgage by there being a written defeasance, or a verbal defeasance, or both. *Smith v. Smith*, 80 Cal. 323, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549; 2 Devl. Deeds, §§ 1100, 1102, 1103; 4 Kent, Comm. (12th Ed.) *142, *143.

The intention of the parties controls, and, in case of doubt, courts always incline to and determine the instrument to be a mortgage. 2 Washb. Real Prop. pp. 60, 66; *Russell v. Southard*, 12 How. 139; *Peugh v. Davis*, 96 U. S. 331.

A sale in form, but which in fact and substance may be avoided by the payment of money within a given time, is, and will be, held to be a mortgage. If a mortgage until that period elapses, it must forever remain a mortgage. *Hickox v. Lowe*, 10 Cal. 197; *Robinson v. Cropsey*, 2 Edw. Ch. 138; 2 Devl. Deeds, §§ 1115, 1107; 4 Kent, Comm. *142, *143; 2 Washb. Real. Prop. p. 65.

Where the terms of the agreement naturally lead to the conclusion that the transaction was intended as security for a debt, clear and decisive proof is requisite to overcome their import. *Hickox v. Lowe*, 10 Cal. 197, 211; *Horn v. Keteltas*, 46 N. Y. 605; *Holmes v. Grant*, 8 Paige, 243.

The determination as to whether the

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statute of limitation had run against the conveyance as a mortgage, and whether as a deed the action of ejectment were not barred by the adverse possession of the defendant for over five years, was in issue by pleadings and evidence, and should have been found. *Spotts v. Hanley*, 85 Cal. 155, 168, 24 Pac. Rep. 738; *Knight v. Roche*, 56 Cal. 15, 17; *Spreckels v. Ord*, 72 Cal. 86, 13 Pac. Rep. 158; *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570.

Limitation on mortgage or mortgage debt is same as on bond or unsecured note. *Wormouth v. Hatch*, 33 Cal. 121; *Arrington v. Liscom*, 34 Cal. 366.

All testimony showing the circumstances, understanding, or agreement under which the deed and defeasance were executed is both admissible and requisite, and decision based on part of the evidence of the case is against law. *Knight v. Roche*, 56 Cal. 17; *Pierce v. Robinson*, 13 Cal. 116; *Russell v. Southard*, 12 How. 139; *Hushon v. Husheon*, 71 Cal. 407, 12 Pac. Rep. 410; *Gay v. Hamilton*, 33 Cal. 686; *Pengh v. Davis*, 96 U. S. 332.

Rand & Howe, for respondent.

A bond, in terms a defeasance, as that the grantee shall reconvey to the grantor, upon being paid a certain sum, does not convert the original conveyance into a mortgage. 2 Washb. Real Prop. 63; *Trull v. Skinner*, 17 Pick. 216; *Green v. Butler*, 26 Cal. 605; *Hughes v. Davis*, 40 Cal. 117.

Before the statute could be set on foot there must be some repudiation of the contract,—some positive denial of the right of plaintiff. *Love v. Watkins*, 40 Cal. 568.

Before defendant could have any standing in a court of equity he must fully pay the amount agreed upon or offer to redeem, and even this would be no bar to ejectment, but must bring his suit, after surrender, for a reconveyance or *assumpsit*. *Duclos v. Walton*, (Nov. 24, 1891,) 21 Or. 323, 28 Pac. Rep. 1; *Townsend v. Petersen*, 12 Colo. 491, 21 Pac. Rep. 619.

MORGAN, J. On the 26th day of July, 1883, the defendant, S. S. Leachman, was the owner of, and in possession of, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 26, in township 35 N., of range 5 W. of Boise meridian, in Nez Perces county. On that day he gave the plaintiff, Madison A. Kelley, a deed of conveyance of the said tract of land, ab-

solute on its face, with covenants of warranty, for the consideration of \$1,661.39. The deed was made, executed, and delivered in the forenoon of said day. In the afternoon of the same day, in pursuance of the agreement of the parties, the plaintiff executed the following agreement to reconvey and deliver the same to the defendant: "This agreement, made and entered into this 26th day of July, A. D. 1883, between Madison A. Kelley, of the city of Lewiston, in the county of Nez Perces, in the territory of Idaho, party of the first part, and Samuel S. Leachman, of the same county and territory, the party of the second part, witnesseth: That whereas, the said party of the second part has this day conveyed by deed of warranty to the said first party the hereinafter described real property, situated in the county of Nez Perces and territory of Idaho, of the sum of sixteen hundred sixty-one and 39-100 dollars, lawful money of the United States of America, to said second party in hand paid, the said first party agrees that, in case the said second party shall, on or before the expiration of thirty months from this date, pay or cause to be paid to said first party the said sum of sixteen hundred sixty-one and 39-100 dollars, with interest on said sum at the rate of one and one half per cent. per month, and shall pay said interest annually, and the said second party shall pay all taxes and assessments legally levied and assessed upon said premises, during the term and at the time the same shall become due and payable, and the said second party shall pay the interest on a certain mortgage in the sum of two hundred and fifty dollars, made by said second party and wife and in favor of the Corbin Banking Company, and shall pay said interest at the time and times the same may become due, which said mortgage is a lien upon the north half of the southeast quarter of section twenty-seven, and the west half of the southwest quarter of section twenty-six, in township thirty-five north, of range five west of Boise meridian, then, in case the said second party shall fulfill all the conditions herein set forth, and at the time herein stated, and shall not suffer any waste to be committed to or upon said premises contained and described in said deed, the said first party will reconvey to said second party, his heirs or assigns, the north half of the southeast quarter of section twenty-seven, and the west half of the southwest quarter of

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section twenty-six, township thirty-five north, of range five west, containing one hundred and sixty acres; also the west half of the southeast quarter, and southwest quarter of the northeast quarter, and southeast quarter of the northwest quarter, of section nine, in township thirty-five north, of range five west of Boise meridian; containing one hundred and sixty acres. All of the above-described premises being the same as this day conveyed to the said first party by the said second party; and the said second party agrees to pay the said interest and taxes and assessments as the same shall become due; and in like manner to pay the interest upon the said Corbin Banking Company mortgage, and that he will not suffer any injury, waste, or damage to be committed upon or to said premises; and, in case any interest, taxes, or assessments should remain unpaid for thirty days after the same shall become due, he, the said second party, will then quit and surrender the whole of said premises to the said party of the first part, his heirs or assigns, and the whole amount shall be considered due. In witness whereof the said parties have hereunto set their hands the day and year first above written. M. A. KELLEY. SAMUEL S. LEACHMAN. Witness: JASPER RAND. Filed Oct. 28th, 1891."

The plaintiff on the 10th day of September, 1891, files his complaint, alleging ownership of the said tract of land; that the defendant on said date entered into possession of the said premises under the plaintiff. Various payments were made from year to year by the defendant to plaintiff upon the amount appearing to be due him, for principal and interest, by the terms of the said agreement, until about the beginning of the year 1890. In February, 1891, plaintiff demanded possession of the land, which defendant refused; whereupon plaintiff brings this suit in ejectment, alleging above facts, and that he is entitled to possession; that value of rents, issues, and profits of said premises is \$300, and that he has sustained damage in the sum of \$150; prays judgment for the recovery of the premises, for rents and profits, damages, and costs of action. Defendant denies ownership of plaintiff; that he was ever in possession; denies value of rents and profits and damages; alleges ownership; continued possession in himself; that the deed and defeasance were intended as a mortgage; alleges the payment of the whole \$1,661.39, principal and

interest; pleads statute of limitation; prays decree of dismissal, and that his title be quieted. The court entered decree of ouster, and judgment for \$100 rents and profits, and \$100 damages. Defendant moved for new trial, which being refused, he appeals, both from order overruling motion for new trial and from the judgment.

The proof shows that the plaintiff was never in actual possession of the land; that the deed was given to plaintiff for the amount of money named therein, which was furnished by the plaintiff to pay off certain indebtedness of the defendant to other parties. The agreement of defeasance, or for reconveyance, was given to afford defendant an opportunity to repay the money with interest, and thus procure a reconveyance of the land. The questions for the determination of this court are, was this an absolute conveyance of the title to the land in question, or must the deed and agreement to reconvey be held a mortgage, and will ejectment lie to gain possession of the land? The agreement to reconvey was executed on the same day as the deed. It was given by the grantee in the deed to the grantor; recites the giving of the deed; and contracts to reconvey the land described, upon the payment of the sum mentioned as the consideration in the deed, with interest thereon at a specified rate; all taxes and assessments, etc., made upon the land. These two writings, taken together, constitute a mortgage. 1 Jones, Mortg. § 20. It would have constituted a mortgage if there had been simply a parol agreement made between the parties to reconvey upon the payment of a stipulated sum. Id. § 248. It might have been in that case more difficult to prove the contract. This being an agreement in writing, there is no difficulty about the proof. In *Smith v. Smith*, 80 Cal. 325, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549, the court say: "It is the settled rule in that state that if a deed, absolute in form, was made merely to secure an indebtedness to the grantee, it is a mere mortgage, and does not pass the title." See, also, *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; 4 Kent, Comm. 142, 143. When, at the time of the execution of an absolute conveyance, a separate defeasance or agreement to reconvey is also executed, the transaction at law will constitute a mortgage. Where the deed and defea-

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sance have been executed and delivered at the same time, and form parts of one transaction, as in this case, the courts have universally considered them as constituting a legal mortgage. 2 Devl. Deeds, 1100, 1101; *Shaw v. Erskine*, 43 Me. 371; 1 Jones, Mortg. § 20; *Walker v. Manufacturing Co.*, 2 Colo. 89; *Knowlton v. Walker*, 13 Wis. 264; *Brinkman v. Jones*, 44 Wis. 498; *Sharkey v. Sharkey*, 47 Mo. 543; *Preschbaker v. Feaman*, 32 Ill. 475; *Ewart v. Walling*, 42 Ill. 453; *Archambau v. Green*, 21 Minn. 520; *Benton v. Nicholl*, 24 Minn. 221; *Brush v. Peterson*, 54 Iowa, 243, 6 N. W. Rep. 287. See, also, *Hickox v. Lowe*, 10 Cal. 197; *Russell v. Southard*, 12 How. 139.

The provision near the end of the agreement to reconvey, which is as follows: "And, in case any interest, taxes, or assessments should remain unpaid for thirty days after the same shall become due, he, the said second party, will then quit and surrender the whole of said premises to the said party of the first part, and the whole amount shall be considered due,"—does not change the character of the transaction as a mortgage. 1 Jones, Mortg. § 250. Parol evidence is admissible to show that an absolute deed and a separate defeasance are parts of the same transaction, and that together they were intended to constitute a mortgage. Such testimony does not contradict the writings, but shows the relation of one to the other. Id. § 248; *Gay v. Hamilton*, 33 Cal. 686; *Preschbaker v. Feaman*, 32 Ill. 475.

Since the deed and agreement to reconvey constitute a mortgage, our statute steps in to direct and control the remedy in case of default, which must be by foreclosure and sale. Section 4520, Rev. St. Idaho. Ejectment is positively and specifically forbidden. Section 4523, Id., is as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of a mortgage to recover possession of the real property, without a foreclosure and sale." Since the plaintiff is not seeking to recover any indebtedness in this action, and the action in its present form cannot be maintained, the amount paid on the debt is not in issue. As ejectment will not lie, the question as to whether such action is barred by statute of limitations is not in the case. For the same reasons the cross petition by defendant to quiet title to another and separate tract of land cannot be maintained herein.

Judgment reversed and cause dismissed, with costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

LATAH COUNTY v. PETERSON.

(June 6, 1892.)

CONSTITUTIONAL LAW — ESTABLISHMENT OF PRIVATE ROADS.

Section 933, Rev. St. Idaho, providing for laying out private or by roads, held to be constitutional.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Action by the county of Latah against E. G. Peterson to condemn a certain strip of defendant's land for a road. From a judgment entered on a verdict, awarding him \$100 damages, defendant appeals. Affirmed.

Freund & Loughary, for appellant.

The taking of private property for a private road is not conferred by the right of eminent domain; hence, when the legislature undertakes to authorize such appropriation of private property, it is an attempted delegation of a power not possessed by the legislature nor the people in legislative capacity, and is unconstitutional. *Taylor v. Porter*, 4 Hill, 140; *Witham v. Osburn*, 4 Or. 318; *Dickey v. Tennison*, 27 Mo. 373; *Com. v. Cambridge*, 7 Mass. 158; *Nesbitt v. Trumbo*, 39 Ill. 110; *Crear v. Crossly*, 40 Ill. 175; *Stewart v. Hartman*, 46 Ind. 331; *Blackman v. Halves*, 72 Ind. 515.

When the order of an inferior tribunal or of some precedent authority is necessary, a court acting without such order is without jurisdiction. *Lane v. Pferdner*, 56 Cal. 122; *Danielwitz v. Temple*, 55 Cal. 42; *Walbridge v. Ellsworth*, 44 Cal. 353.

Forney & Tillinghast and *Mitchell & West*, for respondent.

Judgment will not be arrested for lack of an essential averment in the declaration which is contained by implication in the averments used, or which may have been considered to have been proved as a part of what is alleged. Black, Judgm. § 100.

MORGAN, J. On or before the 15th day of July, 1890, a petition in due form was presented to the board of county commissioners of Latah county, praying for the

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establishment of a private or by road over the lands belonging to the defendant, E. G. Peterson, described in plaintiff's complaint. On said 15th day of July the board of county commissioners appointed three viewers, and directed that said viewers should meet on the 5th day of September, 1890, and view and survey and mark out said road, and estimate the damages accruing to nonconsenting landowners. The said viewers met as directed; surveyed and marked out the road; platted and mapped the same; made their report to said board, which thereupon ordered the road overseer to tender to defendant, who was a nonconsenting landowner, the sum of money awarded to him, which sum the defendant refused to accept. Thereupon this suit was commenced. The cause was tried before the Hon. W. G. PIPER, Judge, and a jury. The jury assessed the damages accruing to defendant at \$100. Judgment of condemnation was thereupon entered. Defendant appealed from said judgment to this court. The principal contention of the appellant is that the act of the territorial legislature, to wit, section 933, Rev. St. Idaho, is unconstitutional, for the reason that it attempts to take private property for private use. It is a general rule that the right of eminent domain does not imply a right in the sovereign power to take the property of one citizen, and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. This doctrine, in the absence of any constitutional provision, is established by a long line of decisions not necessary here to enumerate. Among other decisions, the appellant cites *Osborn v. Hart*, 24 Wis. 89. The statute of Wisconsin authorized the laying out of private roads upon the application of any freeholder, such applicant to pay all damages and costs. To this was added by the same statute the further provision that "such private road, when so laid out, shall be for the use of the applicant, his heirs or assigns, * * * nor shall the owner of the land through which such roads shall be laid out be permitted to use the same as a road, unless he shall have signified his intention of so doing, * * * before the damages were ascertained." The court held in above case that, inasmuch as the public could not use such road, and had no interest in it, and the owner of the land could not use it, the law could not be sustained. It will be noticed that our stat-

ute (section 933 et seq.) contains no such exclusive provisions, but a private road, when opened, can be used for any purpose to which it is adapted by the general public and by any individual thereof. In the same case the court say: "In some of the states it has been held that these roads, although termed 'private,' yet were in fact public roads, so far as the right to use them was concerned, and upon this ground the power of the legislature to authorize them to be laid out has been sustained." *Osborn v. Hart*, 24 Wis. 91; *Perrine v. Farr*, 22 N. J. Law, 356; *In re Hickman*, 4 Har. (Del.) 580. In case of *Witham v. Osburn*, 4 Or. 318, also cited by appellant, the court hold that private property cannot be taken for exclusively private use, whether compensation be made or not; but the court also hold that the legislature may provide for the establishment of private roads, or "byways," as they are termed in our statute, by providing that they shall be public instead of private roads, and that they may be used by the public. It will be noticed that the decree of the court, in the case at bar, directs that the said highway shall be opened for the use and benefit of the said P. N. Lunstrum, the applicant, and the general public, so that the decree itself provides that it shall be a public, as well as a private, road.

In *Nesbitt v. Trumbo*, 39 Ill. 110, and *Crear v. Crossly*, 40 Ill. 175, the court hold that section 93 of the act of 1861 (St. Ill. p. 263) is unconstitutional, for the reason that it transfers the use of the land condemned to the person for whose use the road was established, his heirs and assigns, forever. The owner is deprived of its use, and the other acquires its use perpetually. For all practicable purposes, this amounts to a transfer of the land. It will be seen that this statute is very different from section 933, Rev. St. Idaho. The owner of the soil and the general public has as much interest in and the right to the use of such private road, as fully and completely, as the person upon whose application it is opened; and the effect would be that, if the use of the land for such purpose should cease, it would revert to the owner of the soil. In the two last-named cases Mr. Justice LAWRENCE, one of the most eminent jurists of his time, dissents from the opinion of the court, and giving his reasons, in *Crear v. Crossly*, he says: "If the government, after making a grant, owns all the surround-

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ing lands, the grantee takes a right of way over the surrounding land to the public highway as an incident to his grant; and if the government retains the title to a tract of land, having sold the land surrounding it on every side, a right of way to a public road is reserved by implication. This right of way continues in both cases, both in favor of and against subsequent grantees, for it is a right created by operation of law, and from necessity, to enable owners to enjoy their lands. I consider our statute in regard to private roads as simply based on this common-law right, and regulating its exercise. The right existed before the act was passed, by the established rules of the common law in regard to the construction of grants." These reasons apply with equal force to our own statute, and in our opinion would be sufficient reason for upholding it, were there no other authority. There is abundant authority, however, for sustaining the statute in the decisions of the courts. Where the road, though laid out upon the application and paid for and kept in repair by a particular individual, who is especially accommodated thereby, is, in fact, a public road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned. *Lewis, Em. Dom. § 167; Shaver v. Starrett, 4 Ohio St. 494; Ferris v. Bramble, 5 Ohio St. 109; Denham v. Commissioners, 108 Mass. 202; Sherman v. Buick, 32 Cal. 241, and cases there cited; Monterey County v. Cushing, 83 Cal. 507, 23 Pac. Rep. 700; Brock v. Town of Barret, 57 Vt. 172.* The constitution (article 1, § 14) substantially recognizes the right of the legislature to provide for laying out private roads or byways, as follows: "The necessary use of lands for reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, * * * or any other use necessary to the complete development of the material resources of the state, * * * is hereby declared to be a public use." This provision is certainly suffi-

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cient to authorize the legislature to provide for the establishment of byways, or pentways, as they are sometimes called, or private roads, which are for the use of any one who may desire to use them. The necessity for such private roads is apparent when it is stated that it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways, unless this power existed. Such roads are therefore necessary to the complete development of the material resources of the state. We are therefore of the opinion that section 933, Rev. St. Idaho, is constitutional.

The appellant complains that the decree of the court authorizes the condemnation of a strip of land only 30 feet wide, instead of 50 feet, which is required for the width of highways. It would seem that the person whose land is condemned cannot be heard to complain that the court did not take 50 feet of land instead of 30 feet. It is hardly consistent with his position, since he appears here complaining that any was taken.

The appellant also makes the point that the complaint does not state facts sufficient to constitute a cause of action. We think this point cannot be sustained. The ultimate facts only are necessary to be alleged, and these are sufficiently set forth. The respondent in this case complains that the court below rendered a judgment in form against P. N. Lunstrum for the amount of the damages and one half the costs, while it is undoubtedly true that no judgment can be rendered against one not a party to the suit. As neither the respondent, the county of Latah, nor Lunstrum, nor Peterson has taken any appeal from this part of the judgment, it is not before this court. The condemnation is made substantially upon condition that said Lunstrum shall pay the defendant, Peterson, the damages and one half the costs, (into court,) and, upon such payment or tender, the decree can be enforced. Judgment affirmed.

SULLIVAN, C. J., and HUSTON, J., concur.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

OCTOBER TERM, 1892.

SHEPHERD *v.* GRIMMETT, Registrar.

(October 18, 1892.)

ELECTIONS AND VOTERS — REGISTRATION — "TEST OATH LAW" — VALIDITY.

The elector's oath, enacted at the first session of the legislature of the state of Idaho, and approved February 25, 1891, *held* not to be an *ex post facto* law, not in the nature of a bill of attainder, and to be clearly within the constitutional power of the legislature.

(*Syllabus by the Court.*)

Application by Joseph R. Shepherd for a writ of mandate to compel Hyrum Grimmett, registrar of voters, to register plaintiff as a voter. Application denied.

Arthur Brown, Alfred Budge, John A. Bagley, and C. W. Bennett, for petitioner.

The electors' oath bill partakes of the nature of "a bill of pains and penalties," which is included in the prohibition of the constitution of the United States that "no bill of attainder shall be passed," and that "no state shall pass any bill of attainder." Cooley, Const. Lim. 261; Story, Const. 1338; Bouv. Dict. 247; Fletcher v. Peck, 6 Cranch, 87; Ex parte Garland, 4 Wall. 333-338.

It is a legislative conviction for a supposed crime, which is void. Fletcher v. Peck, 9 Cranch, 87; Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, Id. 333; Drehman v. Stifle, 8 Wall. 595.

Any law that makes an act done before the passage of the law, and which was innocent when done, criminal, and punishes such act, is *ex post facto*, and void. Calder v. Bull, 3 Dall. 386; Kring v. State of Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443; Ex parte Bethurum, 66 Mo. 295; Smith's Const. Const. § 367.

PER CURIAM. This is an application by the plaintiff for a writ of mandate, to the defendant, as registrar of Paris precinct in Bear Lake county, Idaho, commanding him to register the plaintiff as an elector of said precinct, which defendant had refused to do for the reason that plaintiff refused to take the oath required by the statutes of Idaho as a condition precedent to registration. There was no appearance on the part of defendant. It is claimed by the plaintiff that the statute enacted by the first legislature of the state of Idaho, and generally known as the "Test Oath Law," is unconstitutional and void, upon the following grounds: First, that it is in contravention of section 9, art. 1, of the federal constitution, in that it is *ex post facto* in its character; second, that it annuls the provisions of section 3, art. 6, of the constitution of the state of Idaho; third, that it is in the nature of a bill of attainder. Among the most embarrassing problems presented to the framers of the state constitution of Idaho was the regulation of the right of suffrage. Almost since the organization of the territory there had existed within its borders an organization which persisted in practices and teachings which were in open defiance of both local and federal laws which they considered at all impinging upon what they termed their "religious liberties." These practices made them not only a disturbing element in the commonwealth, but a constant menace to free American institutions and government. The necessity for some action putting a period to the advancement of the pernicious doctrines of polygamy and big-

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amy found recognition in the enactment by the legislature of the territory of section 501 of the Revised Statutes, known as the "Test Oath Act," and which prescribed an oath to be taken by all persons as a condition precedent to the exercise of the elective franchise. This act, by its provisions, excluded from the elective franchise in the territory of Idaho all members of the said organization. Some of the members of that organization at once set about divining schemes by which the law might be evaded or set at naught. In October, 1888, just prior to the biennial election of that year, a large number of the members of that organization in Idaho, presumably acting under the direction of indiscreet leaders, made a pretended withdrawal from the organization, and thereafter registered as voters, taking the required oath. Several parties were indicted in the district court of the third district of the territory, and, a test case having been made, the question of the validity of the statute known as the "Test Oath Law," was passed upon by the supreme court of the United States in the case of *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. Rep. 299, and the validity of the statute affirmed by that tribunal. The substance of the "test oath" statute enacted by the territorial legislature was embodied in section 3, art. 6, of the constitution of the state of Idaho, which is as follows, viz.: "Sec. 3. No person is permitted to vote, serve as a juror, or hold any civil office, who is under guardianship, idiotic, or insane, or who has at any place been convicted of treason, felony, embezzlement of public funds, bartering or selling or offering to barter or sell his vote, or purchasing or offering to purchase the vote of another, or other infamous crime, and who has not been restored to the right of citizenship, or who at the time of such election is confined in prison on conviction of a criminal offense, or who is a bigamist or polygamist, or is living in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime, or who in any manner teaches, advises, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any law, or to commit any such crime, or who is a member of, or contributes to the support, aid, or encouragement of, any order, organization, association, cor-

poration, or society which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy, or such patriarchal or plural marriage, or which teaches or advises that the laws of this state prescribing rules of civil conduct are not the supreme law of the state; nor shall Chinese nor persons of Mongolian descent not born in the United States, nor Indians, not taxed, who have not severed their tribal relations, and adopted the habits of civilization, either vote, serve as jurors, or hold any civil office." The constitutional convention, careful not to restrict the power of the legislature in this respect, and to sufficiently provide for any contingency that might thereafter arise, enacted section 4 of article 6, which is as follows: "Sec. 4. The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained." The first legislature that convened under the state organization, in an act entitled "Elections and Electors," provided, among other things, that the registrar must, before he registers any applicant, require him to take and subscribe the oath to be known as the "Elector's Oath," which is as follows: "Elector's Oath: I do swear, or affirm, that I am a male citizen of the United States, of the age of twenty-one years (or will be) the day of ———, A. D. 18—, (naming date of next succeeding election;) that I have (or will have) actually resided in this state for six months and in the county for thirty days next preceding the next ensuing election. (In case of any election requiring a different time of residence, so make it.) That I have never been convicted of treason, felony, embezzlement of public funds, bartering or selling or offering to barter or sell my vote, or purchasing or offering to purchase the vote of another, or other infamous crime, without thereafter being restored to the right of citizenship. That since the first day of January, 1888, and since I have been eighteen years of age, I have not been a bigamist or polygamist, or have lived in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime; and I have not during said time taught, advised, counseled, aided, or encouraged any person to enter into bigamy, polygamy, or such patriarchal, plural, or cele-

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tial marriage, or to live in violation of any such law, or to commit any such crime; nor have I been a member of, or contributed to the support, aid, or encouragement of, any order, organization, association, corporation, or society which, through its recognized teachers, printed or published creed, or other doctrinal works, or in any other manner, teaches or has taught, advises or has advised, counsels, encourages, or aids, or has counseled, encouraged, or aided, any person to enter into bigamy, polygamy, or such patriarchal or plural marriage, or which teaches or has taught, advises or has advised, that the laws of this state or of the territory of Idaho, or of the United States applicable to said territory, prescribing rules of civil conduct, are not the supreme law. That I will not commit any act in violation of the provisions in this oath contained. That I am not now registered or entitled to vote at any other place in this state. That I do regard the constitution of the United States, and the laws thereof, and the constitution of this state, and the laws thereof, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding. (When made before a judge of election, add: 'And I have not previously voted at this election.') So help me God." It is the validity of this provision of the statute which is attacked in this proceeding.

With the policy of either the constitutional provision or the statute the court has nothing to do. If circumstances have arisen since the enactment of the statute which would seem to make its abrogation desirable, it is to another department of the government such an appeal must be made. It is the province of the court only to decide upon the validity of the law. "In the case of *Burch v. Van Horn*, 3 Cong. Elect. Cas. 205, in a report which was adopted unanimously, it was held that the right of a state by a new constitution to require all persons to take an oath that they have not done certain acts, and that they have been loyal to the United States, as a prerequisite to registration and to the right to vote, was absolute, and was not forbidden by the principle of the decision in the case of *Cummings v. State*, 4 Wall. 277." This is all that the act under consideration does. It is true, it makes additional qualifications necessary, but that is directly au-

thorized by section 4, art. 6, of the constitution.

The suggestion of counsel that the law of the first session of the state legislature annuls section 3 of article 6 of the constitution of Idaho, in view of the direct provisions of section 4 of that article, is, in our view, too attenuated to demand the serious consideration of the court. "A state may prescribe a test oath for all electors without violating the constitution of the United States, but if the legislature of a state be not empowered by the state constitution to prescribe the qualifications of voters, it cannot prescribe a test oath which shall add any substantive qualification to those prescribed in the constitution, and yet may prescribe a test oath which, without adding to or changing the qualifications prescribed in the constitution, shall be effectual to disclose the presence or absence of such qualifications. *If, however, the legislature be invested by the constitution with power to prescribe the qualifications of voters, it may prescribe a substantive qualification in the form of a test oath.*" (The italics are ours.) Paine, Elect. p. 69, and authorities there cited. "When the constitution of a state has prescribed qualifications for voters, and defined the qualifications to an officer, it is not competent for the legislature to add to, or to in any way alter, such prescribed and defined qualification, unless the power to do so is expressly or by necessary implication conferred upon it by the constitution itself." *Thomas v. Owens*, 4 Md. 189; *McCrary*, Elect. (2d Ed.) §§ 72-252; *U. S. v. Slater*, 4 Woods, 356; *Rison v. Farr*, 24 Ark. 161; note to *Blair v. Ridgely*, 41 Mo. 63, 97 Amer. Dec. 264, and cases there cited.

It was strenuously claimed by counsel for the petitioner that the law in question was an *ex post facto* law, and therefore forbidden by section 16 of article 1 of the constitution. The definition of *ex post facto* laws, as settled by repeated decisions of the supreme court of the United States, is: "*Ex post facto* laws relate to penal and criminal proceedings which impose punishment or forfeiture, and not to civil proceedings, and are not applicable to civil laws, but to penal and criminal laws only, which affect private rights retrospectively." *Watson v. Mercer*, 8 Pet. 88; *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 87; *Ogden v. Saunders*, 12 Wheat. 266; *Satterlee v. Matthewson*, 2 Pet. 380. The argument of counsel for plaintiff is predi-

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cated largely upon the assumption that the exercise of the elective franchise is an absolute right, and that both the constitutional provision and the statute are in violation of this right. All the authorities are against this assumption. It is only necessary to cite a few leading ones. The right of suffrage is not a natural right, nor is it an unqualified personal right. It is right derived from constitutions and statutes. It is regulated by the states, and their power to fix the qualifications of voters is limited only by the provisions of the fifteenth amendment to the constitution. *Huber v. Reiley*, 53 Pa. St. 115; *Ridley v. Sherbrook*, 3 Cold. 569; *Anderson v. Baker*, 23 Md. 531; *Brightly*, Elect. Cas. 27; *McCrary*, Elect. (2d Ed.) p. 45, § 3; *Paine*, Elect. § 2. It is said by Judge Cooley, (Const. Lim. 589:) "Participation in the elective franchise is a privilege, rather than a right, and it is granted or denied upon grounds of general policy." Chief Justice BOWIE, in *Anderson v. Baker*, 23 Md. 531, says: "The right of suffrage is the creation of the organic law, and might be modified or withdrawn by the same authority which conferred it without being considered as the infliction of any punishment upon those who are disqualified." In *Blair v. Ridgely*, 41 Mo. 63, the court says: "The right to vote or to exercise the privilege of the elective franchise is neither a natural, absolute, nor vested right, of which a man cannot be deprived but by due process of law, but is purely a conventional right, and may be enlarged or restricted, granted or withheld, at pleasure, with or without fault; for outside of society, and disconnected with government, no person either has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as the state may prescribe." So completely is the authority to prescribe the qualification of voters held to be within the power of the legislature by the supreme court of the United States that said court, in the case of *Murphy v. Ramsey*, 114 U. S. 43, 5 Sup. Ct. Rep. 747, uses the following language, to wit: "It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote." The right of suffrage is a political right, conferred by the constitution or the laws of the state, and has ever been regarded as exclusively under state control. It may be granted or withheld, or given subject to such restrictions,

as the majority of those in whom the sovereignty resides may deem most conducive to the public welfare.

It is contended by counsel for the plaintiff that the "test oath" in the law of February 25, 1891, is in the nature of a "bill of attainder," or of "pains and penalties." Section 23, art. 5, of the state constitution provides that "no person shall be eligible to the office of district judge unless he shall be thirty years of age." Does that "attaint" or inflict "pains and penalties" upon all citizens of the state learned in the law, who have not reached that period of longevity? Under our constitution the right of suffrage is confined to males over the age of 21 years. Does that "attaint" or inflict "pains and penalties" upon all the women of the state who have reached their majority? Bills of attainder are at present unknown to our law. Some bills of attainder were passed by the states during and shortly after the Revolution, following English precedents. "It is to English criminal law that we must look for a definition of this constitutional prohibition. 'Attainder' is described in English criminal law to be that extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony receives sentence of death for his crime." 1 Burrill, Law Dict. p. 111; 1 Steph. Comm. 408. The person so sentenced is called "attaint" or "attainted." He is no longer of any credit or reputation. He cannot be a witness in any court. Neither is he capable of performing the functions of a man, for, by an anticipation of his punishment, he is already dead by law. 4 Bl. Comm. 380; 4 Steph. Comm. 446; 1 Burrill, Law Dict. 111. The consequences of attainder are forfeiture of estates and titles and corruption of blood. 4 Bl. Comm. 387; 3 Bl. Comm. 251; 1 Burrill, Law Dict. 111. A bill of attainder is a bill brought into parliament for attainting persons condemned for high treason. 1 Tomlinson, Law Dict. 145. Story says bills of attainder are such special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 3 Story, Const. 209. In *Green v. Shumway*, 39 N. Y. 419, cited by counsel, the law was decided to be unconstitutional, because the constitution of New York prescribed the qualifications of voters, and gave the legislature no power

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to prescribe other or different qualifications. In the opinion the court cited the cases of *Cummings v. State*, 4 Wall. 277, and *Ex parte Garland*, Id. 333. Neither of these cases are at all similar to the case at bar, nor to the case of *Green v. Shumway*, as in both the test oath absolutely prohibited the parties from following their chosen professions or avocations,—the one the ministry, the other the law,—lawful avocations, by which they gained a livelihood. The right to pursue these avocations was a natural right attaching to every man, both in a state of nature and as a member of society, and as sacred and inviolable as the right to till the soil, and in no sense similar to the right of suffrage, which we have seen is a privilege conferred or withheld by the lawmaking power. *Davies v. McKeeby*, 5 Nev. 369, is similar to *Green v. Shumway* in this: that in Nevada the constitution prescribed the qualifications of voters, and no power was given to the legislature to change or add to these requisites. The law in question in that case did so, and was therefore held unconstitutional. We have seen that in this state the constitution (section 4, art. 6) expressly authorized the legislature to prescribe other qualifications, limitations, etc. The above cases are therefore not in point. It is the opinion of the court, therefore, that the law attacked in this case is not an *ex post facto* law; that it is not in the nature of a bill of attainder; and that it is an enactment clearly within the constitutional power of the legislature. The necessity of the law, or the absence of such necessity, or its apparent hardship, cannot be permitted to affect the determination of the court. The peace of society and the welfare and happiness of the people demand that due respect shall be given by the court to the lawmaking power; and, when laws are clearly constitutional, application for change must be made to that branch of the government which alone can make and unmake the law. The writ must be denied, and it is so ordered.

NEZ PERCE COUNTY v. LATAH COUNTY.

(December 14, 1892.)

DIVISION OF COUNTY—LIABILITY OF NEW COUNTY FOR DEBTS OF OLD—CONSTRUCTION OF STATUTE.

By act of congress Nez Perce county was divided, and Latah county created. By

section 7 of said act it was provided that Latah county should be and remain a part of Nez Perce county for judicial purposes until the next meeting of the judges of the supreme court of the territory of Idaho, when terms of court were to be fixed for Latah county. By section 5 of said act Latah was to pay to Nez Perce county her just proportion of the net indebtedness of the latter county. *Held*, that Latah county is liable to pay her just proportion of the judicial expenses of the county of Nez Perce until December 31, 1888.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. PIPER, Judge.

Nez Perce county presented to the board of county commissioners of Latah county a claim for a ratable proportion of the salaries of certain county officers. The board rejected the claim, and Nez Perce county appealed to the district court. From a judgment of the district court affirming the action of the board, and from an order overruling a motion for a new trial Nez Perce county appeals. Reversed.

E. O'Neill, J. W. Poe, and James E. Babb, for appellant.

On the division of a county, and organization from its territory of a new county, the rule that the old county retains all the property, including money in treasury and uncollected taxes, has no application where the enactment itself provides for a division of the property, taxes, and liabilities. *Dill. Mun. Corp.* §§ 188, 189, and note; *Board of Com'rs of Cheyenne Co. v. Board of Com'rs of Bent Co.*, 15 Colo. 320, 25 Pac. Rep. 508.

Corporations, like individuals, are liable on their contracts, and are liable even in implied *assumpsit*. 1 *Dill. Mun. Corp.* § 166, and note; 2 *Kent, Comm.* 305; *Bank v. Patterson*, 7 Cranch, 299.

On dissolution the liability would pass to the inhabitants. 1 *Dill. Mun. Corp.* § 173; *Clark v. Saline Co.*, 9 Neb. 516, 4 Pac. Rep. 246; *Roberts v. People*, 9 Colo. 458, 13 Pac. Rep. 630.

The act organizing the county of Latah is prospective, and not retroactive. *Coulson v. Portland*, Deady, 481; *Wallace v. Mayor*, etc., 29 Cal. 181; *Nougues v. Wallace*, 7 Cal. 65; *People v. Johnson*, 6 Cal. 499; *Koppikus v. Capital Com'rs*, 16 Cal. 253; *People v. May*, 9 Colo. 404, 12 Pac. Rep. 838; *Colusa Co. v. De Jarnett*, 55 Cal. 373; *Placer Co. v. Campbell*, (Cal.) 11 Pac. Rep. 602.

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D. C. Mitchell and *A. J. Green*, for respondent.

An appeal does not lie from an order of the board of county commissioners. *Rupert v. Board*, ante, 21, 2 Pac. Rep. 718; *Van Camp v. Board*, ante, 33, 2 Pac. Rep. 721.

When a new county is created out of part of an old county, the old county takes the county property, and becomes liable for the whole of the county indebtedness, in the absence of legislative provision to the contrary. *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Gilliam Co. v. Wasco Co.*, 14 Or. 525, 13 Pac. Rep. 324; *Windham v. Portland*, 4 Mass. 388.

A county is duly organized when the officers have been appointed and qualified. *Keating v. Marble*, 39 Kan. 370, 18 Pac. Rep. 189.

MORGAN, J. This action was brought by Nez Perce county against Latah county for a ratable proportion of the salaries of the sheriff, clerk of the district court, and prosecuting attorney of the county of Nez Perce. The salaries were for official services rendered by these officers for both counties from June 1, 1888, to December 31, 1888, inclusive. Nez Perce county was divided by act of congress entitled "An act to create and organize the county of Latah," approved May 14, 1888, (1 Sess. Laws 1888-89, p. 147,) and Latah county was attached to Nez Perce county for judicial purposes until 30 days after the next meeting of the judges of the supreme court, which was December 1, 1888. The claim or account for the proportion of said salaries, to wit, for the sum of \$1,783.44, being four sevenths of the salaries of said officers from June 1, 1888, to December 31, 1888, and which had been paid by Nez Perce county, duly verified, was presented to the board of county commissioners of Latah county for allowance, and on June 1, 1889, was by said board rejected or disallowed. From the decision of said board an appeal was taken to the district court of the second judicial district in and for Latah county. Trial was had in said court, resulting in a judgment affirming the decision of the board of county commissioners of Latah county, which judgment was rendered July 18, 1891. From this judgment an appeal was taken to this court on September 5, 1891. On July 18, 1891, notice of motion for new trial was duly filed. After settlement of statement by

the judge, motion for new trial was duly made and denied on February 5, 1892. On March 6, 1892, an appeal was taken to this court from the order overruling the motion for new trial. This appeal was taken on questions of both law and fact. On the 5th day of February, A. D. 1892, the attorneys for the respective parties entered into the following stipulation, to wit: (Title of the court and cause.) "Now, at this time, the motion for new trial having been overruled, it is hereby stipulated by the parties to the above-entitled action, E. O'Neill and J. W. Poe appearing for the plaintiff, and A. J. Green and D. C. Mitchell for the defendant, that on an appeal from the said order overruling the motion for a new trial therein, the appeal from the judgment heretofore taken, and the appeal from the said order overruling the motion for new trial, shall be considered as one case in the supreme court, by and with the consent of said court, and that one brief shall be prepared for both appeals, and both be argued at the same time and as one case. Dated at Moscow, Latah county, Idaho, this 5th day of February, A. D. 1892. E. O'NEILL & J. W. POE, Attys. for Plaintiff. D. C. MITCHELL & A. J. GREEN, Attys. for Defendant." On the 10th day of October, 1892, it being the first day of the October term of the supreme court, and at the time said cause came on for hearing, the attorneys for respondent filed their motion to dismiss this action on the following grounds, to wit: "The record herein discloses the fact that this cause came into the district court upon an appeal from an order of the board of commissioners, and, after being tried in the district court, can only be brought to this court by writ of error."

In the case of *Rupert v. Board*, 2 Pac. Rep. 718,¹ cited by counsel, this court decided that matters decided by the district court on appeal from the orders of the board of county commissioners can only be brought to the supreme court for review by writ of error. This results from the fact that the statute provides no method of bringing such cases to the supreme court by appeal, and not from want of jurisdiction when the case is once in court. The supreme court has jurisdiction of such causes when once brought in, as it has jurisdiction of both the parties and the subject-matter. The bringing of

¹ Ante, 21.

Nez Perce County v. Latah County.

this cause into this court in this manner is irregular and unauthorized, and, if no general appearance had been entered by respondent's attorneys, and no such stipulation as now appears on file had been made, the respondent might have procured a dismissal of the appeal by appearing specially for that purpose, as was done in *Rupert v. Board*, supra. But in this cause the attorneys for the respondent, after an appeal from the judgment had been taken, and on the same day on which the order overruling the motion for a new trial had been entered by the district judge, entered into a stipulation with the attorneys for the appellant, by which they agreed that the appeal from the judgment, and the appeal from the order overruling the motion for new trial, should be considered as one case in the supreme court, and that one brief should be prepared for both appeals, and both be argued at the same time, and as one case. By this stipulation the attorneys did not mean that they would argue a motion to dismiss the appeal, or the "case," as is the word used in the motion, as the motion to dismiss was not then made, and was not in fact placed on file until eight months thereafter. We must conclude that the attorneys intended to and did stipulate that the said appeals should be heard on their merits.

The method of bringing said appeal being an irregularity which may be waived by the parties, either by a general appearance, joinder in error, or by stipulation, we are constrained to hold that the right to move for dismissal of the appeal was waived by the stipulation. *Bonner v. State*, 40 Ill. App. 629; 1 Amer. & Eng. Enc. Law, 183, and other authorities there cited; *Suydam v. Pitcher*, 4 Cal. 280. By section 5 of the act providing for the organization of Latah county it is enacted that Latah county shall pay to the county of Nez Perce a just proportion of the net indebtedness of Nez Perce county. It is further provided that the board of adjusters appointed by the act should ascertain all the county, as then existing, justly owes, in warrants, scrip, or other just debts, which amount shall constitute the gross indebtedness of said county of Nez Perce, from which amount certain assets are to be deducted, to ascertain the net indebtedness of said county. It will be noticed that the act provides that Latah

county shall pay her just proportion of all the debts of Nez Perce county, whether they may be then due or may fall due in the future. At the January meeting, 1888, of the board of county commissioners said board was required to and did fix the salaries of sheriff, clerk of the district court, and district attorney for said county of Nez Perce, as it then existed, for the year 1888. By section 7 of said act, Latah county, notwithstanding it was organized as a separate county, was attached to Nez Perce for judicial purposes until 30 days after the meeting of judges of the supreme court of Idaho territory. This, in effect, provides that Latah county, notwithstanding the division, was to remain a part of Nez Perce county for judicial purposes, until 30 days after the convening of the supreme court, when terms of court for Latah county were to be fixed. At the November term, 1888, for the district court, for Nez Perce county, it was determined by said court that the sheriff of Nez Perce county and the district attorney of said county should respectively serve all processes and prosecute all causes appearing in said court for Nez Perce county as it originally existed, including the then territory of Latah county, in pursuance of the said seventh section of the act of congress. The record shows that said officers did perform such services as they were required. The obligation to pay said officers, including the clerk of the district court, for the year 1888, was fixed at the time their salaries for said year were fixed, to wit, in January, 1888. It then became a debt of Nez Perce county, although not due until December 31, 1888. A just proportion of said indebtedness was by the terms of the act of congress required to be paid by Latah county. The fact of appointment of district attorney, sheriff, and clerk of the district court at the time of the organization of Latah county is immaterial in this case. The question as to the necessity for the appointment of such officers by Latah county when they were appointed is not before this court. It is therefore the opinion of this court that Latah county is liable for her just proportion of the salaries of said officers for the year 1888. Judgment of the district court is reversed, and a new trial ordered.

SULLIVAN, C. J., and HUSTON, J., concur.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Idaho

NOVEMBER TERM, 1892.

WESTHEIMER *et al.* v. THOMPSON *et al.*

(November 18, 1892.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

1. Failure to file transcript within the time prescribed by the rules of the court is ground for dismissal of appeal, but such failure may be excused for cause shown.

SAME—DEFAULT OF OFFICER OF COURT.

2. Parties litigant should not be made to suffer through the default of an officer of the court, when due diligence is shown.

(*Syllabus by the Court.*)

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Action by Ferdinand Westheimer & Sons against Archibald D. Thompson and others to foreclose a mortgage. There was judgment for plaintiffs, and defendants appealed. Plaintiffs moved to dismiss the appeal. Motion denied.

W. C. Howie, for appellants.

Hawley & Reeves and Charles H. Reed, for respondents.

The omission of serving the notice of appeal on the clerk within the time limited therefor cannot be rectified. 3 Estee, Pl. & Pr. § 4999; Ellsworth v. Fulton, 24 How. Pr. 20; People v. Eldridge, 7 How. Pr. 108.

HUSTON, J. The respondent moves the dismissal of the appeal in this case upon the ground that the transcript has not been filed in accordance with rule 4 of the rules of this court. Paragraph 7 of rule 4 provides that, "in all cases where the transcript is required to be printed by the

first paragraph of this rule, the appellant or plaintiff in error shall, within sixty days after the appeal is perfected or the writ of error issued, and the bill of exceptions and statement (if there be any) are settled, serve and file a printed (and, in cases where the transcript is not printed, shall file a written) transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken." Rule 2 provides: "If the transcript of the record is not filed within the time prescribed by rule 4, the appeal or writ of error may be dismissed on motion, without notice, on the first Monday of the term during which the cause is subject to call. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party." It seems in this case the appeal was regularly taken by filing and serving notice of appeal, and by filing the required undertaking; the bill of exceptions was prepared in due time, and forwarded to the district judge who tried the case, who duly settled and allowed the same, and returned it to the clerk of his court; that the attorney of the appellant frequently called upon the clerk to ascertain if the bill of exceptions had been allowed or returned by the judge, and was on each occasion informed by the clerk that it had not; that he never learned the contrary until October 20th, when, upon an examination of the files in the case in the office of the clerk of the district court, he dis-

Miller v. Pine Min. Co.

covered the bill of exceptions, with the allowance of the district judge indorsed thereon, dated July ———; that he at once filed his *præcipe* for a transcript with the clerk of the district court, and had the same printed as speedily as possible, but, owing to apparently unavoidable delays, was unable to have the same ready for filing and service until the 14th day of November, the first day of the present term. In a case similar to that under consideration, and arising under rules almost identical with those of this court, the supreme court of Nebraska (*Allis v. Newman*, 45 N. W. Rep. 621) use the following language: "Where the judge signing a bill of exceptions left it at the courthouse, among other papers and records which he supposed were to be filed, thereby evidently intending to place it in the care of the clerk, but the latter failed to file and take charge of it, the time while the bill was mislaid will be deducted from the time intervening between the rendition of the judgment and the filing of the transcript." In the same case the court says: "The fault, therefore, was that of an officer of the court, and a party will not be permitted to suffer from his default." With the views of the supreme court of Nebraska, as expressed above, this court is in full accord. A rule, or the construction of a rule, which would deprive a party of his right of appeal by reason of the default of an officer of the court solely, would be more than inequitable; it would be arbitrary, tyrannical, and unjust, and might be destructive of the end for which courts are established and maintained,—the administration of the law in justice. Our attention is called by counsel to the decision of this court in the case of *Mahony v. Marshal*, 29 Pac. Rep. 110.¹ The facts in that case were entirely different from those in the case at bar, as will be readily seen from an examination of the decision of this court therein. In that case "judgment was rendered February 28, 1891, notice of appeal was served and filed March 9, 1891, undertaking on appeal was filed March 13, 1891, statement on appeal settled and allowed by the judge of the district court September 15, 1891, and filed with the clerk on September 19, 1891." Motion to dismiss the appeal was made on January, 1892, on the ground that no transcript had ever been filed. The court further says in that case: "Affidavits are

presented by appellant in support of his request for further time within which to file transcript, and in excuse for his delay and apparent laches. These are met by counter affidavits on the part of the respondents, specifically and unequivocally denying the statements made in the affidavits on the part of the appellant. It is impossible for this court to say which are true, and which are false. One fact, however, is undenied,—that the attorney for the respondents, as soon as the statement on appeal was filed in the clerk's office, immediately sent written notice of the fact to the attorneys of the appellant." A very cursory examination and comparison of the facts in *Mahony v. Marshal* and those in the case at bar will dispel any idea that the cases are parallel, or that there is any conflict in the decisions in the two cases. Under statutes and rules similar to ours it has been uniformly held that, while failure to file the transcript within the specified time is ground for dismissal of the appeal, the delay may be excused. Each case must, therefore, depend upon the facts shown to establish the excuse for delay. 2 Hayne, New Trials & App. 820. We would suggest to counsel that they would save the court some labor if, in presenting motions of this kind, they would take the trouble to furnish the court with briefs of points and authorities relied upon, and not compel the court to do work legitimately belonging to counsel. The motion to dismiss appeal is denied. If, however, the respondent has been delayed in his preparation for the argument, the case will only be heard at this term upon his consent.

SULLIVAN, C. J., and MORGAN, J., concur.

MILLER v. PINE MIN. CO.

(November 18, 1892.)

MOTION TO DISMISS APPEAL—FILING TRANSCRIPT.

Motion to dismiss appeal under rule 2 for the reason that transcript was not filed and served in time required by paragraph 7 of Rule 4. *Held*, that transcript was filed and served within the time required by said paragraph 7.

(*Syllabus by the Court.*)

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Action by James Miller against the Pine Mining Company. There was judgment

¹Ante, 1065.

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for plaintiff, and defendant appealed. Plaintiff moved to dismiss the appeal. Motion denied.

Wyman & Wyman, for appellant. *Cahalan & Badger*, for respondent.

SULLIVAN, C. J. The respondent moves, under rule 2 of the rules of this court, to dismiss this appeal, on the ground that the transcript of record was not filed and served within the time prescribed by paragraph 7 of rule 4 of the rules of this court. The appellant appears, and resists said motion, and presents an affidavit in support of his position, setting forth the facts in regard to the settlement of the bill of exceptions and the filing and service of the transcript of record.

Rule 2, under which this motion is made, declares, among other things, that, if the transcript of record is not filed within the time prescribed by paragraph 7 of rule 4, the appeal may be dismissed, on motion, without notice, on the first Monday of the term during which the cause is subject to call. Paragraph 7 of rule 4 declares, among other things, that the transcript of record, when required to be printed by the rules of this court, shall be filed and served within 60 days after the appeal is perfected, and the bill of exceptions settled. The points for us to determine, then, are the dates when the appeal was perfected, and the bill of exceptions settled, and whether the transcript was filed and served within 60 days after latest date.

The record shows that the appeal was perfected by filing the proper undertaking not later than the 9th day of June, 1892; and it is shown by the affidavit of appellant that the trial judge undertook to settle and certify the bill of exceptions on the 22d day of August, 1892, but because of an error or mistake, which was corrected by the trial judge, the bill of exceptions was not in fact settled and certified until the correction of said error or mistake, on the 7th day of October, 1892. It therefore follows that the 60-day period given for filing and serving the transcript did not begin prior to the 7th day of October. The respondent moves to dismiss on the theory that said 60-day period began on August 22, 1892, when in fact it did not begin prior to October 7, 1892. The type-written transcript was filed with the clerk of this court on the 19th day of October, 1892, and the printed transcript served and filed on the 12th day of November, 1892, and within the time prescribed by paragraph 7 of rule

4. The motion to dismiss is therefore denied.

MORGAN and HUSTON, JJ., concur.

ELLIOT v. HALL, Constable, et al.

(December 1, 1892.)

EXEMPTIONS—EARNINGS—TEMPORARY POSSESSION BY ANOTHER.

When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under control of the debtor, although temporarily in the hands of another.

(Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Action by G. Washington Elliot against J. N. Hall, constable, and George D. Golder and Henry Swanholm, sureties on the bond of said Hall, for the seizing by said Hall under execution of certain moneys of plaintiff. There was judgment in a justice's court for plaintiff, and defendants appealed to the district court. From a judgment of the district court for defendants, and from an order overruling a motion for a new trial, plaintiff appeals. Reversed.

Wyman & Wyman, for appellant.

The fundamental principle and general rule for interpreting statutes granting exemptions is that they, being in furtherance of humanity and the protection of the family, should be liberally construed. *Freem. Ex'ns*, § 208; *Estate of McManus*, 87 Cal. 292, 25 Pac. Rep. 413; *Montague v. Richardson*, 24 Conn. 347; *Kuntz v. Kinney*, 33 Wis. 514; *Kenyon v. Baker*, 16 Mich. 373; *Bevan v. Hayden*, 13 Iowa, 122.

It cannot be claimed that this was a fraudulent conveyance of property, for there was no conveyance or attempt to convey, and for the further reason that there can be no fraudulent conveyance of exempt property. *Freem. Ex'ns*, § 135; *Derby v. Weyrich*, 8 Neb. 174; *U. P. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. Rep. 139.

J. W. Badger, for respondents.

The proceeds of exempt property are not exempt. Transposition of exempt property destroys or loses the exemption. *Brackett v. Watkins*, 21 Wend. 68; *Mandlove v. Burton*, 1 Ind. 39; 1 *Freem. Ex'ns*, (2d Ed.) § 247; *Wooster v. Page*, 54 N. H. 125.

If personal property exempt be fraudu-

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lently assigned to defraud creditors of the debtor, and be thereafter levied upon by such creditor, the debtor is not entitled to claim the same as exempt. *State v. Koch*, 40 Mo. App. 635.

If exempt property or goods be so mixed with others that they can no longer be identified, the right of exemption is lost. The claimant must always be able to point out the identical property claimed. *Smith v. Turnley*, 44 Ga. 245; *Roth v. Wells*, 29 N. Y. 471.

The right to exemption is a personal privilege, and may be waived. *Homes v. Corbin*, (Mo. App.) 4 West. Rep. 98.

HUSTON, J. The plaintiff was a miner in the employ of the Comfort Consolidated Mining Company. A judgment had been recovered against him in justice's court. Execution was issued thereon, and levied upon a certain sum of money in the hands of one Trevitic. There is no question but that the money so levied upon was the wages of the plaintiff, earned within the 30 days next preceding the date of the levy. Trevitic had drawn the same from the company at the request of plaintiff, and held it for him. Trevitic stated to the officer making the levy (J. N. Hall, the principal defendant) that plaintiff owed him nothing; that he simply drew the money for him as an accommodation, and held it subject to his call. On demand of the officer (Hall) holding the execution, Trevitic delivered the money so held by him to such officer. Plaintiff brings his action against the officer and his sureties for the recovery of the money, claiming the same as exempt from levy, under the provisions of subdivision 7 of section 4480 of the Revised Statutes of Idaho, which is as follows: "The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution, or levy of attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this territory, (state,) supported wholly or in part by his labor." The necessary affidavits were duly served by plaintiff, establishing the facts required by the section of the statute referred to. Plaintiff recovered judgment in justice's court. Defendants appealed to district court, when the judgment of the justice's court was reversed, and judgment for costs was rendered for defendants, and from the judg-

ment of the district court the plaintiff appeals to this court. There is nothing in the record showing the grounds upon which the district court based its decision and judgment. The case was heard by the district court upon a stipulation as to the evidence. It appears from the plaintiff's motion for a new trial that, while the district court held that the money levied upon by the officer by virtue of the execution was exempt as wages, under the provisions of the statute, the plaintiff had deprived himself of the benefit of the statute by "commingling, or causing to be commingled, said wages, so as to lose their identity as wages." This view seems to be acquiesced in by defendants. The only evidence of a "commingling" is the fact that Trevitic drew this money from the company, for the accommodation of the plaintiff, and held the same for the plaintiff; that plaintiff was not indebted to Trevitic, nor had Trevitic any claim or lien upon the money so drawn.

It is insisted by respondents (1) that the drawing of the money by Trevitic, upon the order or request of plaintiff, was a fraud upon the creditors of plaintiff; (2) that it was such a commingling of the money as deprived it of the exemption provided by the statute. The money being confessedly exempt as wages, its disposition by the plaintiff could not operate as a fraud upon defendants. *Freem. Ex'ns*, § 136; *Derby v. Weyrich*, 8 Neb. 174; *Railroad Co. v. Smersh*, 22 Neb. 751, 36 N. W. Rep. 139. The drawing of the money by Trevitic, and his holding it for the accommodation of the plaintiff, it not appearing that there were any dealings between plaintiff and Trevitic, or that Trevitic had or claimed to have any interest in or lien upon the money, could hardly be called a "commingling." Trevitic did not hold any other money or property of the plaintiff. Suppose plaintiff had given his wife or one of his children an order to draw his wages; would that have been a commingling? The object of the statute was to preserve, for the support of the debtor and his family, a portion of his earnings, and to the accomplishment of this end the statute should receive a liberal construction. The beneficent intention of the legislature must not be defeated by a strained or technical construction. This rule of construction seems to have been quite generally recognized in this class of cases. *Freem. Ex'ns*, § 208; *In re McManus*, 87 Cal. 292, 25 Pac. Rep.

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413; *Montague v. Richardson*, 24 Conn. 347; *Kuntz v. Kinney*, 33 Wis. 514; *Kenyon v. Baker*, 16 Mich. 373; *Bevan v. Hayden*, 13 Iowa, 122. The case of *Wooster v. Page*, 54 N. H. 125, is cited by respondents in support of their contention that the wages of the plaintiff lost the privilege of exemption by reason of the payment of the same to Trevitic, at the request of the plaintiff. The case of *Wooster v. Page* does not seem to go so far as claimed by the respondents, but would seem to favor that view. The court in that case rests its decision largely upon the decision of the same court in the case of *Morse v. Towns*, 45 N. H. 185. In the latter case (as cited by the court in *Wooster v. Page*) it seems that "Towns having enlisted, and received from the town of Pembroke a bounty of two hundred dollars, went away to the wars, leaving the money with his wife, for the support of herself and their two children. The wife used a part of it, and, of the rest, put into the hands of the trustee one hundred and fifty dollars, to be returned from time to time as needed for the support of the family; and for this sum the trustee gave his note, payable to her or her order. The trustee stated that he took the money expressly as the bounty money of the husband, and that the wife had no other means of support. The trustee was held chargeable, on the ground that the bounty, having been paid over to the volunteer, was no longer 'bounty,' and as such exempt, but was simply 'money,' not exempt." Does this construction of a statute, intended by the legislature to encourage and uphold patriotism, to secure from the humiliation of poverty and want the wife and children of the soldier, who has voluntarily offered up his life for his country, carry out the intention of the lawmakers? We think not. In the case of *Rutter v. Shumway*, 26 Pac. Rep. 321, the supreme court of Colorado say: "It is claimed by counsel for plaintiff in error that the proper construction of the act of 1885 is that the wages of the debtor are exempt from garnishment while they remain in the hands of the employer, before payment, but not afterwards." The act declares: "There shall be exempt from levy under execution, attachment, or garnishment the wages and earnings of any debtor, to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy," etc., (literally the same as the Idaho statute.)

The language is unconditional and absolute, that the wages "shall be exempt from levy under execution, attachment, or garnishment," and the courts cannot justly add words which would tend to defeat or restrict the manifest purpose of the statute. So long as the wages or earnings of the debtor are capable of identification, he is entitled to have them exempt, according to the terms and provisions of the statute. We prefer the broad humanity of the "Cowboy Law" to the cold and technical construction which would make the intended beneficence of the law a mockery and delusion, and take the bread of the soldier and the wage earner from the mouths of his wife and children to glut the maw of an insatiate creditor. The judgment of the district court is reversed, and judgment ordered to be entered for plaintiff for the sum of \$66.25, and costs, which the clerk of the court below will enter in his judgment docket immediately on receipt of the *remittitur* from this court, and issue execution thereon.

SULLIVAN, C. J., and MORGAN, J., concur.

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CRONIN *et al.* v. BEAR CREEK GOLD MIN.
Co.

(December 15, 1892.)

APPEAL—DISMISSAL—UNCERTAINTY OF UNDERTAKING.

Where two appeals are taken,—one from a judgment, and the other from an order denying a new trial,—an undertaking, promising, in consideration "of such appeal," to pay all damages and costs which may be awarded against appellant "on the appeal," not specifying which one, is void for uncertainty as to both appeals, and both will be dismissed. *Eddy v. Van Ness*, ante, 93, 6 Pac. Rep. 115, followed.

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Action by Michael Cronin and others against the Bear Creek Gold Mining Company to determine adverse claims to certain mining property. From a judgment of nonsuit, and from an order overruling a motion for a new trial, plaintiffs appeal. Appeals dismissed.

Wyman & Wyman, for appellants. Richard Z. Johnson & Sons, for respondent.

MORGAN, J. This action was brought in the district court of Elmore county, by plaintiffs against defendant, upon an adverse claim to mining property. The

Van Ness v. McLeod.

cause was tried before the court without a jury November 4, 1891, and a judgment of nonsuit and for costs was rendered on the above date. Motion for new trial, having been made, was heard before the judge of said court, at chambers, on the 7th day of October, 1892, and overruled on said date, as appears by the record. On October 21, 1892, plaintiffs gave notice of appeal both from the judgment and from the order overruling motion for new trial. Undertaking on said appeal was duly filed, in the following form: [Title of court and cause.] "Whereas, the plaintiffs in the above-entitled action are about to appeal to the supreme court of the state of Idaho, from a judgment rendered against them in the above-entitled court on the 4th day of November, 1891, and in favor of the defendant, for the sum of eighty and 25/100 dollars, and also from the order denying the motion for new trial made and entered on the 7th day of October, 1892: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the state of Idaho, do hereby, jointly and severally, undertake and promise, on the part of the plaintiffs and appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, or a dismissal thereof," etc. Respondent moves to dismiss both appeals on the ground that the undertaking therein is void.

This bond is, in form, precisely like the bond in *Mathison v. Leland*, 1 Idaho, 712, and in *Eddy v. Van Ness*, 6 Pac. Rep. 115,¹ in both of which cases, decided in this court, the court held that the bond being but for one appeal, and not specifying either, is void as to both. On the authority of the above cases, both appeals are dismissed. Costs awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

VAN NESS v. McLEOD.

(December 21, 1892.)

CONTINUANCE—DETERMINATION OF PROCEEDINGS IN GARNISHMENT.

1. An attachment suit is commenced by First National Bank of Hailey against Bews, J. W. Hodgman, et al., and the writ of attachment is served upon George A. McLeod as garnishee. Thereafter Van Ness brings suit against McLeod on two promissory notes. McLeod files a motion, supported by affidavit, for a suspension of pro-

ceedings in the latter suit, until his liability as garnishee in the attachment suit be determined, alleging that the notes upon which he is sued are the property of Hodgman, and were transferred to Van Ness to defeat and defraud his creditors. *Held*, that proceedings in the latter suit should be suspended until the liability of McLeod in the garnishment proceedings is determined.

FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS—REACHING PROPERTY BY GARNISHMENT.

2. *Held*, also, that property or debts transferred by a defendant in attachment in fraud of creditors may be reached by the creditors by process of garnishment, although the defendant could not recover them himself.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by J. H. Van Ness against George A. McLeod on two promissory notes. From a judgment for plaintiff, entered upon an order overruling defendant's motion to suspend proceedings until the determination of a cause then pending, in which defendant was summoned as garnishee, and upon an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Angel & Loy, for appellant.

The garnishee cannot plead the pendency of the attachment suit in abatement of an action, subsequently brought against him, by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in attachment, so long as the proceedings by attachment are in force. The proper course is for the court to order a suspension of the action against the garnishee by his creditors until the attachment proceedings are disposed of. 3 *Estee*, Pl. & Pr. § 4175; *McFadden v. O'Donnell*, 18 Cal. 160; *McKeon v. McDermott*, 22 Cal. 667; *Pierson v. McCahill*, 21 Cal. 122.

Stipulations for attorneys' fees are not rigid, unbending contracts, to be enforced literally under any and all circumstances, but are under the control of the court. They are in the nature of the stipulated damages for breach of contract. *Peyser v. Cole*, 11 Or. 39, 4 Pac. Rep. 520; *Balfour v. Davis*, 14 Or. 47, 12 Pac. Rep. 89; *Jaquith v. Hudson*, 5 Mich. 123; *Myer v. Hart*, 40 Mich. 517.

Bruner & Parsons, for respondent.

The garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment. *Wap. Attachm.* § 202; *Drake, Attachm.* § 458; *Sickman v. Abernathy*, 14 Colo. 174,

¹Ante, 93.

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23 Pac. Rep. 447; *Perea v. Bank*, (N. M.) 27 Pac. Rep. 322; *Hassie v. Congregation*, 35 Cal. 378; *Grain v. Aldrich*, 38 Cal. 520.

There being no statement or bill of exceptions, nothing can be considered but the judgment roll. *McCoy v. Oldham*, 1 Idaho, 465.

MORGAN, J. This action was brought June 22, 1891, by J. H. Van Ness, plaintiff, against George A. McLeod, defendant, on two promissory notes executed and delivered by said defendant to one David Earhart, who assigned said notes to plaintiff herein before maturity. Defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. On December 8, 1892, defendant filed a motion in the district court for Alturas county, where this action was pending, to suspend further proceedings in above cause pending a decision in the case of *First National Bank of Hailey vs. J. W. Hodgman et al.*, then pending in said court, in which proceeding defendant had been garnished, as debtor of said Hodgman, by said bank. By the provisions of section 4308, Rev. St. Idaho, the plaintiff in an attachment suit, if he is informed or has reason to believe that any person is owing any debt to the defendant in said suit, may require the sheriff to serve upon said person a copy of the writ, and a notice that such credits or other property or debts are attached in pursuance of such writ. Section 4309 provides that all persons having in their possession or under their control such credits, unless such debts be paid to the sheriff, shall be liable to the plaintiff for the amount of such debts, until the attachment be discharged, or any judgment recovered by him be satisfied. It is a general rule under these statutes, and the decisions of the courts in reference thereto, that the garnishee is liable to the attaching creditor to the amount of his indebtedness to the defendant in the attachment suit; and, if the garnishee is sued by his creditor, (the defendant in the attachment suit,) he can procure a suspension of proceedings in said action, until his liability to the attaching creditor shall be determined. The method of procuring such suspension is by motion based upon an affidavit stating that he has been garnished in a suit wherein his creditor is defendant, and asking a stay of proceeding until his liability in the attachment suit

then pending shall be determined. Upon presentation of this motion, and a proper affidavit, further proceeding in the cause should be suspended. 3 *Estee*, Pl. Pr. § 4175; *McFadden v. O'Donnell*, 18 Cal. 160; *McKeon v. McDermott*, 22 Cal. 667; *Piereson v. McCahill*, 21 Cal. 122; *Winthrop v. Carlton*, 8 Mass. 456; *Wade*, Attachm. § 501. The plaintiff, however, contends that the indebtedness of McLeod to Hodgman cannot be reached by the attaching creditor by garnishment, because the notes which were the evidence of such indebtedness had been transferred to Van Ness, (plaintiff in this action,) and cites *Wap. Attachm.* pp. 202, 215, and other authorities. These authorities do not sustain the contention. It is true the general rule is, as stated, that the garnishee is not chargeable unless the defendant in the attachment suit could recover of him what the creditor seeks to secure by garnishment; but an exception exists in the case where the debt, or the evidence thereof, is transferred to a third party, for the purpose of its being reached by his creditors, or in fraud of their rights. In such a case the defendant in the attachment could not recover the indebtedness, but his creditor may. The fraudulent transfer debars the defendant from suing for it, but it is no estoppel should the plaintiff in the attachment suit seek to reach the property in the assignee's hands by process of garnishment. *Id.* p. 215.

The plaintiff in the attachment suit could treat the property or debt as still belonging to the defendant, though in the hands of a third person; yet the defendant could not claim it as his, and have his right of action against such third person. In the case at bar the defendant, McLeod, alleges in his affidavit that the said notes are actually the property of J. W. Hodgman, the defendant in the attachment, and that they were given to said Earhart and transferred to Van Ness at the request of Hodgman, without consideration, in fraud of and with the view of preventing his creditors from reaching them. If this is true, and it must be taken as true for the purpose of this motion, then the further prosecution of the case against McLeod should have been suspended until the determination of the principal suit. *Sickman v. Abernathy*, (Colo. Sup.) 23 Pac. Rep. 447. The validity of the assignment, and the question as to whether the notes in fact were and are the property of the defendant J. W. Hodgman, may be tried

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in the garnishment proceeding instituted by the First National Bank against Bews, Hodgman, et al., and this suit should await the trial of such issue. *Lee v. Tabor*, 8 Mo. 233; *Perea v. Bank*, (N. M.) 27 Pac. Rep. 322. The contrary doctrine would compel this court to assist in making successful a fraudulent transfer of choses in action to defeat the claims of creditors, and would enable the debtor in many cases to defeat his creditors by a fraudulent transfer of his property,—a position against law and good conscience. It is the opinion of this court that the judgment of the district court should be reversed, and the cause suspended until the question of the liability of the defendant, McLeod, to the attaching creditor be determined; and it is so ordered. Costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

GUHEEN, Assessor and Tax Collector, v.
CURTIS, County Treasurer.

(December 26, 1892.)

TAXATION—COLLECTION OF STATE TAXES—COMPENSATION OF COLLECTOR.

1. Compensation of a tax collector for collecting state taxes fixed by section 1679, Rev. St., and for collecting state proportion of per capita taxes, and all other taxes, fixed by section 2154, Rev. St.; said compensation to be paid as prescribed by section 2158, Id.

SAME.

2. All state taxes collected must be turned over by the tax collector to the county treasurer, and by him turned into the state treasury, without any deduction of compensation for collecting the same.

SAME.

3. The minimum and maximum annual compensation of assessor and tax collector is fixed by section 7, art. 18, of the constitution, and he can in no event receive a larger sum than therein provided.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Application by John J. Guheen, assessor and tax collector, for a writ of mandate to compel H. W. Curtis, county treasurer, to pay petitioner certain commissions for collecting state taxes. From a judgment dismissing the petition, petitioner appeals. Affirmed.

H. W. Smith, for appellant. George H. Roberts, Atty. Gen., for respondent.

SULLIVAN, C. J. The appellant, as assessor and tax collector of Bingham county, made application to the district court of the fifth judicial district for a writ of mandate to compel the respondent, as treasurer of said county, to pay to appellant \$1,563.42, commissions claimed to be due for the collection of \$26,038.61, as the state proportion of property taxes levied in said county, and \$1,431 as the state proportion of the poll taxes collected by him in said county, and paid over to the treasurer thereof. An alternative writ was issued. The respondent appeared, and by demurrer and answer raised the issue as to whether, under the facts stated in the application, it was the duty of the respondent to pay the amount claimed to appellant; or, in other words, whether respondent's refusal was wrongful or unlawful. A trial of the issue thus raised was had before the court, and a peremptory writ of mandate refused, and judgment entered in favor of the respondent, dismissing said petition, and for costs. This appeal is from the judgment.

The contention of appellant is that it was the duty of respondent, as county treasurer, to pay the compensation claimed out of said taxes before turning the money over to the state treasurer. The respondent contends that he is prohibited, by section 7, art. 7, of the constitution, from paying out any part of the state taxes for any purposes whatever, but must turn the same into the state treasury. The question for our determination is, is the appellant entitled to payment of his commissions for collecting state taxes from the state money collected by him?

The compensation claimed by the appellant is claimed under section 1679 of the Revised Statutes of 1887, so far as the property tax is concerned, and under section 2154, as to commissions on poll taxes. Section 1679 provides as follows: "The compensation for the services of auditors, assessors, and tax collectors and county treasurers, respectively, for the duties performed by them in assessing, collecting, receiving, and paying over territorial taxes, or the territorial portion of any taxes, are as follows: To the assessor and tax collector, as full compensation for his services and the services of his deputies, seven (7) per centum of the amount by him paid over; to the county treasurer and auditor, each, three (3) per centum of the amount paid over by the treasurer." Section 2154, so far as it relates to the compensation to

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be paid to assessors and tax collectors, is as follows: "The assessor shall receive not less than twelve (12) per centum, and not to exceed fifteen (15) per centum of all per capita taxes collected, and not less than four (4) per centum, and not to exceed six (6) per centum, of all other taxes by him collected." Prior to the adoption of the constitution, the assessor and tax collector was entitled to receive as compensation a certain percentage of all taxes collected, regardless of the aggregate amount thereof; but section 7, art. 7, of the constitution, declares, among other things, that he shall receive annually, as compensation for his services, not more than \$3,000, and not less than \$500, while section 8 of said article 7 declares that such compensation shall be paid by fees or commissions, or both, as prescribed by law. Said section 1679 prescribes the per centum to be paid to the tax collector for the collection of all state taxes, and section 2154 prescribes his minimum and maximum per centum on per capita taxes, and on all other taxes. Section 2158 of the Revised Statutes declares the method, and out of what fund, said compensation shall be paid. Prior to the adoption of the constitution, the compensation of such officer, for the collection of territorial taxes, was paid by the county treasurer out of the territorial money, and we think legally so, under the provisions of section 1680 of the Revised Statutes of 1887; but we are of the opinion that the payment of said compensation out of the state fund is now prohibited by section 7, art. 7, of the constitution, which declares that "all taxes levied for state purposes shall be paid into the state treasury." By reason of the provisions of said section 7 of article 7 of the constitution, all taxes collected for state purposes must be paid into the state treasury, without any deduction for fees or commissions for collecting the same. This court held in *Cunningham v. Moody*, 28 Pac. Rep. 395,¹ that "all taxes levied and collected for state purposes must be paid into the state treasury, without any deduction for commissions or other charges." We know of no reason for changing the opinion therein expressed. The appellant is not entitled to the payment of his compensation for collecting the state taxes out of state money collected by him, but is entitled to receive his compensation therefor at the per centum prescribed by section 1679, Rev.

St., out of the "current expense" fund of his county, as prescribed by the provisions of section 2158 of the Revised Statutes. The maximum compensation to be paid annually to the assessor and tax collector is, however, limited by the provisions of said section 7, art. 18, of the constitution, to the sum of \$3,000, and he can in no event receive a larger sum. The judgment of the court below is affirmed, with costs of this appeal in favor of respondent.

MORGAN and HUSTON, JJ., concur.

PICOTTE v. WATT, County Treasurer, *et al.*

(December 26, 1892)

EQUITY—JURISDICTION—REMEDY AT LAW.

1. When the statute provides a plain, speedy, and adequate remedy, it must be pursued. The fact that such a proceeding imposed great inconvenience cannot be urged as a reason for the interposition of equity.

SAME—PLEADING—ALLEGATION OF FRAUD.

2. A simple allegation of fraud and illegality in the action of a board of commissioners, without the statement of any facts constituting the fraud or illegality, is insufficient.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by T. E. Picotte against W. H. Watt, county treasurer, and others, to restrain the payment of certain warrants drawn on the county treasury by the board of commissioners. From a judgment for defendants, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

A. F. Montandon, for appellant.

Corporate powers cannot be enlarged by by-laws and ordinances. *Thompson v. Roe*, 22 How. 422; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947.

When a particular method of exercising any corporate power of a municipality is prescribed by statute, no other can be adopted. *Anthony v. Jasper Co.*, 101 U. S. 697; *Ogden v. Daviess Co.*, 102 U. S. 637; *Wells v. Supervisors*, *Id.* 625; *Kelly v. Multnomah Co.*, 18 Or. 356, 22 Pac. Rep. 1110.

Whenever equitable grounds—such as irreparable injury, multiplicity of suits, fraud, etc.—intervene, equity will intervene. *Dow v. City of Chicago*, 11 Wall. 108.

Brunner & Parsons, for respondents.

Courts of equity will not lend their aid

¹ Ante, 862.

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in preventing alleged wrongs when the ordinary legal tribunals are capable of affording sufficient relief. 1 High, Inj. § 28, and cases cited.

And it must appear that plaintiff has no remedy at law that would be complete. *De Witt v. Hays*, 2 Cal. 463; *Lupton v. Lupton*, 3 Cal. 120; *Tomlinson v. Rubio*, 16 Cal. 203; *Leach v. Day*, 27 Cal. 644.

If not shown, the complaint is demurrable. *Wingfield v. McLure*, 48 Ark. 510, 3 S. W. Rep. 439; 1 High, Inj. §§ 28, 230; *Murphy v. Harbison*, 29 Ark. 340.

Injunction will not lie when statute provides a remedy. *Brown's Appeal*, 66 Pa. St. 155; *Hammersly v. Turnpike Co.*, 8 Phila. 314.

When a party by laches has lost his remedy, equity will not interfere. *Wilkerson v. Walters*, 1 Idaho, 564; *Hazard v. Cole*, Id. 301; *Sedam v. Williams*, 4 McLean, 51; *Long v. Smith*, 39 Tex. 160.

Injunction will not be granted on mere allegations of irreparable injury; the facts must appear. *Hale v. Railroad Co.*, 23 W. Va. 454; 1 High, Inj. § 34.

HUSTON, J. Plaintiff brings this action to restrain the payment by the treasurer of Alturas county of certain warrants issued upon the treasury of said county by the board of commissioners thereof, upon the alleged ground that such warrants were fraudulently and illegally "allowed, audited, and registered." The warrants are described by number, amount, date, and name of person to whom issued. While there is no statement in the complaint, in direct terms, of any facts constituting the alleged fraud, illegality in the allowance of the accounts, or claims for which the warrants were issued, it is fairly inferable from the allegations of the complaint that a large part, if not all, of the claims upon which said warrants were issued were so issued upon and in payment of claims against Alta county. The legislature of the state of Idaho, at its first session, by an act passed on March 3, 1891, undertook to create the counties of Alta and Lincoln out of the then territory of the counties of Alturas and Logan. This act of the legislature was subsequently declared to be unconstitutional by the supreme court of the state. Now whether the claims accruing against Alta county during the time intervening between the passage of the act organizing that county and the decision of the supreme court,

pronouncing the same void, were properly chargeable and allowable against Alturas county, is a question we are not, under our view of this case, at this time called upon to decide. The defendants filed a general demurrer to plaintiff's complaint, which was sustained by the district court. The plaintiff declining to answer, judgment was rendered for defendants, and from such judgment plaintiff appeals to this court.

The sole question before us is that raised by the demurrer to the complaint. It is contended by respondents that, if the plaintiff desired to contest the allowance of the claims upon which the warrants in question were issued, the means and method for reaching that result are amply provided by section 1776, Rev. St. Idaho, and that, having neglected to avail himself of such remedy, he is debarred from invoking the aid of equity. Section 1776, Rev. St. Idaho, is as follows: "An appeal may be taken from any order, decision, or action of the board, while acting in an official capacity, by any person aggrieved thereby, or by any taxpayer of the county, where any demand is allowed against the county, or when he deems any order, decision, or action of the board illegal or prejudicial to the public interests." This statute would seem to cover entirely the case presented by the plaintiff in his complaint. But it is urged by plaintiff that to have taken an appeal in each of the cases enumerated in the complaint would have subjected him to great trouble and inconvenience. This may be unfortunate for plaintiff and those he represents, but it furnishes no excuse for the court to set aside a rule so generally recognized, and repeatedly iterated by this court, as that equity may not be invoked where the party has a complete and adequate remedy at law. Counsel for appellant contends that, as the claims alleged to have been illegally allowed are numerous, and were allowed at different times, a resort to the remedy provided by the statute would have involved the institution of a multiplicity of suits, and therefore it is permissible for him to resort to equity in the first instance, notwithstanding the remedy provided by statute. This is only another phase of the contention just disposed of, and, if recognized, would involve the like consequences. The statutory remedy being complete and adequate, the plaintiff must resort to it; and having shown no reason for not doing so, arising

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from any acts of defendants, he is precluded from invoking the aid of equity. While the general charge of fraud and illegality in the allowance of the claims upon which said warrants were issued is repeated frequently in the complaint, in no single instance are the—or any—facts constituting such alleged fraud or illegality specifically set forth, or set forth at all. The demurrer was properly sustained. The judgment of the district court is affirmed, with costs.

SULLIVAN, C. J., and MORGAN, J., concur.

HAMPTON v. DILLEY.

(December 26, 1892.)

OFFICE AND OFFICER—CHANGE OF COUNTY—APPOINTMENTS BY GOVERNOR AND COUNTY BOARD.

H. was duly elected judge of the probate court of Logan county at the regular election held in 1890. The legislature on March 3, 1891, and after H. had taken office under his said election, passed an act changing Logan county to Lincoln county. H. was appointed by the governor, under the provisions of the act of March 3, 1891, probate judge of Lincoln county. D. (the defendant, and who was at the time clerk of the probate court of Logan county, under H.) was appointed, by the commissioners of Logan county, probate judge of said Logan county; said board refusing to recognize the act of March 3, 1891, as law. The supreme court of the state declared the act of March 3, 1891, unconstitutional. Thereupon H. demanded possession of said office of D. D. refused to deliver possession of the office to H., and H. brings his action to recover possession of the office. *Held*, H. was entitled to recover said office.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. STOCKSLAGER, Judge.

Action by H. S. Hampton against S. B. Dilley to try the right to the office of judge of probate of Logan county. From a judgment for defendant, plaintiff appeals. Reversed.

H. S. Hampton and *V. Bierbower*, for appellant.

There cannot be a *de facto* officer where no *de jure* office exists to be filled. In re Hinkle, 31 Kan. 712, 3 Pac. Rep. 531.

Unconstitutional enactments are inoperative. Cooley, Const. Law, p. 144; Cooley, Const. Lim. 224; State v. Tuffy, 20 Nev. 427, 22 Pac. Rep. 1054.

A vacancy in office can only occur upon the happening of one of the things men-

tioned in the statute. People v. Whitman, 10 Cal. 38; State v. Wilson, 30 Kan. 661, 2 Pac. Rep. 828; Rosborough v. Boardman, 67 Cal. 116, 7 Pac. Rep. 261; Gorman v. Commissioners, 1 Idaho, 553.

S. B. Kingsbury, for respondent.

A resignation may not only take place by abandonment of official duties, but also by being appointed to and accepting a new office, incompatible with the former one. Ang. & A. Corp. §§ 433, 434.

Where office is vacated voluntarily, no judicial determination is necessary. State v. McClinton, 5 Nev. 329; People v. Board of Metropolitan Police, 26 N. Y. 481; Callo-way v. Sturm, 1 Heisk. 764.

Plaintiff must be "a person now rightfully entitled to the office." He must stand on the strength of his own rights. If he has been guilty of acts that would vacate or forfeit the office, he cannot recover, even if no court or board has passed on the question. High, Extr. Rem. § 652.

The right of plaintiff to the office is tried in this action; and if, by judicial proceedings, plaintiff might have at any prior time been ousted, or the office declared vacant, the failure of any one to take those steps does not give plaintiff a right to an office he has voluntarily abandoned. State v. Wilson, 30 Kan. 661, 2 Pac. Rep. 828.

The act of plaintiff in accepting the appointment of probate judge of Lincoln county is an estoppel on him to claim a right to be installed into this office, or to have the fees of the office earned by the appointee. Bigelow, Estop. (2d Ed.) pp. 503, 508-510, 515, 516; People v. Hartwell, 67 Cal. 11, 6 Pac. Rep. 873; High, Extr. Rem. §§ 631, 658, 668, 686, 687, 746; People v. Waite, 70 Ill. 25; Gunter v. Laffan, 7 Cal. 588; Dorsey v. Ashley, 72 Ga. 460.

HUSTON, J. At the regular biennial election of 1890 the plaintiff was elected to the office of probate judge for Logan county for the two years next following the 1st day of January, 1891. He regularly qualified as such on the 13th day of January, 1891, and entered upon the discharge of his duties as such officer. On the 3d day of March, 1891, the legislature of Idaho passed an act, by the terms of which they created the counties of Alta and Lincoln out of the territory theretofore compris-

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ing the counties of Alturas and Logan. At the time of the passage of the act referred to, Bellevue was the county seat of Logan county. By the provisions of said act the town of Shoshone was made the county seat of Lincoln county, and the town of Bellevue was included within the boundaries of the county of Alta. Immediately following the passage of the said act organizing said counties of Alta and Lincoln, the governor of the state, in accordance with the provision of said act, appointed various persons to fill the several offices of said counties of Alta and Lincoln, so as aforesaid organized by and under said act of March 3, 1891, and among others appointed the plaintiff probate judge of said Lincoln county. Plaintiff accepted said appointment, and at once qualified as such officer. The board of commissioners of Logan county, refusing to recognize the validity of the act of March 3, 1891, immediately on the acceptance by the plaintiff of the appointment of judge of probate court of Lincoln county, and his qualification as such officer, and on the ——— day of March, 1891, appointed the defendant probate judge of Logan county, and installed him in said office. Proceedings were instituted to test the validity of said act of March 3, 1891, which resulted in the declaring of the same unconstitutional by the supreme court of the state. *People v. George*, (Idaho,) 26 Pac. Rep. 983, and 27 Pac. Rep. 680.¹ Upon the announcement of such decision, plaintiff made demand of the defendant for the possession of said office of probate judge of Logan county, which was refused by defendant; and he continued to hold, and still does hold, said office, and performs the duties and functions thereof. Plaintiff brought action in the district court under the provisions of chapter 6, Gen. Laws Idaho 1880-81. A trial was had in the district court for Logan county before the court with a jury, and verdict was rendered in favor of the defendant. From the judgment entered thereon the plaintiff appeals to this court.

The case comes to us upon a bill of exceptions presenting quite a number of exceptions to evidence, findings, and instructions; but, having carefully examined the record, we conclude that, for all the purposes of this decision, the questions may

all be resolved into one: Did the plaintiff, by accepting from the governor of the state the appointment of probate judge of Lincoln county, thereby abandon, forfeit, or resign the office of probate judge of Logan county? Or, to state it differently, did the acts of the plaintiff create a vacancy in the office of probate judge of Logan county on the ——— day of March, 1891, the date of defendant's appointment and investiture? Abandonment is largely a question of intention, and it is clear, from all that is presented by the record, that it was never the intention of plaintiff to quit or give up the office of probate judge of Logan county.

It is claimed by the respondent that the appellant neglected to perform the duties of the office to which he was elected during a period of three months prior to his bringing this action, and therefore that the office became vacant, by operation of the statute, but the record shows that within the period required by the constitution the appellant duly qualified and entered upon the performance of the duties of his office. It is also conceded in the argument that, soon after he so entered upon his duties, he appointed the defendant in this action clerk of said court, and placed the records thereof in his care and keeping, and from that day until the present time the said defendant has, by force, and against the will of this plaintiff, kept possession of said records and said office, although possession thereof was repeatedly demanded; and now, having wrongfully and unlawfully seized said office, and wrongfully kept possession thereof, he (the defendant) alleges that plaintiff has neglected to perform his duties therein, and that, therefore, said office was vacated by plaintiff, thereby seeking to take advantage of his own wrong. The court that would sustain the defendant in such a claim could scarcely be called a court of justice.

But it is contended by counsel for respondent that plaintiff, by accepting the appointment of probate judge of Lincoln county, forfeited the office of probate judge of Logan county. In support of this contention, we are cited to numerous authorities which seem to establish the rule that the acceptance, by the incumbent of an office, of another office or position, incompatible with that already held, amounts to an abandonment or forfeiture of the first. This rule seems to

¹Ante, 848.

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have the sanction of authority and principle. But does the case of the plaintiff fall within the rule? He was regularly elected to the office of probate judge of Logan county, qualified, and entered upon his duties as such. His office was abolished by the act of the legislature creating Lincoln county. The act of the legislature was the law until it was pronounced void by the proper tribunal. To hold otherwise would be to abrogate the first duty of the citizen,—obedience to the law. To hold otherwise would be to encourage every person to whom a law is distasteful or burdensome to disobey or set it at naught. While we recognize, with becoming deference, the high authority cited by counsel, which says that, "when a statute is adjudged to be unconstitutional, it is as if it had never been," (Cooley, Const. Lim. p. 222,) we are unwilling to assent to the sweeping application claimed therefor by counsel for the respondent. If any and every person "invested with a little brief authority" is permitted to defy the law, "village Hampdens" will be as thick as autumnal leaves in Valambrosa.

We have been unable to find a case parallel with that under consideration. A law had been passed by the legislature with all the required constitutional formalities, and, as said by Judge BREESE in *People v. Salomon*, 54 Ill. 46, it "became, by its own intrinsic force, the law to every public officer in the state, and to all the people." Again, in the same case, the same learned judge uses this language: "To the law every man owes homage,—the very least, as needing its care; the greatest, as not exempted from its power. To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government; for, if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection to the laws."

The plaintiff was acting entirely in an individual capacity when he accepted the appointment of probate judge of Lincoln county. The positions of the plaintiff and the defendant were entirely different. The plaintiff accepted the law as it came to him, clothed in all the insignia of legality. The defendant assumed to question the constitutionality of the law, refused obedience to it, and accepted an appointment to an office which, as the law then

stood, had no existence. Say the supreme court of Texas in *Sessums v. Botts*, 34 Tex. 335: "It is believed that any citizen of the state, whose interests are affected by an act which he believes unconstitutional, may, by pursuing a legal course, test the constitutionality of a law, or, if he chooses, may wholly disregard that act as law; but in that case he acts at his peril, and, should the act of which he complains be decided to be law, then he must suffer the consequences of a bad judgment or a perverted will. It is therefore deemed advisable for every good citizen to obey whatever may be promulgated by the lawmaking power as law until the same shall have been passed upon by the courts of the country in a legitimate and proper manner. If this, then, is the duty of the citizen, and he obeys or submits to whatever has received the legislative sanction as law, then he should be protected in that obedience, or at least he should not be deemed guilty of laches, and his rights sacrificed to those who are ready to usurp the province of the judiciary, and declare for themselves what is and what is not law." In the same case the court, in commenting upon the passage from Cooley, Const. Lim., above cited, say: "We are not willing to construe the quotation from Cooley, Const. Lim., in the same light as the learned counsel for the plaintiff in error appears to have done. It is true that, when an act has been declared unconstitutional, then it is as though it had never been; but we do not think that the author, in the text, or the cases cited by him, intended to announce the doctrine that an unconstitutional law could be no protection to officers or citizens before the same had been passed upon and judged invalid." With the views of the supreme court of Texas we are in full accord, and we think the doctrine therein enunciated peculiarly applicable to the case at bar. There could be no incompatibility between the offices of probate judge of Lincoln county and that of probate judge of Logan county, for the existence of one precluded the existence of the other. The plaintiff is not seeking to derive any benefit under, nor does he predicate any claim upon, the act of March 3, 1891. Hence his case is not within the rule which says no one can derive any advantage or claim any rights under or by virtue of any law which has been declared unconstitutional. He was elected to the office of probate judge of Logan county

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by the people of said county. A law was passed changing Logan to Lincoln county. He accepted an appointment to the same office in Lincoln county. It seems to us it would not only be manifestly unjust to the plaintiff, but it would be recognizing a pernicious doctrine, were we to hold that the plaintiff should be punished; for, in depriving him of the office to which the people have elected him, we do punish him, simply because he respected and obeyed the law while it was the law. Notwithstanding the high authority to the contrary, we are constrained to believe that the better rule is that all should obey the law, as it comes from the lawmaking power, until the proper tribunal has passed upon it. Obedience to the law, as it appears, when clothed with all the evidences of authority, ought not to subject the obeying citizen to loss or punishment. Recognition of the law, and obedience thereto, is not the prevailing virtue of this age or country. The disposition to construe the law for themselves, to pass upon its constitutionality, and to defy and disobey it whenever it seems to impinge upon their notions or whims, or especially their so-called religious views, is a sentiment which does not need the spur of judicial encouragement in this country.

Numerous exceptions were taken by the appellant to the instructions to the jury given by the court, and to those refused to be given; but as these questions cannot again arise, under the conclusion we have reached, it is unnecessary to pass upon them.

It is the judgment of this court that the plaintiff and appellant, H. S. Hampton, was duly elected probate judge of Logan county, Idaho, at the general election held on October 1, 1890; that he duly qualified as such officer, and entered upon the duties of said office; that he has never abandoned, forfeited, or resigned said office; that he is entitled to the possession of said office, and to the emoluments thereof, for the two years next succeeding January 13, 1891; and that he forthwith have restitution of said office. And it is further ordered that the district court for Logan county proceed to assess the damages suffered by said Hampton by reason of his deprivation of said office by defendant, according to law.

SULLIVAN, C. J., and MORGAN, J., concur.

WHITE et al. v. MULLINS et al.

(December 26, 1892.)

MECHANIC'S LIEN — NOTICE OF CLAIM — SUFFICIENCY.

1. A notice of mechanic's lien which fails to state, unequivocally and plainly, the name of the owner or reputed owner, or the terms, time, and conditions of the contract under which the labor was performed, is fatally defective.

SAME.

2. A statement at the head of the notice of "W. and M., Subcontractors, versus B., Contractor, and M., Owner," is not a compliance with the requirements of the statute, requiring that the name of the owner or reputed owner should be stated in the lien.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. STOCKSLAGER, Judge.

Action by J. S. White and another against B. G. Mullins and another to foreclose a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Reversed.

H. S. Hampton, for appellants.

The notice or claim of lien being made a part of the complaint, its sufficiency is properly tested by demurrer. *Miner v. Marshall*, (N. M.) 27 Pac. Rep. 481.

The notice is insufficient, in that it does not state the name of the owner or reputed owner of the ditch, or that the owner is unknown. *Hooper v. Flood*, 54 Cal. 218; *Phelps v. Mining Co.*, 49 Cal. 336; *Malter v. Mining Co.*, 18 Nev. 209, 2 Pac. Rep. 50. It does not state the name of the person by whom plaintiffs were employed. *Warren v. Quade*, 3 Wash. St. 750, 29 Pac. Rep. 827.

It does not state the time, terms given, or conditions of the contract. *Hooper v. Flood*, 54 Cal. 218.

A direct and unequivocal averment in any material particular must be made before any evidence can be introduced to support it. *Malter v. Mining Co.*, 18 Nev. 209, 2 Pac. Rep. 50.

V. Bierbower, for respondents.

A lien notice is sufficiently definite which fairly apprises the owner of what he is charged with, what kind of material, and what the same was furnished for. *Manufacturing Co. v. Kennedy*, 4 Wash. St. 305, 30 Pac. Rep. 79.

A substantial compliance with the statute regarding the contents of a claim of mechanic's lien is all that is necessary to its validity. *Giant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 25 Pac. Rep.

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976; *Mill Co. v. Garrettson*, 87 Cal. 589, 25 Pac. Rep. 747.

A claim of lien for materials furnished or labor performed need not state that the building was completed. *Harmon v. Ashmead*, 68 Cal. 321, 9 Pac. Rep. 183.

HUSTON, J. This is an action brought by the plaintiffs to foreclose a mechanic's lien. The case was tried in the district court before a jury. Verdict and judgment for plaintiffs, from which appeal is taken to this court. The record shows a bill of exceptions, wherein are presented various exceptions to the sufficiency and competency of evidence, and to the sufficiency of the evidence to support the special findings of the jury. The defendants filed a demurrer to the complaint of plaintiffs, alleging insufficiency of facts to constitute a cause of action, and ambiguity, etc. This demurrer was overruled by the court, and defendants filed answer.

The first error assigned by defendants is that the notice of lien filed by plaintiffs, and which is attached to and made a part of their complaint, is insufficient, under the statute. The notice of lien is as follows:

"State of Idaho, county of Logan—ss.: White and Mallison, Subcontractors and Claimants, *versus* R. J. Bledsoe, Contractor, and B. G. Mullins, Owner. Notice is hereby given, to all whom it may concern, that we, as subcontractors, do hereby file a lien with the county recorder of Logan county, state of Idaho, and that it is our intention thereby to claim and hold a lien upon a certain ditch hereinafter described, under and by virtue of the laws and the provisions of the statutes of the state of Idaho, for such cases made and provided, to secure to us the payment of the sum of one hundred and seventy-four and 70-100 dollars, for work and labor done and performed by us upon that certain ditch located in the precinct of Bliss, in the county of Logan, state of Idaho, and known as the 'Mullins Ditch,' starting from a point on the Malad river, in said precinct of Bliss, in said county of Logan, and state of Idaho, about one mile above the residence of S. C. Frost, and thence running in a westerly direction towards Bliss station, on the O. S. L. Railway, for a distance of six miles; that said labor was performed on divers days and times between September 20, 1890, and October 28, 1890, at the instance of R. J. Bledsoe, the contractor; that a full,

true, and correct statement of the sum due us from the said contractor is one hundred and seventy-four dollars and 70-100; that claimants performed said labor at the request of the contractor, R. J. Bledsoe; that thirty days have not elapsed since the last of said work and labor was done; and that it is our intention to claim and hold a lien against said ditch, or so much thereof as may be necessary, for the security of said amount above mentioned. Witness our hand hereunto set this 22d day of November, 1890. WHITE AND MALLISON.

"State of Idaho, county of Logan—ss.: J. S. White, being first duly sworn, says that he is one of the above-named firm, that he has read the foregoing lien, and that the same is true of his own knowledge. J. S. WHITE. Subscribed and sworn to before me this 22d day of November, 1890. W. C. HILL, Justice of the Peace, Logan county, Idaho.

"Filed February 21, 1891."

Section 5130, Rev. St. Idaho, is as follows: "Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person." Under a statute almost identical with that of Idaho, the supreme court of Nevada, in *Malter v. Mining Co.*, 2 Pac. Rep. 50, held that, while the statute should be liberally construed, every material requirement should be complied with, and that, where a direct and unequivocal allegation of the name of the owner is wanting in the notice of the lien, such notice is radically defective, and no lien can be founded thereon. It can hardly be claimed that the *descriptio personæ* at the head of the no-

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tice, to wit, "White and Mallison, Sub-contractors and Plaintiffs, *versus* R. J. Bledsoe, Contractor, and B. G. Mullins, Owner," is a direct and unequivocal allegation of the name of the owner. There is not even an attempt to state in the notice the "terms, time given, and conditions" of the contract. In *Hooper v. Flood*, 54 Cal. 218, it is held that "an omission to state in the claim the terms, time given, and conditions of the contract under which the work is done or the material furnished, is fatal. In *Bradbury v. Improvement Co.*, 10 Pac. Rep. 620,¹ the supreme court of Idaho held that "the mechanic's lien law must be strictly construed." It is unnecessary to consider further the errors presented, as those already referred to are decisive of the case. The demurrer of defendants to the complaint should have been sustained. The judgment of the district court is reversed, and judgment for defendants ordered to be entered, with costs to appellants.

SULLIVAN, C. J., and MORGAN, J., concur.

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SWANHOLM v. REESER.

(December 30, 1892.)

ASSUMPSIT—SUFFICIENCY OF ANSWER.

1. The denial of indebtedness, without a denial of the facts alleged in the complaint, out of which such indebtedness arose or follows, is a conclusion of law, and raises no issue of fact.

SAME—COUNTERCLAIM.

2. A defense set up by way of counterclaim, alleging that the plaintiff is indebted to defendant in the sum of \$156 for use of a certain building, and for \$1,265.75 for certain gold bullion, without alleging that said sums are due, or that defendant is entitled to credit therefor on the demand sued on, is no defense.

(*Syllabus by the Court.*)

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Assumpsit by Henry Swanholm against Jacob Reeser. There was judgment in the probate court for defendant, and plaintiff appealed to the district court. From a judgment of the district court for defendant, plaintiff appeals. Reversed.

Wyman & Wyman, for appellant.

A defect of a material averment in the pleadings will make the judgment based thereon fatally defective on appeal. *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac.

Rep. 939; *Morgan v. Menzies*, 60 Cal. 341; *Barron v. Frink*, 30 Cal. 489; *Osborn v. Graves*, 11 Or. 526, 6 Pac. Rep. 227; *Smith v. Smith*, 106 Ind. 43, 5 N. E. Rep. 411; *McAninch v. Hamilton*, 1 Ind. App. 429, 27 N. E. Rep. 719; *Bean v. Gregg*, 7 Colo. 499, 4 Pac. Rep. 903.

If any one of the defenses made or counterclaims is not sufficiently pleaded, a general verdict for the defendant will make the judgment for the defendant error. *Barron v. Frink*, 30 Cal. 487; *Anderson v. Fisk*, 36 Cal. 626.

August Quitzow and *H. W. Weir*, for respondent.

SULLIVAN, C. J. This action was brought in the probate court of Elmore county upon a demand for goods, wares, and merchandise sold and delivered to the respondent, and for cash advanced to respondent, claimed to be of the value of \$563.83, and that respondent is entitled to a deduction of \$41 from said amount because of certain indebtedness due from appellant to respondent. The respondent interposed an answer, which was demurred to by appellant. The demurrer was sustained, and thereupon respondent filed his amended answer. A general demurrer was interposed to the amended answer, and overruled by the court. The case was tried by the court without a jury, and judgment entered in favor of respondent. Thereupon the cause was appealed to the district court and there tried before the court with a jury, and a judgment entered in favor of the respondent. This appeal is from said judgment of the district court, on the judgment roll alone.

The only question for determination is as to whether the court erred in overruling the demurrer to the amended answer. The cause of demurrer therein stated is that the amended answer does not state facts sufficient to constitute a defense to appellant's action, or a counterclaim, or a cross action. The appellant, who was plaintiff in the court below, states his cause of action in the first paragraph of his complaint, and it is as follows: "The plaintiff complains and alleges that the defendant is indebted to the plaintiff in the sum of five hundred sixty-five 83/100 dollars, upon an account for goods sold and delivered, and cash, money of the United States, advanced by the plaintiff to the defendant, at his request, at Rocky Bar, Elmore county, Idaho, between the 1st day of May, 1886, and the 5th day of June,

¹ Ante, 221.

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1889, and that the same is now due and payable, but said sum has not been paid, nor any part thereof, except the sum hereinafter mentioned." The denial in the answer is as follows: "That the defendant is not indebted to the plaintiff in any sum whatever; that the account referred to in the complaint for goods sold and delivered, and money advanced, by plaintiff to defendant, is not correct." The denial of "indebtedness," without a denial of the facts which were pleaded to show the existence of such indebtedness, is but a denial of a conclusion of law, and raises no issue of fact. *Bliss*, Code Pl. §§ 212, 334; *Curtis v. Richards*, 9 Cal. 33; *Wells v. McPike*, 21 Cal. 216. The denial "that the account referred to in the complaint for goods sold and delivered, and money advanced, by plaintiff to defendant, is not correct," is not a sufficient denial of the allegation of the complaint above quoted. It simply denies the correctness of the account. The amount due on said account might be more or less than that claimed in the complaint, and still the denial be true. The material allegations of said complaint are not denied, and are therefore admitted by the defendant. The counterclaim that is attempted to be set up in the fourth paragraph of the answer alleges a legal conclusion, and the conclusion is that plaintiff is indebted to the defendant in the sum of \$156 for the use and occupancy of a certain building, and is also indebted to the defendant in the further sum of \$1,275.75 for gold bullion, for which the plaintiff has not credited the defendant. There is no allegation that said sums, or either of them, are due, or that defendant was entitled to credit therefor on the demand sued on. The answer contains no denial of the allegations of the complaint, and no defense is set up by way of counterclaim. The record does not show that the demurrer to the answer was passed upon by the district court, but the objection to the answer raised by the demurrer in this case is never waived. See *Miller v. Mining Co.*, post, 1206, 31 Pac. Rep. 803, (decided by this court at its present term,) and authorities therein cited. The judgment of the court below is reversed, and the cause remanded to district court, with instructions to permit respondent to amend his answer, if he so desires. Costs of this appeal in favor of appellant.

HUSTON and MORGAN, JJ., concur.

ROBINSON *et al.* v. KINNEY, Sheriff, *et al.*

(December 31, 1892.)

SHERIFFS—ACTION ON BOND—LIABILITY OF SURETIES.

1. Where a sheriff received payment of the amount called for by an execution issued upon a judgment, and neglected to pay over the same, the sureties of the sheriff are responsible therefor in an action brought upon the bond.

SAME.

2. The penalty provided for in sections 1874 and 1876 of Rev. St. of Idaho are not recoverable from the sureties upon the official bond of sheriff.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by E. J. Robinson and J. C. Emery against P. H. Kinney, principal, and P. A. Regan and others, sureties, on the official bond of said Kinney as sheriff. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiffs appeal. Reversed.

A. F. Montandon, for appellants.

A principal charging himself with having received so much estops sureties from controverting it. *Potter v. U. S.*, 107 U. S. 126, 1 Sup. Ct. Rep. 524.

The records of the court showing money to have been received by the marshal under execution are evidence against his sureties. *Williams v. U. S.*, 1 How. 299; *Dwight v. St. John*, 25 N. Y. 203; *Grier v. Jones*, 54 Ga. 154.

Due delivery of letters at the usual period is presumed from the fact of mailing. *Whart. Ev.* §§ 1323, 1324; *Pennypacker v. Insurance Co.*, 80 Iowa, 56, 45 N. W. Rep. 408; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. Rep. 71; *Lindenberger v. Beall*, 6 Wheat. 104.

Failure to get service on the principal does not defeat an action against the surety on bond joint and several. *Peelie v. State*, 118 Ind. 512, 21 N. E. Rep. 288.

Where obligation is joint and several, one or all may be sued. *Minor v. Bank*, 1 Pet. 46; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161.

Demand on the principal is not necessary where surety directly undertakes. *Colburn v. Brooks*, 78 Cal. 443, 21 Pac. Rep. 2; *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. Rep. 325; *Crock. Sher.* § 884.

Where one holds property belonging to another under such circumstances that a duty arises to hand it over to the owner, demand is not necessary before action.

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Woods v. Hamilton, 39 Kan. 69, 17 Pac. Rep. 335.

N. M. Ruick, for respondents.

HUSTON, J. P. H. Kinney, the principal defendant, as sheriff of Alturas county, received an order of sale issued upon a judgment and decree recovered in the district court for Alturas county in favor of the plaintiffs and against one Gilman. Levy was made under the execution upon certain real estate situated in Alturas county. Due notice of sale was published, and, after several postponements, sale was had, and the property was bid in by the attorney of the plaintiffs, and certificate of sale regularly executed and delivered to him. No return was ever made by the sheriff upon the order of sale. The sheriff, some time before the expiration of the time for redemption of the property from sale, resigned his office, and left the country. On January 23, 1891, the plaintiffs, by their attorney, moved the honorable judge of said district court at chambers for the appointment of a commissioner to execute a deed in accordance with the certificate of sale theretofore issued as aforesaid. Said motion was contested by the defendant in the judgment, and on the hearing the attorney of said defendant presented a receipt, a copy of which appears in the record, and is as follows: "Hailey, April 10, 1890. Received from John Gilman, three hundred twenty-five dollars (\$325) to settle a judgment of Robinson and Emery vs. John Gilman. [Signed] P. H. KINNEY." On the 7th day of February, 1891, the said district judge rendered his decision denying said motion, which decision was in writing, and contains the following: "That on October 31, 1887, plaintiffs recovered judgment against John Gilman in above cause. That on March 14, 1890, plaintiffs caused to be issued the order of sale of the second district court in the said cause, and delivered it to P. H. Kinney, then sheriff of the county of Alturas, territory of Idaho, as sheriff, commanding the said sheriff thereunder to sell the property in said order described, or so much thereof as he might deem necessary to satisfy said judgment and costs. After the levy on the property by the sheriff as aforesaid, but before the sale aforesaid, and on April 10, 1890, defendant, John Gilman, paid said P. H. Kinney, as sheriff aforesaid, all he, said sheriff, claimed due plaintiffs under said order of sale, or that he, as sheriff, was entitled to receive there-

under. Said P. H. Kinney is not now, and since about August 1, 1890, has not been, sheriff of Alturas county. For the foregoing reasons I deny the motion. [Signed] C. O. STOCKSLAGER, District Judge. This 7th day of February, A. D. 1891. Filed February 14, 1891." On February 28, 1891, plaintiffs instituted suit against said sheriff, and the other defendants as sureties upon said sheriff's official bond. The complaint sets forth in due form the cause of action as hereinbefore indicated, and prays judgment against such of defendants as have appeared in the action. The answer is a general denial. Neither complaint nor answer was verified.

The only evidence offered by the defense was touching the genuineness of the signature of P. H. Kinney to the receipt hereinbefore set forth. Several witnesses called by defendant testified that the signature on the receipt was not that of P. H. Kinney. About an equal number testified on the part of plaintiff that they believed it was the signature of P. H. Kinney. Walter Gilman, a witness on the part of plaintiffs, testified that he was the son of John Gilman, defendant in the suit of Robinson & Emery vs. Gilman; that he was present with his said father at the bank in Worcester, Mass., when he procured a draft for \$325, to send to Sheriff Kinney to pay the judgment in the case of Robinson & Emery vs. Gilman; that the draft was indorsed by said John Gilman, and was sent to Sheriff Kinney; that Kinney, in April, 1890, at Hailey, admitted to witness that he had received the draft, and assured him there would be no sale of the property. C. J. Selwyn, a witness on the part of plaintiffs, testified that he was cashier of First National Bank of Hailey on April 10, 1890; that said bank paid a draft from Worcester National Bank of Massachusetts for \$325, payable to John Gilman, and indorsed by P. H. Kinney to Francis A. Smith; that the draft was paid to Mr. Smith. The judgment, decree, and order of sale, the notice of sale, and proof of publication thereof, and the certificate of sale, were all in evidence. The jury found a verdict for the defendants. Plaintiffs made a motion for new trial, which was overruled, and from the order overruling said motion, and from the judgment, this appeal is taken.

Appellants allege as error the refusal of the court to admit in evidence the decision of the district judge upon the motion for

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appointment of a commissioner to execute deed in accordance with the certificate of sale. We think this point is well taken. The district judge had already decided that the money due upon the judgment in the case of Robinson et al. vs. Gilman et al. had been paid to Kinney as sheriff, and for that reason refused to allow a deed to pass to the purchaser upon the certificate of sale. It would seem as though that decision settled the question of the receipt of the money by Kinney, and we know of no reason why such proof should not have been admitted. Still we think the receipt of the money by Kinney was sufficiently proven without this evidence.

Appellants allege error in the ruling of the district court in excluding a copy of a certain letter dated February 17, 1891, purporting to have been written by the attorneys of the plaintiffs to the defendant Kinney, making demand upon him for the money alleged to have been collected and received by him as sheriff. Defendants objected to the introduction of this letter, upon the ground, among others, that no proper foundation had been laid for its introduction. We think this objection was well taken. We have searched the record in vain for any evidence that any such letter as that of which the one offered purports to be a copy was ever written. The record says: "Next, plaintiffs offered a copy of a letter mailed to P. H. Kinney, February 17, 1891, marked 'Plfs. Ex. 2,' for identification, which reads as follows;" then follows the copy of the letter. But it nowhere appears that any proof was made or offered that any such letter was ever written or mailed.

Appellants allege as error certain instructions given by the court to the effect that to entitle plaintiffs to recover it was essential for them to prove a valid judgment, execution, delivery of execution, payment to the sheriff of the money received, and that the same has not been by him paid over to the parties entitled to receive the same, and that demand therefor has been made upon him. We cannot see that there was error in these instructions. This action is brought upon sections 1874, 1876, of the Revised Laws of Idaho, which are severally as follows: Section 1874: "If the sheriff does not return a notice or process in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him." Section 1876: "If he neg-

lect or refuses to pay over on demand to the person entitled thereto any money which may come into his hands by virtue of his office, (after deducting his legal fees,) the amount thereof, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month from the time of demand, may be recovered by such person." To recover under the latter section it is, as charged by the district court, incumbent upon the plaintiffs to allege and prove a demand. The demand was alleged, but plaintiffs failed to prove it. There could be no recovery against the sureties of the sheriff under section 1874, Rev. Laws Idaho. That section of our Code was adopted literally from the Code of California, and it has been held by the supreme court of that state (*Glascok v. Ashman*, 52 Cal. 493) that the penalty provided for in that section could only be recovered against the sheriff; that his sureties were not liable therefor. We think, however, that it was clearly shown by the evidence that the defendant Kinney, as sheriff, received upon the execution in his hands in favor of plaintiffs and against Gilman the sum of \$325. This sum it was his duty to pay over to the plaintiffs, less his legal fees. There is no evidence showing what his fees were. We are of the opinion that plaintiffs are entitled to recover on the case made by the record the sum of \$325, and interest thereon at the rate of 10 per cent. per annum from April 10, 1890. The judgment of the district court is reversed, and said court is ordered to enter judgment in favor of plaintiffs and against defendants for the sum of \$325, with interest thereon from April 10, 1890, at the rate of 10 per cent. per annum; costs to appellants.

SULLIVAN, C. J., and MORGAN, J., concur.

MAHONEY v. MARSHALL, Sheriff, *et al.*

(December 31, 1892.)

CLAIM AND DELIVERY — STIPULATION AS TO DAMAGES.

1. In an action of claim and delivery it was stipulated by the parties, through their respective attorneys, that, if plaintiff was entitled to recover at all, he was entitled to recover the full value of the property (in this case \$2,500) or nothing.

SAME—ESTOPPEL.

2. The jury found for the plaintiff in the sum of \$2,500. The record showing that the

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plaintiff was clearly entitled to recover, *held*, that a verdict and judgment for \$2,500 would not be disturbed.

(*Syllabus by the Court.*)

Appeal from district court, Cassia county; C. O. STOCKSLAGER, Judge.

Action of claim and delivery by B. F. Mahoney against G. S. Marshall, sheriff, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hawley & Reeves, J. C. Rogers, and L. Vineyard, for appellants. *Charles Cobb, Smith & Smith, and J. Brumback*, for respondent.

HUSTON, J. Plaintiff brought action of claim and delivery to recover possession of certain personal property taken by defendant. The property had been delivered to plaintiff by one Moon, the owner, as security for a debt owing from said Moon to plaintiff. It was seized by defendant Marshall, as sheriff, by virtue of a chattel mortgage in favor of defendant Child. Defendants admit that said chattel mortgage is void. The case was tried by a jury, and before submission it was agreed by the parties, through their respective attorneys, that "the judgment or verdict found by the jury should be for the full sum of twenty-five hundred dollars or nothing." The verdict was for plaintiff for the sum of \$2,500.

The appellants contend that the district court erred in entering judgment for \$2,500, and claim that it should have been for a lesser sum. We think defendants are estopped by their stipulation from raising that objection here, especially as the evidence shows the plaintiff entitled to recover that sum. We have carefully examined the record, and, finding no error, the judgment of the district court is affirmed, with costs to appellants.

SULLIVAN, C. J., and MORGAN, J., concur.

FIRST NAT. BANK OF HAILEY *v.* BEWS *et al.*

(December 31, 1892.)

ACTION ON NOTE—PLEA OF PAYMENT—SUFFICIENCY.

1. Where the answer admits the making of the note sued on, and alleges by sufficient averments that a mortgage was given to secure said note, and, to further secure the same, that the maker entered into an agreement to give the holder of the note and the mortgagees possession of a valuable property, with authority to collect the rents, to keep said property insured, and, in

case of loss by fire, to collect the insurance, and pay first all taxes, premiums on insurance, and then the note and interest thereon; that they took possession thereof, and collected the rents; that the property was consumed by fire, and that plaintiff and mortgagees collected said insurance; that the amount so collected far exceeded all demands; and that said note was fully paid from said funds,—the said answer sets up a complete plea of payment and set-off, and proof thereof should be permitted.

SAME—PARTIES—CROSS BILL TO BRING IN.

2. Where it appears, either from the pleadings or proof, that a complete determination of the rights of all the parties cannot be made without making other persons parties, it is the duty of the court to order such persons brought in, and it should permit the defendant to file a cross bill for that purpose.

(*Syllabus by the Court.*)

Appeal from district court, Alturas county; C. O. STOCKSLAGER, Judge.

Action by the First National Bank of Hailey against H. Bews, Kate Bews, O. R. Young, and J. W. Hodgman on a promissory note. There was judgment for plaintiff, and defendants appeal. Reversed.

A. F. Montandon, for appellants.

Plaintiff, not demurring to new matter in the answer, is deemed to have denied it. Code, § 4217; *Williams v. Dennison*, 94 Cal. 540, 29 Pac. Rep. 946.

A plea in abatement is waived by pleading to the merits. *Railroad Co. v. Harris*, 12 Wall. 65; *Bell v. Railroad Co.*, 4 Wall. 598.

A pleading to the merits admits the capacity to sue. *Society v. Pawlet*, 4 Pet. 480; *Yeaton v. Lynn*, 5 Pet. 224; *Livingston v. Story*, 11 Pet. 351; *Kane v. Paul*, 14 Pet. 33; *Pullman v. Upton*, 96 U. S. 328.

A plea of *nonassumpsit* waives a plea to the jurisdiction for lack of proper parties. *Evans v. Gee*, 11 Pet. 80; *Bailey v. Dozier*, 6 How. 23; *Sims v. Hundley*, Id. 1.

Angel & Loy, for respondent.

A counterclaim must be a claim existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. Rev. St. § 4184; *Stearns v. Martin*, 4 Cal. 227; *Naglee v. Palmer*, 7 Cal. 543; *Howard v. Shores*, 20 Cal. 282; *Cook v. Davis*, 22 Cal. 158; *Corwin v. Ward*, 35 Cal. 195; *Hook v. White*, 36 Cal. 299; *McGuire v. Lamb*, ante, 346, 17 Pac. Rep. 749.

Any person may be made a defendant who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination

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or settlement of the question involved therein. Code Civil Proc. § 4102.

MORGAN, J. Plaintiff, a corporation, brought suit against the defendants upon a promissory note for \$5,000, and allege (1) that plaintiff is a corporation; (2) that defendants were partners; that defendants, on the 29th day of August, 1887, for value received, made, executed, and delivered to McCornick & Co., bankers at Hailey, Idaho, their certain promissory note in writing, dated on said last-mentioned day,—and insert a copy of the note, which is in the usual form; that thereafter, before the commencement of this suit, said note was duly assigned to the plaintiff, who is now the lawful owner and holder thereof; that said note has not, nor any part thereof, been paid; and pray for judgment for note, interest, and costs of suit.

Defendant O. R. Young, by leave of the court, files his amended answer, as follows: "Amended answer. O. R. Young, by leave of court first had and obtained, files his amended answer herein, and says: (1) That, at the time of the execution of the note sued upon in this action, defendants therein also executed a like note for the same amount to the firm of Willman & Walker, then of Hailey, Idaho, and secured the payment of both said notes by then and there executing their mortgage to plaintiff's assignor and said firm of Willman & Walker, jointly, for the amount of both of said notes, on their certain real property then known as the 'Hailey Merchants' Hotel,' consisting of lots nineteen and twenty, of block forty, of the town of Hailey, with the improvements thereon, the whole thereof being then worth much over forty thousand dollars. (2) That about the 1st day of June, 1888, the note sued upon in this action was assigned to plaintiff, and thereby it became the owner and holder of the same, and to the extent of said note is also owner in the mortgage aforesaid. (3) That, to further secure said mortgagees and this plaintiff, on or about June 24, 1888, defendants aforesaid entered into an agreement with said mortgagees and this plaintiff to the following effect: That said mortgagors would put said mortgagees and this plaintiff in possession of said property, with power to use or rent the same for the benefit of mortgagors, by using or renting the same to best advantage, and apply the proceeds thereof, first in payment of taxes

legally levied and assessed thereon, next in keeping said property insured to an amount of not less than \$25,000, and then apply any overplus remaining after payment of taxes and premium on insurance aforesaid, first to the interest accruing on the said notes, and next towards the principal, and thus on, until all of said notes be fully satisfied; and in case of loss by fire before said notes were paid, then to apply so much of the insurance aforesaid as would be necessary to satisfy the same. (4) Thereupon said mortgagees and this plaintiff did agree with said mortgagors, defendants herein, to use or rent said property, collect the rents, pay the taxes, insure and keep the same insured for \$25,000, pay the interest and principal thereout, or out of the insurance, in the manner and form as stated in the third paragraph of this answer. (5) Thereupon, and the said mortgagees and this plaintiff having accepted and agreed to do and perform the matters and things as in said paragraph 4 of this answer stated and contained, and in consideration thereof, said mortgagees and this plaintiff were duly put in possession of the property aforesaid, and from said day, and continuously thereafter, said mortgagees and this plaintiff were and remained in possession of the same, used, rented, and collected the rents thereof, and applied the same to their own use. (6) That the income aforesaid, collected as aforesaid, for the purpose aforesaid, largely exceeded the possible taxes and insurance premium aforesaid. (7) That on July 2d, and during mortgagees' and plaintiff's possession aforesaid, said property was consumed by fire and was a total loss, and the insurance money which mortgagees and this plaintiff did recover under the insurance aforesaid, together with the rents collected, as aforesaid, largely exceeds any possible amount of both principal and interest on both of the notes aforesaid, and the same are fully paid, and a large amount over and above the same is due defendants. (8) Defendant has no positive knowledge that plaintiff did actually receive any insurance after the loss of the said property by fire, or that plaintiff insured the said property at all, but he avers that the said property was consumed by fire through a general conflagration of the town of Hailey, and the same did not originate on said premises at all; that he is informed, and believes said information, that all risks covered by insurance at said time were fully

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paid, and therefore alleges the fact to be that all risks of insurance against the said premises, which thereon then and there existed, were fully paid. (9) By the agreement aforesaid, and plaintiff's possession thereunder as aforesaid, plaintiff solemnly agreed to and with defendant to keep the said premises insured against loss by fire during his said possession of the same, for not less than the sum of \$25,000, and to pay itself thereout, and the other aforesaid mortgagees, any amount that in the event might then remain due on the notes aforesaid, and to turn the whole thereof to defendants' account and benefit, holding nothing to itself thereout but the principal and interest due at that time on the notes sued upon in this action; and if plaintiff actually neglected to cause to be insured, and keep insured, the said property as aforesaid, for the amount aforesaid, then plaintiff is liable to defendants for such neglect in the sum of \$25,000. (10) Defendant never had any accounting or payment whatever by plaintiff or the other said mortgagees, either as regards the uses and benefits derived by them from the possession of the said premises, nor of the rents thereof collected as aforesaid, nor of the insurance aforesaid. Wherefore defendant prays for judgment that plaintiff account to defendant for all rents, issues, and profits it derived from the possession and during the possession of the said premises, for all insurance recovered by it, or, if it neglected to insure, then for damages for such neglect; and, after deducting therefrom the note sued upon in this suit, then for judgment for any balance found due this defendant, and for general relief. A. F. MONTANDON, Attorney for Defendant O. R. Young. [Duly verified.] Filed February 19, 1892."

Paragraphs 9 and 10 of the answer are in the nature of a cross bill for an accounting and for damages, are not properly a part of the answer, are not well pleaded, and must be rejected, as the case now stands, as surplusage. The cause of action therein attempted to be set up must be set up in the form of a cross bill separate and distinct from the answer, and stating a complete cause of action in itself, making the said Willman & Walker codefendants, and praying that they may be brought in, and for an accounting and damages. Defendant pleads, first, that defendants made this note, and another of like amount, to Willman & Walker; that they secured both notes by mortgage

to plaintiff's assignor and the said Willman & Walker, upon what was called the "Merchants' Hotel Property," then worth \$40,000; admits assignment of the McCornick note to plaintiff herein; alleges that, to further secure the aforesaid notes, the defendants entered into an agreement with the mortgagees and this plaintiff, by which defendants were to deliver possession of the said Merchants' Hotel to the said mortgagees and the said plaintiff, and that they were to receive the said possession, rent said building, and pay said notes out of the rents and profits thereof; that said plaintiff and mortgagees were to keep said property insured, and, in case of destruction by fire, they were to collect insurance, pay taxes, premium on insurance, then principal and interest on notes. The fourth paragraph of the answer alleges that said mortgagees and plaintiff agreed to take said property on these conditions. Paragraph 5 alleges that mortgagees and plaintiff, having accepted said agreement, were put in possession of the property, continued to remain in possession, used, rented, and collected the rents thereof, and applied the same to their own use. Paragraph 6 states that the income aforesaid, collected as aforesaid, largely exceeded taxes and premium on insurance. (7) That on July 2, 1889, and during mortgagees' and plaintiff's possession, said property was consumed by fire and was a total loss, and the insurance money which mortgagees and this plaintiff recovered as aforesaid, together with the rents collected, largely exceeds any possible amount of both principal and interest on both of the notes aforesaid, and the same are fully paid, and a large amount over and above the same is due the defendants. The first seven paragraphs of the answer allege a complete counterclaim, which may be properly set off against the claim of plaintiff, and he should have been permitted to prove it. Such amount as the plaintiff had received and converted to its own use out of the rents of the building, and out of insurance money, constitutes a good cause of action against the plaintiff in favor of the defendant, and therefore is proper counterclaim. Section 4184, Rev. St. Idaho. It arose out of the same transaction; was connected with the subject of the action; it is a cause arising upon a contract, and existed at the commencement of the action, and therefore must be set up, or it is barred. See section 4185.

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Rev. St. Idaho; 2 Estee, Pl. & Pr. 3369. It is also a cause of action in favor of defendant and against the plaintiff, between whom a several judgment can be had. Id. 4184. If the rights of all the parties, or of the parties to this action, could not be determined properly without bringing in other parties, then the court should require other parties to be brought in, and should have permitted defendant to file his cross complaint for that purpose. See sections 4101, 4102, Rev. St. Idaho. See, also, section 4113, which reads: "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but, when a completed determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and thereupon the party, directed by the court, must cause to be served a copy of the summons," etc. This may be done at any stage of the action, before decision of the court or a verdict of the jury, when the discovery is made that other persons are necessary parties. All necessary parties being before the court, there is no difficulty in determining the rights and obligations of each, and entering judgment accordingly; and this is especially authorized by the statute, (section 4351,) which is: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case required it, determine the ultimate rights of the parties on each side, as between themselves." Care should be taken, however, that the rights of each should arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. Under our practice, as established by the statute, equitable defenses may be set up in suits at law, and *vice versa*. *Wa Ching v. Constantine*, 1 Idaho, 266; *Walker v. Sedgwick*, 8 Cal. 403, 405, where the court say "that the objection that the proceedings may become too complex by permitting different questions at law and in equity to be settled in one suit, though founded in much plausibility and some truth, is not sufficiently strong as to overcome the plain provisions of the statute and the substantial dictates of justice." It is the policy of the law, as at present administered, that no man shall be required to advance money

in the first instance, and then sue to recover it back. The plain intention of the statute is that, when the parties are once in court, all conflicting claims shall be finally settled, and that such claims shall compensate each other, and judgment should be given in his favor who proves his just claim to be the larger. Insolvency may exist in many cases where it cannot be proven at the time, and may often occur in the future, before the party could possibly recover in his cross action. Parties were often ruined by the practical operation of the old rule, which is invoked by the plaintiff in this case, and which seems to have been founded more in the convenience of courts than upon the true principles of justice. It is like the practice of the justice of the peace, of whom it is said that he never heard any testimony except for the plaintiff, upon the alleged ground that the contrary practice, of hearing the testimony on both sides, tended to produce doubt and confusion in his own mind. The old rule may have been more simple, but it was all on one side, and practically defeated the very ends contemplated by the law itself. The court erred in refusing to permit defendants to introduce evidence under the plea of payment set up in the first seven paragraphs of the answer. The court also erred in refusing to permit defendants to file cross complaint bringing in Willman & Walker, and setting up their cause of action for damages on the agreement alleged to have been made by Willman & Walker and plaintiff with defendants. Judgment reversed, and new trial ordered. Costs awarded to appellants.

SULLIVAN, C. J., and HUSTON, J., concur.

STATE v. COLLINS.

(December 31, 1892.)

ARSON—INHABITED BUILDING—JAIL.

A jail occupied by two prisoners is an "inhabited building," within the meaning of Rev. St. 1887, § 7007, which defines arson in the first degree as maliciously burning in the nighttime an "inhabited building" in which there is at the time some human being.

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

John Collins was convicted of an attempt to commit arson, and appeals. Affirmed.

Bowen v. Weatherman.

Sample Orr, for appellant.

The building should be owned or possessed by another person. 3 Chit. Crim. Law, p. 1121; 2 Russ. Crimes, 487, 488.

The indictment was fatally defective, in that it did not allege that the building which is alleged to be a jail was used as a jail, or that it was an erection capable of sheltering human beings, or that the same had usually been occupied by any person lodging therein at night. Code, §§ 7001, 7002.

There is no such crime as an attempt to commit arson in the state of Idaho.

George H. Roberts, Atty. Gen., for the State.

A jail is an inhabited "dwelling house," within the statutes against arson, and "a jail" is a house. Bish. St. Crimes, §§ 207, 289; Bish. Crim. Law, § 105.

The ownership need not be alleged, or, if alleged, it need not be alleged in the occupant. *People v. Fisher*, 51 Cal. 319; *Sack. Instruct. Juries*, §§ 21, 22; *Com. v. Flynn*, 3 Cush. 529; Bish. Dir. & Forms, § 183; *People v. Simpson*, 50 Cal. 304.

There need be no allegation of ownership where the arson is of a public building. Bish. Crim. Law, § 36, and cases cited note 3, p. 17.

When upon the face of the indictment the facts charged show that there was an attempt to commit a crime punishable by law, which is of such a character as to come within the Revised Statutes, the offense is well charged. *Com. v. Flynn*, 3 Cush. 529.

HUSTON, J. The defendant was convicted at the June term of the district court for the county of Bingham of the crime of an attempt to commit arson of the second degree, and sentenced to confinement in state prison for two years, from which judgment and sentence defendant appeals to this court. The only errors charged by defendant, which we deem it important to consider, are in the giving by the court of certain instructions.

The giving of instruction No. 3 by the court is charged as error. That instruction was as follows: "Any building which has usually been occupied by any person lodging therein at night is an inhabited building, within the meaning of this chapter." There was no error in this instruction. The building attempted to be burned by defendant was the jail of the city of Idaho Falls, and was at the time occupied by

defendant and another as prisoners. The instruction asked by defendant, and refused by the court, to the effect that the town (city in this case) was incapable of owning property, was properly refused. It is urged by counsel for defendant, in his brief, that there is no such offense known to the statutes of Idaho as "an attempt to commit arson." This exception does not appear in any bill of exceptions or assignment of errors, and, if counsel had taken the trouble to read section 7235 of the Revised Statutes of Idaho, it would probably not have appeared in his brief. The judgment of the district court is affirmed.

SULLIVAN, C. J., and MORGAN, J., concur.

BOWEN *et al.* v. WEATHERMAN, Probate Judge.

(December 31, 1892.)

TAXATION OF COSTS—AGREEMENT AS TO AMOUNT.

Defendant moved the court for a retaxation of the costs claimed by plaintiff, agreeing that if the motion should be allowed he would pay the damages and the costs found due on retaxation, to which proposition plaintiff consented. The court retaxed the costs, and struck out \$123.77. The defendant immediately paid the judgment and costs, less the amount so struck out. Plaintiff thereafter filed a demand for a writ of execution for the balance of said costs, disallowed by the court. The court refused to issue the writ. *Held*, that the writ was properly refused; that plaintiff was bound by his agreement in accepting the defendant's proposition to pay the judgment and the costs found due by the court.

(*Syllabus by the Court.*)

Appeal from district court, Cassia county; C. O. STOCKSLAGER, Judge.

Petition by W. H. Bowen and G. S. Marshal for a writ of mandate to compel S. P. Weatherman, probate judge of Cassia county, to issue an execution to cover a balance due and unpaid on a certain judgment entered in the records of the probate court of said county. From a judgment denying the writ, petitioners appeal. Affirmed.

Charles Cobb and *Stewart & Dietrich*, for appellants.

The probate courts in civil jurisdiction are inferior courts, and have only the powers given by statute. Rev. St. 1887, §§ 3842, 3841; *Winter v. Fitzpatrick*, 35 Cal. 269; *State v. Hall*, 49 Me. 412.

A judgment of the probate court must be rendered within the time prescribed by

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law. After that time jurisdiction is lost. *McNamara v. Spees*, 25 Wis. 539; *Hull v. Mallory*, 56 Wis. 355, 14 N. W. Rep. 374; *Stephens v. Santee*, 49 N. Y. 35; *Crandall v. Bacon*, 20 Wis. 639.

An attorney has only authority to bind client by agreement filed with the clerk or entered upon the minutes of the court. Rev. St. § 3998; *Borkheim v. Insurance Co.*, 38 Cal. 628.

A stipulation, even by the parties themselves, will not invest the court with jurisdiction. 12 Amer & Eng. Enc. Law, 401; *Filley v. Cody*, 4 Colo. 110; *The Lucy*, 8 Wall. 307; *Montgomery v. Anderson*, 21 How. 386; *Ballance v. Forsyth*, Id. 389.

Amendment or vacation of judgment after time for appeal has expired is void. *Hawks v. Votaw*, 1 Wash. St. 70, 23 Pac. Rep. 442.

F. E. Ensign, for respondent.

HUSTON, J. This is an appeal from a judgment of the district court of Cassia county denying a writ of mandate. The facts, as they appear by the record, are substantially as follows: On March 12, 1891, plaintiff, W. H. Bowen, recovered in the probate court for the county of Cassia a judgment against one Gwin for the sum of \$43.75 damages, and \$306.97 costs. On the 24th day of March, 1891, on demand of the plaintiff, execution was issued upon said judgment, and on the same day the defendant filed his notice of appeal, and the undertaking thereon required by statute, and thereupon the probate court ordered a stay of proceedings under the execution. On the 26th day of March "the said plaintiff, Bowen, by his attorney, A. Heed, Esq., filed exceptions to the sufficiency of the sureties on the said undertaking." What action, if any, was had upon this exception—whether the sureties justified or not—does not appear from the record; but it does appear "that on the 6th day of April, 1891, the transcript on appeal in said cause was duly filed with the clerk of the district court." How the transcript could have been filed, if the exception to the sureties was still pending, is not easily discernible, yet on the 14th day of April, 1891, the plaintiff applied to the probate court for a writ of execution on the judgment so as aforesaid entered on March 12, 1891; and on the 21st day of April, 1891, the said probate court, having taken one more day to consider this important question than it

required to make the world, concluded to issue execution, "but by the consent of the attorneys of both parties then present, the matter was continued, without further action, until the 27th day of April, 1891." "On the 27th day of April, 1891, the said parties in said action * * * appeared by their respective attorneys, A. Heed, Esq., for plaintiff, and J. C. Rogers, Esq., for defendant; and defendant then and there made a motion for a retaxation of the costs claimed by plaintiff in said action, agreeing that, if the motion to retax said costs should be allowed, that said defendant would immediately pay the damages and costs found due on retaxation, under protest, * * * to which motion to retax said costs the said plaintiff by his attorney, A. Heed, Esq., then and there consented. Whereupon the said probate court immediately proceeded to retax the aforesaid costs, in conformity to said agreement, and in accordance with law, and, after a careful examination of the cost bill, struck out of said bill of costs \$123.77, leaving the amount due on said judgment to plaintiff \$226.25, which amount of \$226.25 was immediately paid by said defendant." On the 4th day of May, 1891, C. Cobb, Esq., filed in said probate court a demand, signed by A. Heed, Esq., for a writ of execution for the balance of said bill of costs, disallowed as hereinbefore stated, to wit, the sum of \$123.77, which demand was refused by the said probate court. Thereupon the plaintiff applied to the district court for a writ of mandate, commanding the probate court to issue execution upon said alleged judgment. The district court refused to issue the writ, and in this we think said court was entirely correct. Whatever technical points may be raised in support of the contention of plaintiff, it is palpable that his claim is without merit. In the first place, a bill of costs in justice's or probate court, of \$307 costs upon a judgment of \$43 damages, is of itself more than suspicious; and the plaintiff so considered it, or he would not, nor would his attorney, have consented to take \$226 in settlement of the judgment. Of course, the probate court had no authority to retax costs after entering judgment, but should carefully tax costs allowed by law before entering judgment in accordance with section 4732, Rev. St. Idaho. We think the use of technical terms by the probate judge has somewhat confused matters. Doubtless the very truth of the matter is, the

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plaintiff agreed to accept the defendant's proposition to pay the judgment and the legal costs, and the probate judge then proceeded to give the cost bill "a careful examination," "according to law," and found \$123.77 of illegal items therein, leaving a balance of costs amounting to about \$183, which, upon a judgment for \$43, would seem to be liberal. The defendant, according to agreement, paid this amount, although evidently still believing that he was being wronged. Nevertheless he paid it, and the plaintiff accepted it, as defendant and the probate court clearly understood, in full satisfaction of the judgment, and as no doubt was the intention and purpose of the parties. If the probate judge neglected to satisfy the judgment upon his docket, the defendant ought not to be made to suffer therefor. The judgment of the district court is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

SMITH, Road Overseer, v. MONTGOMERY.

(December 31, 1892.)

HIGHWAYS—DEDICATION—EVIDENCE.

Suit by road overseer to compel the removal of a building from West Main street in the town of Blackfoot. Appellant's contention is that the land on which the building stands had never been dedicated to the public as a highway. *Held* evidence sufficient to show dedication.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROD, Judge.

Action by I. E. Smith, road overseer, against John Montgomery, to compel defendant to remove a certain building that encroached on an alleged highway. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Affirmed.

Stewart & Dietrich, for appellant.

The fact that town officers exceeded their lawful powers in expending highway taxes is not sufficient to convert into public highway. *State v. McCabe*, 74 Wis. 481, 43 N. W. Rep. 322.

Mere nonaction of owner is not enough to constitute a dedication. *City of Bloomington v. Bloomington Cemetery Ass'n*, 126 Ill. 221, 18 N. E. Rep. 298; *Forney v. Calhoun Co.*, 84 Ala. 215, 4 South. Rep. 153.

The mere fact that a highway is traveled by whoever has occasion or sees fit

to do so is not sufficient evidence of dedication. *Willey v. People*, 36 Ill. App. 609.

Mere permissive use by the public of a piece of ground left open is not a dedication. *Weiss v. South Bethlehem Borough*, 136 Pa. St. 294, 20 Atl. Rep. 801.

Attempted dedication by one who does not hold title is insufficient. *Lee v. Lake*, 90 Amer. Dec. 220; *Kyle v. Logan*, 87 Ill. 64; *State v. Trask*, 27 Amer. Dec. 560.

A dedication by a mere occupant of public land does not bind after-acquired title. *Gentleman v. Soule*, 83 Amer. Dec. 264; *Chapman v. School Dist.*, Deady, 139; *Lownsdale v. Portland*, Id. 139.

The evidence of dedication must be clear, unequivocal, and unmistakable. *Ang. & D. Highw.* 142; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Gage v. Railroad Co.*, 84 Ala. 224, 4 South. Rep. 415; *City of Shreveport v. Drouin*, 41 La. Ann. 867, 6 South. Rep. 656; *Holdane v. Cold Springs*, 21 N. Y. 474; *Irwin v. Dixon*, 9 How. 30; *State v. Adkins*, 42 Kan. 203, 21 Pac. Rep. 1069.

J. W. Eden and Smith & Smith, for respondent.

If the testimony is conflicting, the appellate court will not disturb the verdict or order denying a new trial. *Mootry v. Hawley*, 1 Idaho, 543; *Ainslie v. Printing Co.*, Id. 641; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419.

The court will not disturb the finding of the jury, although the verdict is not in accord with what the court believes to be the weight of the evidence. *Smelting Co. v. Pless*, 8 Colo. 87, 5 Pac. Rep. 650.

SULLIVAN, C. J. This action was brought by the respondent, as road overseer of what is known as the "Blackfoot Road District," to compel the appellant to remove a certain building from what is claimed to be a part of West Main street in the town of Blackfoot, Bingham county. The case was tried by the court with a jury, and, upon the special verdict of the jury, judgment was entered in favor of the respondent. A motion for a new trial was interposed by the appellant, and overruled by the court, and this appeal was taken from the order overruling said motion.

The only question raised by this appeal is as to the sufficiency of the evidence to support the special verdict or findings of the jury. The appellant contends that said street is but 66 feet in width, and that there is a strip of land 34 feet in width be-

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tween the easterly side line of said street and the westerly side line of the Utah & Northern Railway right of way, bordering thereon and parallel therewith, of which appellant is the owner, and that the building complained of is situated thereon. The respondent contends that said street is 100 feet in width, and that said building is situated in said street. The appellant contends that the evidence is insufficient to support the following findings: (1) That the ground in dispute was used as a highway; (2) that it was repaired as a highway; (3) that it was dedicated as a highway. The evidence shows, without conflict, that the land in dispute had been used as a highway from 1879 up to 1891, the date when the building complained of was erected. The appellant himself testifies that he had known the land since February, 1879, and that it had been used by the public to travel over up to 1891. Several other witnesses testify to the same fact. The evidence also shows that at least two road overseers had repaired said land as a highway for the benefit of the public. We think that the evidence clearly established that said ground was both used and repaired as a highway. This disposes of the first two points made by appellant.

As to the third. The record shows that one W. C. Lewis, grantor of appellant, made a homestead entry, under the laws of the United States, for certain land, which included that upon which the said town of Blackfoot is situated. That, after Lewis had made his said homestead entry, one C. Bunting was desirous of erecting a store building upon said land, and so informed said Lewis, and inquired of Lewis where and upon what conditions he could get some land therefor. Lewis informed Bunting that he had made a homestead entry for said land, and that he could not "then" say anything about the matter, as he had no title to the land. It appears, however, that some arrangement was made as to where, or at what point, Bunting might erect a store building, for Bunting proceeded to erect one on said land. It further appears that, during the conversation between Lewis and Bunting above referred to, Bunting inquired of Lewis whether there would be a row of buildings between the lot on which he was to erect said store building and the railroad right of way, and Lewis replied that there would not; that it would be left open as it then was. Thereafter, and after

Lewis had made final proof for said land, he platted a portion thereof as the town site of "Blackfoot City." The plat made by him is before this court as part of the evidence in this case. The lot on which Bunting erected the store building above referred to fronts on what is designated on said plat as "West Main Street," and is 100 feet from the westerly side line of said railway right of way. Said plat is made on a scale of 200 feet to the inch, and indicates a row of blocks on each side of said right of way, and 100 feet therefrom. The 100 feet of ground between said railway right of way and the first row of blocks easterly therefrom is designated on said plat as "East Main Street," and the 100 feet of ground between said right of way and the first row of blocks westerly therefrom is marked on said plat as "West Main Street." The plat contains no marks or lines nor anything whatever to indicate that any portion of said 100 feet of ground is reserved for any purpose whatever. It is true that intention to dedicate must be shown, and not intention of reservation; but when Lewis platted the townsite of Blackfoot, and left 100 feet of ground running through the central part of said town, and designated it on the town plat as "West Main Street," and he and his grantee permitted the public to use the same as a street for 10 years or more without objection, we think appellant is estopped from claiming that said entire 100 feet of ground was not dedicated as a street, regardless of the general statement on said plat that streets are 66 feet wide. If the contention of appellant be true, then the intention of Lewis was to reserve to himself a strip of land 34 feet wide, extending through said town, and dividing it near the center, without any streets crossing said strip connecting the parts of the town thus divided. Appellant urges that the statement made by Lewis to Bunting—that said 100 feet of ground should remain open as a street—was made before he (Lewis) had acquired title to said land, and hence was not binding on him for that reason. He seems to overlook the fact that his grantor, after acquiring title to said land, platted the same, leaving West Main street 100 feet wide, as he had stated to Bunting should be done. The vital principle of dedication is the intention to dedicate. Ang. Highw. § 142. The evidence clearly shows that it was the intention of Lewis to dedicate said West Main street, 100 feet in width, to the pub-

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lic, and the denying of appellant's motion for a new trial was not error. The judgment of the court below is affirmed, with costs of this appeal in favor of respondent.

HUSTON, J., concurs. MORGAN, J., took no part in the hearing or decision of this appeal.

IDAHO LAND CO. v. PARSONS.

(December 31, 1892.)

CONVENTIONAL BOUNDARIES—ADVERSE POSSESSION.

When coterminous owners of land establish a boundary line, and take possession to the line so agreed upon, and one of them erects valuable improvements thereon, and holds quiet and peaceable possession thereof, without objection from the other coterminous owner or his grantees, for a period of more than eight years, such line is binding upon them, and those holding under them.

(*Syllabus by the Court.*)

Appeal from district court, Bingham county; D. W. STANDROP, Judge.

Ejectment by the Idaho Land Company against Joseph Parsons. From a judgment for defendant, and from an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

Stewart & Dietrich, for appellant.

The fixing of a boundary by agreement is conclusive or effectual only where the true boundary has been or is in controversy, and parties agree on a new one, thus abandoning the old. *Manufacturing Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385; *Quick v. Nitschelm*, 139 Ill. 251, 28 N. E. Rep. 926; *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. Rep. 153.

The relation of husband and wife creates no agency in the husband, and his misrepresentations concerning his wife's property, not assented to by her, create no estoppel against her. *Bigelow*, Estop. p. 508; *Hall v. Callahan*, 66 Mo. 316; *Caldwell v. Hart*, 57 Miss. 123; *Kirkman v. Bank*, 77 N. C. 394; *Watson v. Hewitt*, 45 Tex. 472.

A husband has no power to alienate or incumber the land of his wife, much less fix boundaries for it. *Quick v. Nitschelm*, supra; *Gosselin v. City of Chicago*, 103 Ill. 623.

Privies of a grantor who is estopped are not estopped if they are subsequent purchasers for value, and have no notice that he is estopped. *Rutz v. Kehr*, (Ill. Sup.) 25 N. E. Rep. 957, 29 N. E. Rep. 553.

James W. Elen, for respondent.

When coterminous proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, the line so established is binding upon them and those holding under them. *Cavanaugh v. Jackson*, 91 Cal. 583, 27 Pac. Rep. 931; *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Cooper v. Vierram*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. Rep. 604; *Blair v. Smith*, 16 Mo. 273; *Orr v. Hadley*, 36 N. H. 575; *Houston v. Sneed*, 15 Tex. 307, *Fisher v. Bonnehoff*, 121 Ill. 435, 13 N. E. Rep. 150.

It is not necessary that there should be a dispute about the true line in order to bind the parties by agreement fixing and establishing a line. *Helm v. Wilson*, 76 Cal. 485, 18 Pac. Rep. 604; *White v. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Truett v. Adams*, 66 Cal. 223, 5 Pac. Rep. 96; *Smith v. Hamilton*, 20 Mich. 438.

Conveyances made to the wife during coverture for value are community property. *Ingersoll v. Truebody*, 40 Cal. 611; *Moore v. Jones*, 63 Cal. 12; *Wedel v. Herman*, 59 Cal. 516; *Ramsdell v. Fuller*, 28 Cal. 42; *Landers v. Bolten*, 26 Cal. 420; *Johnson v. Burford*, 39 Tex. 249.

SULLIVAN, C. J. This is an action in ejectment, brought by the appellant, to recover the possession of 111-16 acres of land, claimed to be a part of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 3, township 3 S., range 35 E., B. M., and for damages. The defense interposed was a denial of appellant's ownership and right of possession, and a claim of ownership by the respondent. The case was tried by the court, without a jury, and a judgment entered in favor of the respondent. A motion for a new trial was made by appellant, and overruled by the court. This appeal is from said judgment and order overruling the motion for a new trial.

The appellant specifies seven errors claimed to have been made by the court below. In our view of the case, it is not necessary for us to consider each specification of error separately, and we will therefore consider them together.

The real question for our determination is the sufficiency of the evidence to justify the findings of the court. On or about the 15th day of April, 1883, the respondent was in the actual occupation and possession of lots 3 and 4 of section 3, township

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2 S., range 35 E., B. M., and thereafter procured title thereto from the government of the United States. The facts, as shown by the record, are substantially as follows: On or about the 15th day of April, 1883, one Minnie J. Danilson, the grantor and predecessor in interest of appellant, was the owner of, and in the actual possession of, the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 3, township 3 S., range 35 E., B. M.; that on the date last above mentioned the respondent desired to erect a fence on the line between said lots 3 and 4 and said S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 3. It was not known to the owners of either tract where said line was. The respondent proposed to T. J. Danilson, the husband and agent of Minnie J. Danilson, that they run the boundary line between said tracts, and offered to employ a surveyor for that purpose. Danilson replied that he was a surveyor, and that he would run the line. To this proposition the respondent assented, and the said Danilson took his instrument, and the respondent and one Killion carried the chain, and the line was surveyed. After the survey was made, Danilson said to respondent: "That is the line. You can build your fence on it." The respondent thereupon erected a fence on said line, by and with the consent of the said Minnie J. Danilson, and has been in the actual occupation and possession of the land in dispute, and claimed to be the owner thereof, without objection or protest from appellant or its grantor, since April 15, 1883, up to December 22, 1891, the date of the commencement of this suit. The record shows that said Minnie J. Danilson conveyed said S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 3 to appellant on August 30, 1888. The contention of appellant is that the evidence shows that the appellant's grantor and respondent undertook to find or ascertain the true boundary line between said tracts of land; that a mistake was made as to its true location, and for that reason appellant is not bound by the line established,—and cites in support thereof *Manufacturing Co. v. Packer*, 9 Sup. Ct. Rep. 385; *Hatfield v. Workman*, (W. Va.) 14 S. E. Rep. 153; *Quick v. Butler*, (Ill. Sup.) 28 N. E. Rep. 926. In the first case above cited it is held that "the assent was given, not to settle a dispute, but to acquiesce in the running of a line about which no dispute had then arisen, and upon the supposition that the person running it knew where the true lines were; that it was an acquiescence resulting

from pure mistake or error." The court say the assent was given "upon the supposition that the person engaged in running it knew where the true lines were." No such supposition entered into the case at bar. The respondent desired to erect valuable improvements upon the boundary line separating said tracts. The grantor of appellant, by her agent, established the boundary and agreed with the respondent that he might erect his fence thereon. The respondent claimed the land in dispute, and had adverse possession thereof from April 15, 1883, to August 30, 1888, (during which time appellant's grantor was the owner of, and in the possession of, said S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 3,) and from August 30, 1888, to December 22, 1891, (during which last period of time the appellant was the owner of said last described tract of land,) making in all a period of eight years and over eight months that respondent had the quiet, peaceable, adverse possession of said disputed tract, claiming to be the owner thereof, and had valuable improvements thereon, without any claim being made thereto by appellant or its grantor. Thus the respondent had been in the quiet, peaceable, adverse possession of said land, claiming to be the owner, for a period of over three years longer than is required for the statute of limitations to run in the acquisition of title to real estate thereunder. This decision, however, is not based on that ground. We only state this as a circumstance that might justly be taken into consideration. We think that, under the facts of this case, it would be most unjust and inequitable to permit the appellant to recover said land. We do not think that the principle laid down in the first case cited is applicable to the case at bar. In *Hatfield v. Workman*, supra, the court say: "They were not attempting to fix or establish any new line, but Workman says they were aiming to run the line laid down by Commissioner Beekley in his division of this tract into lots. There is no evidence in this case that after said line was run, to ascertain in which lot the mouth of Denison would fall, either of the parties ever recognized it, or in any matter treated it, as the boundary line between said tracts. It ran through wild and unimproved lands, and was evidently run by mistake. * * * All that appears to have been done by these parties, Workman and Mangus, was to run and mark this line. There was

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never any other recognition of it, no improvement or fence along it, and nothing else to indicate possession or ownership on either side of the line." In that case the parties were in ignorance of the location of the true point at which to begin the survey, and the line was run for the purpose of ascertaining the correct dividing line, and not for the purpose of establishing one. It will be observed that neither of the parties in the case just cited recognized or in any manner treated said line as the boundary line between said tracts. It presents a very different case than the one at bar. In the case of *Quick v. Butler*, supra, the court say: "It is well settled in this state that the owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession and the making of improvements, will be binding and conclusive, and cannot afterwards be disputed; but such an agreement must be clearly proven, and cannot be inferred from slight acts of the parties, although it may sometimes be implied from unequivocal acts. *City of Bloomington v. Bloomington Cemetery Ass'n*, 126 Ill. 221, 18 N. E. Rep. 298. In most of the cases when the rule has been held to apply, there has been no question as to the authority of the parties making such verbal agreement. There has been a dispute, or at any rate an uncertainty, as to the true location of the boundary line, so that the agreement operates as a settlement of what was unsettled. Both parties have taken possession of their respective tracts or lots after making the agreement, and have cultivated or otherwise improved the same up to the line agreed upon. Such possession has been continued for a considerable length of time, though the statute of limitations may not have run. The grantees holding under the parties to the agreement, where they have been purchasers for value, have generally had notice of it, either actually, or by reason of the long-continued possession of their grantors, and the recognition by the latter, for a considerable period of time, of the boundary line agreed upon." We think the law as laid down in that case is applicable to the case at bar. The boundary line agreed upon was recognized by both parties, and the adverse possession under claim of ownership assented to, for nearly double the period of time required by the statute of limitations for the acqui-

sition of title to real estate; valuable improvements had been placed on said land by respondent; and we think appellant is estopped from claiming said land. "When coterminous proprietors of land, in good faith, agree upon, fix, and establish a boundary line between their respective tracts of land, the line so established is binding upon them and those holding under them." *Cavanaugh v. Jackson*, 91 Cal. 583, 27 Pac. Rep. 931; *White v. Spreckels*, 75 Cal. 616, 17 Pac. Rep. 715; *Smith v. Hamilton*, 20 Mich. 433; *Houston v. Sneed*, 15 Tex. 308; *Fisher v. Bennehoff*, 121 Ill. 435, 13 N. E. Rep. 150. The judgment of the court below should be affirmed, with costs of this appeal in favor of the respondent, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

CUNNINGHAM v. GEORGE, County Auditor.

OTTERSON v. SAME.

(December 31, 1892.)

COUNTIES — DIVISION INTO COMMISSIONERS' DISTRICTS.

1. The law requiring the county commissioners to divide the county into county commissioners' districts (section 1748, Rev. Laws Idaho) is still in force.

ELECTIONS AND VOTERS — ELECTION OF COUNTY COMMISSIONER—CANVASS AND RETURN.

2. The electors of the whole county are entitled to vote for one county commissioner for each district, and such vote must be abstracted as provided for the vote for other county officers.

SAME—POWERS OF CANVASSING BOARD—DECLARING RESULT.

3. The canvassing board has no authority to declare who is or is not elected.

SAME—DUTIES OF AUDITOR—ISSUING CERTIFICATE.

4. The auditor, as auditor, must issue certificate to the person in each district having the highest number of votes in the whole county.

(Syllabus by the Court.)

Two petitions for a writ of mandate, one by John C. Cunningham, the other by James Ottersson, to compel Wesley B. George, auditor of Logan county, to issue certificates of election to petitioners. Petitions granted.

Texas Angel and *H. S. Hampton*, for petitioners.

As the Revised Statutes re-enacted sections 1 and 2 of the act of January 27, 1885, substantially, and omitted sections 3

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and 4, it is presumed that such omissions were intentional, and the repeal of the latter sections was intended. In *re Wheelock*, (Sup.) 3 N. Y. Supp. 890; In *re New York Institution for Instruction of Deaf and Dumb*, (Sup.) 7 N. Y. Supp. 860; *Butler v. Sullivan Co.*, 108 Mo. 630, 18 S. W. Rep. 1142; *Moore v. Mausert*, 49 N. Y. 332; *People v. Board of Assessors*, 84 N. Y. 610.

The constitution and the Australian act cover the whole subject-matter of the statute, (Act Jan. 27, 1885,) and are therefore an implied repeal. Sedg. St. Const. p. 105; *Norris v. Crocker*, 13 How. 429; *U. S. v. Tynen*, 11 Wall. 88; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704; *State v. Stoll*, 17 Wall. 425; *Daviess v. Fairbairn*, 3 How. 636; *U. S. v. Claflin*, 97 U. S. 546; *Cook County Nat. Bank v. U. S.*, 107 U. S. 445, 2 Sup. Ct. Rep. 561; *Heckmann v. Pinkney*, 81 N. Y. 211.

R. B. Johnson, S. B. Kingsbury, and George H. Roberts, for respondent.

A certificate of election is merely *prima facie* evidence of title to an office; but it is not conclusive, nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be established, not only without, but against, the evidence of the certificate. *Magee v. Calaveras Co.*, 10 Cal. 376; *Sherburne v. Horn*, 45 Mich. 160, 7 N. W. Rep. 730; *People v. Cover*, 50 Ill. 100; *State v. Stewart*, 26 Ohio St. 216; *O'Hara v. Powell*, 80 N. C. 103; *McCrary, Elect.* § 335.

The court, having no jurisdiction in this proceeding to recall the certificate issued by the clerk of the board of canvassers by direction of the board, will not do an idle thing by directing another certificate to issue, for a certificate is in no sense necessary to enable the complainant to assert his rights. *People v. Supervisors of Greene Co.*, 12 Barb. 221, 222.

The court cannot in this proceeding try the title to the office. *Warner v. Myers*, 4 Or. 76; *Biggs v. McBride*, 17 Or. 652, 21 Pac. Rep. 878; *People v. Harvey*, 62 Cal. 508; *Denver v. Hobart*, 10 Nev. 28; *Mechem, Pub. Off.* §§ 978-981.

Mandamus will not be granted to enforce rights under a statute that prescribes another adequate and specific remedy. *McCrary, Elect.* §§ 322, 323.

Mandamus can only be issued to compel a party to act when it was his duty to act without it. It confers upon him no

new authority. *People v. Gilmer*, 5 Gilman, 249; *Commissioners of Highways v. People*, 66 Ill. 339; *People v. Chicago & A. R. Co.*, 55 Ill. 95.

A *mandamus* will not issue to compel a public officer to perform a ministerial duty when the evidence shows that his ability to do so depends on the co-operative action of a third person, who is not before the court. 14 Amer. & Eng. Enc. Law, p. 140, citing *State v. Cavanac*, 30 La. Ann. 237.

MORGAN, J. This is a petition filed in this court by the plaintiff against the said defendant, praying that a writ of mandate may be issued, addressed to the said defendant, as auditor of Logan county, in the state of Idaho, directing and requiring the said auditor to make out and deliver to this plaintiff a certificate of election to the office of county commissioner of district No. 2 in the county of Logan, in the state of Idaho. The petitioner in the above-entitled action alleges that Wesley B. George, defendant therein, was on the dates therein mentioned, and is now, the duly-qualified and acting clerk of the district court, and *ex officio* auditor of the county of Logan; that petitioner is a citizen and elector of the county of Logan, in the state of Idaho, and is the John C. Cunningham who was duly nominated to the office of county commissioner of district No. 2 in said county of Logan, state of Idaho, to be voted for at the election to be held on the 8th day of November, 1892, in said county and state; that, pursuant to law, a general election was held in said county of Logan on the 8th day of November, 1892; that at said election certain electors of said county, duly nominated to the office of county commissioner, were voted for by the people of said Logan county for the said office of county commissioner of said Logan county, among them, for county commissioner of district No. 2, Benjamin M. Davis, Charles B. Ford, and this plaintiff; that, according to the entire vote cast at said election in said county, the said John C. Cunningham received a plurality of all the votes cast in the said county, as county commissioner of district No. 2; that the board of county commissioners of said county, acting as a board of canvassers of election, did, subsequent to said election, meet at their office, and canvass the votes of said election, and cause to be made abstracts

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thereof; that said canvass is complete, and abstract made and signed by said board; that said abstract shows that the plaintiff received the highest number of votes polled in said county for the office of county commissioner of the second district therein, (a certified copy of the said abstract is attached to the petition, and marked "Exhibit A," and made a part of said petition;) that before the commencement of this action the said plaintiff demanded of said Wesley B. George, auditor as aforesaid, that he make out a certificate of election to him, the said John C. Cunningham, in the form provided by law, showing the plaintiff to be elected to the office of county commissioner for the county of Logan, for the second district therein, and deliver said certificate to this plaintiff; that said auditor refused, and still does refuse, so to do; that there is no plain, speedy, and adequate remedy in the ordinary course of law; that he is injured by said refusal of said auditor,—and prays for a writ of mandate to be issued to said auditor directing him to make out and deliver said certificate to said plaintiff.

After such examination of the authorities as we have been able to make, we are satisfied such writ should issue, providing it appears, by the laws now in force relating thereto, that the said petitioner is entitled to have all the votes cast for him within the limits of Logan county counted for him, and provided, further, that said plaintiff received the highest number of votes cast by said electors for said office.

This brings us to the question as to whether said plaintiff is entitled to have the whole number of such votes so cast for him in said county counted for him, or is he restricted to the votes cast in district No. 2 of said county? Prior to the thirteenth session of the legislature of the territory of Idaho, the county commissioners of the several counties were elected by the votes of the electors of the county at large. An act was passed by the thirteenth session of said legislature, and approved January 27, 1885, which, so far as it applies to this case, is as follows: "Section 1. The boards of county commissioners of the several counties of this territory shall, at their regular meeting in July preceding any general election of county commissioners and other county officers, divide their respective counties into three districts, to be known as 'County Commissioners' Districts Nos. 1, 2, and 3,' respectively. Sec. 2. Said division shall be

made by said board so as to give as nearly as practicable an equal number of resident voters to each of said districts: provided, that in making such division into districts no voting precinct shall be divided. Sec. 3. At each succeeding general election one person shall be elected as county commissioner by the voters of each district. Such person so elected shall possess the qualifications prescribed by law, and shall be an actual resident within the district from which he is elected. In canvassing the vote for county commissioners the board of canvassers shall count the votes from each district separately, and shall declare the person receiving the greatest number of votes in each district to be elected. Sec. 4. Should a vacancy occur in said board, such shall be filled from the resident voters of the district in which the vacancy occurred." 13 Sess. Laws, p. 85. It will be noticed that this act provides that the counties shall be divided into three districts, in such manner as to give each district, as near as may be, an equal number of resident voters, and that no voting precinct shall be divided; that at each succeeding election one person shall be elected county commissioner by the voters of each district, and, among other qualifications, such person shall be an actual resident of the district from which he is elected, and that, in canvassing the vote, the board of canvassers shall count the votes from each district separately, and shall declare the person receiving the greatest number of votes in each district to be elected; and all acts and parts of acts in conflict therewith are repealed.

The next legislation upon the subject we find in sections 465, 466, Rev. St. Idaho, which provide that "on the first Monday of November, and every second year thereafter, there must be elected * * * one county commissioner for each of the three districts of each county." With these sections must be taken the following sections, to wit: "Sec. 1746. Each member of the board of county commissioners must be an elector of the district he represents." "Sec. 1748. At their regular meeting in July preceding any general election, the board of county commissioners must district their county into three districts, as nearly equal in population as may be, to be known as 'County Commissioners' Districts Nos. 1, 2, and 3,' but in making such districts no voting precinct shall be divided." In this act the legisla-

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ture changed the provisions appearing in the act of 1885 which required the districts to contain as nearly as may be an equal number of resident voters, and, instead thereof, require that the districts shall be so divided as to be as nearly equal in population as may be. It will be seen, also, that the legislature in re-enacting the act of January 27, 1885, which is contained in sections 465 and 466 of the Revised Statutes of Idaho, left out the following provisions, which are contained in that law, to wit: "At each succeeding general election one person shall be elected as county commissioner by the voters of each district, and in canvassing the vote for county commissioners the board of canvassers shall count the votes from each district separately, and shall declare the person receiving the greatest number of votes in each district to be elected." And the following: "Should a vacancy occur in said board, such shall be filled by the resident voters of the district in which the vacancy occurred." The provisions for canvassing the votes, as set forth in the Revised Statutes of Idaho, are substantially as follows: "Sec. 600. The board of commissioners in the several counties must act as a board of canvassers of elections, and must on the tenth day after any general or special election, or sooner if the returns be received, and all the commissioners are present, proceed publicly at their office to open the returns, and canvass the votes of said election, and make up abstracts thereof; and it is their duty to canvass and make up abstracts of all returns that are intelligible on their face, and which are sufficiently authenticated to show what returns they are; and if returns are rejected on account of informality, ambiguity, or uncertainty, (and none must be rejected for other causes,)" etc. "When said canvass is complete, the abstract must be made up and signed by the board. The abstract of votes for delegate to congress must be on one sheet, and the abstract of votes for member of the territorial council or assembly shall be on one sheet, and the abstract of votes for county, district, and precinct officers must be on one sheet. The board must declare the result of the election and cause a certificate of election to be given by their clerk to any person or persons elected to a county, district, or precinct office within the county, and certify to each of said abstracts, as herein provided." Up to 1889, then, the law with reference to the election of county commis-

sioners is substantially as follows: "That, at the regular meeting of the board of county commissioners in July preceding any general election, the board shall district their county into three districts, as nearly equal in population as may be; that one county commissioner for each of the three districts of each county shall be elected; that the board of county commissioners in the several counties should act as a board of canvassers of elections; that they canvass the votes of each election, and make up abstracts thereof, among others the abstracts of votes for county, district, and precinct officers, and this shall be upon one sheet; and the board must declare the result of the election, and cause a certificate of election to be given by their clerk."

The provision of the law of 1885 requiring the votes of each district to be counted for the commissioners of each district having been left out of the law, it is apparent that the legislature did not intend that the board of canvassers should longer proceed in the manner pointed out in the law of 1885 in the counting of votes for county commissioners. The law, then, as it existed before the passage of the act of 1885, must be followed by said board of canvassers; that is, that the county commissioner must be elected from each district, but that the voters of the whole county should cast their votes for each of said commissioners, and that such votes should be counted as the law existed prior to 1885. Section 17 of the Revised Statutes provides that "no statute law is continued in force because it is consistent with the provisions of the Revised Statutes upon the same subject; but, in all cases provided for therein, all statute laws heretofore in force in this territory, whether consistent or not with the provisions of the Revised Statutes, unless expressly continued in force, are repealed and abrogated." Section 19 also provides that "all general acts, and parts and clauses of acts of a general nature, passed prior to the fourteenth session of the legislative assembly, are hereby repealed, and these Revised Statutes are in force in lieu thereof." The constitution (section 6, art. 18) provides as follows: "The legislature, by general and uniform laws, shall provide for the election biennially in each of the several counties of the state of county commissioners," etc. In pursuance of this section of the constitution, the legislature of the state of Idaho, at its first session, adopted

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a general election law, approved February 25, 1891, (pages 57 to 108, inclusive.) By this law it is enacted: "Section 1. That the provisions hereinafter enacted shall regulate and govern all elections hereafter holden in the state of Idaho for the election of all officers provided by the constitution and laws of the state of Idaho, at either general or special elections, except school district elections." Section 7 provides that "at the general election of 1894, and every fourth year thereafter, there shall be elected in every county of the state a clerk of the district court, who is *ex officio* auditor and recorder; and at the general election A. D. 1892, and every alternate year thereafter, there shall be elected in every county of the state the following officers, to wit: Three county commissioners; a sheriff; county treasurer, who is *ex officio* public administrator; probate judge, who is *ex officio* county superintendent of public instruction; a county assessor, who is *ex officio* tax collector; one coroner; and one surveyor." Section 27 provides that "certificates of nomination for county and precinct officers shall be filed with the auditor of the respective counties wherein the officers are to be elected." No mention is made of district officers within the county. The section, however, requiring county commissioners to district the county, being still in force, is operative. Section 101 of said act provides for canvassing the vote by county commissioners, which provisions are substantially as follows: "Sec. 101. The board of county commissioners, the auditor acting as clerk, in the several counties, must act as a board of canvassers of elections, and must, on the tenth day after any general or special election, or sooner if all the returns be received, and any two commissioners are present, proceed publicly at their office to open the returns, and canvass the votes of said election, and make up abstracts thereof; and it is their duty to canvass and make up abstracts of all returns that are intelligible on their face, and which are sufficiently authenticated to show what returns they are. * * * When said canvass is complete, the abstract must be made up and signed by the board. The abstracts shall be made out in the following manner. The abstract of votes for electors for president and vice president of the United States shall be on one sheet, and the abstract of votes for county and precinct officers shall be on another sheet. It will

be seen that no mention is made of district officers within the county in this act. The law then goes on to say: "And it shall be the duty of the auditor of the county immediately to make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers, respectively, and cause such certificate to be delivered to the person entitled to it." By this act it will be seen that the board of canvassers are not authorized to declare any person elected to any office, nor are they required or authorized to declare what person has been elected to any office. Having canvassed the returns, they are required to make out abstracts of votes for each of the officers separately as therein directed, and deliver them to the auditor of the county. The law, then, provides that it shall be the duty of the auditor of the county (not as clerk of the board, but as auditor) immediately to make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers respectively. In the performance of this duty he is not under the direction or control of the board of canvassers, in any sense whatever. He must make out a certificate of election to each person having the highest number of votes. It then becomes the duty of the auditor, as auditor, simply to count the votes as they appear upon the abstract for county and precinct officers respectively, make out his certificate, and deliver it to the person entitled to it. The board of canvassers, having received and accepted the returns from each voting precinct, cannot reject or refuse to abstract all the votes contained therein for the officers to be elected, respectively. Neither can the auditor reject nor refuse to count any votes whatever, but all of the votes cast in the county, as appears by said abstract for county commissioners, must be counted for each commissioner respectively. Section 181 of said act provides as follows: "All acts and parts of acts enacted by any territorial legislature relating to elections be, and the same are hereby, repealed."

The abstract made out by the board of county commissioners marked "Exhibit A," and made a part of the complaint, was complete and proper in every respect, and in accordance with the law as it now stands, until it was mutilated, either by the board or by the auditor, by writing in the words "Counted" and "Not counted," which appear in red ink in various places

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thereon. These abstracts show as follows: That Thomas Fay received 158 votes for county commissioner for district No. 1 of Logan county. James L. Fuller, for commissioner of district No. 1 for Logan county, received 291 votes. That James Otterson received, as county commissioner for district No. 1, 337 votes. James Otterson, having received the highest number of votes cast in the said county of Logan for the office of county commissioner for the first district of said county, is entitled to the certificate of election. For commissioner of district No. 2, Benjamin M. Davis received 235 votes. For the same office in said district, Charles B. Ford received 282 votes. For the same office, John C. Cunningham received 312 votes. John C. Cunningham, having received the highest number of votes cast in said county for county commissioner of district No. 2, is entitled to the certificate of his election. It is therefore the opinion of the court that the certificates of election for the office of county commissioner of Logan county given to James L. Fuller, as commissioner for district No. 1, and Charles B. Ford as commissioner for district No. 2, are without authority of law, and void; that the paper marked "Proceedings of the Board of Canvassers of Logan County, Idaho," and dated, "Bellevue, Nov. 21, 1892," as purporting to state that James L. Fuller received the highest number of votes for county commissioner in district No. 1, and declaring him to be duly elected to the office of said county commissioner of said Logan county, and stating that Charles B. Ford received the largest number of votes in district No. 2, and purporting to declare the said Fuller and Ford to be elected to the said office of county commissioner of Logan county, is without authority of law, and void. The said county commissioners have no right or authority, under the law, to declare any person elected to either of said offices. It is ordered that peremptory writ issue herein, as prayed for in complaint.

It having been agreed by the attorneys for the respective parties, in the case of Otterson v. Wesley B. George, auditor, that said cause should abide the decision in this case, and be governed thereby, it is ordered that the peremptory writ issue in the said cause in like form. Costs awarded to petitioner.

SULLIVAN, C. J., and HUSTON, J., concur.

MILLER v. PINE MIN. CO.

(December 31, 1892.)

ACTION AGAINST CORPORATION — SUFFICIENCY OF COMPLAINT—ALLEGATION OF CORPORATE EXISTENCE.

1. In a suit against a private corporation, the complaint is fatally defective unless it contains an unequivocal averment that it is a corporation.

SAME.

2. Without this averment, the complaint does not state facts sufficient to constitute a cause of action, and this defect is never waived.

(Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. STOCKSLAGER, Judge.

Action by James Miller against the Pine Mining Company. From a judgment for plaintiff, defendant appeals. Reversed.

For former report, see ante, 1140, 31 Pac. Rep. 802.

Wyman & Wyman, for appellant.

The affidavit is no part of the undertaking. Hayne, New Trials & App. § 213; Rev. St. § 4810.

If an undertaking to stay an execution has been filed, the issuance of the execution is wrongful; and hence the motion to quash was well taken, and should have been sustained. Rev. St. § 4810.

Cahalan & Badger, for respondent.

The execution was properly issued, and the motion to quash the same properly dismissed, for the reason that no undertaking on appeal was filed with clerk of court, as provided by law. Code Civil Proc. §§ 4810, 4934; Hastings v. Halleck, 10 Cal. 31; Wheelock v. Warschaner, 34 Cal. 265, 269; Hill v. Finnigan, 54 Cal. 311.

The jurat must be subscribed by the officer, with his official addition. Ladow v. Groom, 1 Denio, 429; Jackson v. Stiles, 3 Caines, 128.

An affidavit should show upon its face that it was made before some officer competent to take affidavits. Lane v. Morse, 6 How. Pr. 395; People v. Townsend, Id. 178.

MORGAN, J. This action was commenced in the probate court of Elmore county on the 30th day of November, 1891. Complaint was filed on that date. On February 12, 1892, Wyman & Wyman appeared for the defendant, and demurred to plaintiff's complaint, on the ground that it did not state facts sufficient to constitute a cause of action. On February 8, 1892, defendant appeared, and moved the court to

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dissolve the attachment issued herein, and release the property therefrom. On the 23d day of February, 1892, the probate court heard both the motion to dissolve the attachment and the demurrer, and overruled both. On the 26th day of April, 1892, the cause was removed to the district court, and all further proceedings were had therein. It does not appear from the record whether the demurrer was presented to the district court or not; but, as the ground of the demurrer was that the complaint failed to state facts sufficient to constitute a cause of action, it may be taken advantage of at any stage of the action, and may even be objected to for the first time in the supreme court. An answer having been filed, the cause was tried before the court and a jury, resulting in a verdict and judgment for the plaintiff for the sum of \$410, with interest and costs. From this judgment the defendant appeals to this court.

The ground of objection to the complaint is that it appears from the caption of the complaint that the defendant is not a natural person, but is a corporation. There is no allegation in the complaint that the defendant is a corporation, nor is there any statement of facts equivalent thereto. The complaint is entirely silent upon the subject. The words "a corporation," annexed to the name of the defendant in the title of the cause, is not an allegation that defendant is a corporation, but is a mere description of the person of the defendant. See *White v. Mullins*, 31 Pac. Rep. 801,¹ (decided at the present term of this court.) In all cases where suit is brought against a private corporation, it is necessary to allege its corporate character, and the complaint is fatally defective in this respect. *Bliss*, Code Pl. §§ 246, 247; *Loup v. Railroad Co.*, 63 Cal. 99; *People v. Railroad Co.*, (Cal.) 23 Pac. Rep. 303. This objection to the complaint is never waived. *Greathouse v. Heed*, 1 Idaho, 482; *Rev. St. Idaho*, § 4178. This averment was material. Where there is an entire absence of a material averment, the defect is not cured by verdict. *Richards v. Insurance Co.*, (Cal.) 22 Pac. Rep. 939; *Morgan v. Menzies*, 60 Cal. 341; *Osborne v. Graves*, (Or.) 6 Pac. Rep. 227. The plaintiff contends in his brief that defendant voluntarily admitted its corporate character, and refers to pages 22 and 23 of the transcript. These pages contain the cross-examina-

tion of witness Shaughnessy by plaintiff's attorney, as a part of the bill of exceptions, as follows: "Question. Of what company are you the president? Wyman: I object. It is not to any issue in the complaint. Court: He may answer. (Defendant duly excepts.) Answer. Pine Mining Company. Q. Is that a company or corporation, or both? Wyman: Object to that as not responsive to any issue raised by the pleadings, complaint, or answer; as incompetent, irrelevant, and immaterial, and not the best evidence. Court: Objection overruled. (And thereupon the defendant, by its counsel, then and there duly excepted to said ruling, and now assigns said ruling as prejudicial error.) A. It is a corporation. Q. Where was that corporation organized, if you know? Wyman: I object to that as incompetent, irrelevant, and immaterial. Court: Answer. (To which ruling defendant again excepted.)" It will be noticed that all of this evidence was introduced by the plaintiff, and admitted over the objection of defendant's attorney. The admission of this evidence was error. No allegation appearing in the complaint that defendant was a corporation, it is not responsive to the issues. It is error, also, because not the best evidence; the articles of incorporation, or a certified copy thereof, being the best evidence.

It is also claimed that defendant introduced the contract of lease between the said defendant and the said Mueller; but the record shows that this evidence was introduced by the plaintiff upon cross-examination, and over the objection of defendant. This was not proper evidence of incorporation, because of the absence of the necessary averment. For these reasons the judgment must be reversed; and it is so ordered, and the attachment dissolved. Costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

BALLENTINE v. WILLEY, Governor, *et al.*

(January 13, 1893.)

CONSTITUTIONAL LAW—APPORTIONMENT OF LEGISLATURE—REPRESENTATIVE AND SENATORIAL DISTRICTS.

1. An act entitled "An act providing for the apportionment of the legislature," approved March 13, 1891, (1 Sess. Laws, p. 195,) divides the state into senatorial and representative districts, and declares the representation which

¹ Ante, 1164.

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each district is entitled to. That, because of an act creating Alta and Lincoln counties out of territory theretofore comprising Alturas and Logan counties having been declared unconstitutional, said apportionment act failed to provide representation for two existing counties, Alturas and Logan, and provided representation for two counties having no existence. *Held* unconstitutional.

SAME—ACT VOID IN PART—EFFECT.

2. When an act having but one object is in part valid and in part invalid, and the parts are so mutually connected with and dependent upon each other as to conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not have passed the residue independently, the act must be held void.

SAME—POWERS OF LEGISLATURE—APPORTIONMENT.

3. The legislature is prohibited from passing an apportionment act which does not give substantially just and equal representation to the people of each county, based upon either the voting or entire population, or upon some other fair basis.

(Syllabus by the Court.)

Petition by James M. Ballentine for a writ of mandate to compel Norman B. Willey, governor, and others, as board of state canvassers, and A. J. Pinkham, as secretary of state, to examine and return the whole number of votes cast at an election, and to issue a certificate of election to petitioner. Petition denied.

Texas Angel and *O. E. Jackson*, for plaintiff. *S. W. Moody* and *Edgar Wilson*, for defendants.

PER CURIAM. This is an application made by J. M. Ballentine for a writ of mandate to compel the defendants, as the state board of canvassers, to proceed to examine and make a statement of the whole number of votes cast at the election held November 8, 1892, for the office of member of the house of representatives for Ada county, and make the proper return thereof to the secretary of state, and to compel the secretary of state to issue a certificate of election to the plaintiff to the said office of member of the house of representatives from Ada county. An alternative writ was issued, and on the return thereof the defendants A. J. Pinkham, as secretary of state, Silas W. Moody, as state auditor, and Frank R. Coffin, as state treasurer, appeared, and demurred to the petition. The defendants Norman B. Willey, as governor, and George H. Roberts, attorney general, appeared, and by an-

swer admitted the allegations of the petition. The case was heard upon the demurrer of defendants Pinkham, Moody, and Coffin.

This case arises out of an act passed by the first legislature of the state of Idaho, entitled "An act providing for the apportionment of the legislature," approved March 13, 1891, (1 Sess. Laws, p. 195.) Said act was passed under and by virtue of the provisions of section 4 of article 3 of the constitution, which section provides as follows: "The members of the legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to congress, and thereafter to be apportioned as may be provided by law: provided, each county shall be entitled to one representative." At the date of the approval of said apportionment act the state of Idaho was composed of 18 counties, and said act declared the representation that each of said 18 counties was entitled to. Prior to the approval of said apportionment act, an act was passed organizing the counties of Alta and Lincoln out of the territory theretofore included in the counties of Alturas and Logan, which act was thereafter declared unconstitutional by this court. After the act organizing the counties of Alta and Lincoln had been held unconstitutional, said apportionment act gave representation to two counties that had no existence, viz. Alta and Lincoln, and failed to give representation to two existing counties, viz. Alturas and Logan. The vital question for determination is the validity of said apportionment act, for upon the determination of that question depends partly, if not wholly, the right of the plaintiff to the issuance of the writ of mandate prayed for.

Counsel for plaintiff contend, regardless of the fact that the act creating the counties of Alta and Lincoln had been declared unconstitutional and void, that that part of said apportionment act which provides the representation for all counties except Alta and Lincoln should be held valid, and given effect, and that, as legislative representation for Alturas and Logan counties is not provided for by said act, they are entitled to the representation provided for them by the constitution; while the defendants Pinkham, Moody, and Coffin contend that said act is unconstitutional and void, for the reasons that it provides legislative representation for nonexistent

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counties; that it fails to give representation to existing counties; and that the intent and object of said act was to accomplish a single purpose only, to wit, that of making an apportionment of the entire state for legislative representation, and that without the void part the act cannot effect such purpose; and cite in support thereof several authorities. Counsel for plaintiff cite in support of their contention, Cooley, Const. Lim. p. 209. The author says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional because it is not within the scope of legislative authority. It may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just, constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and uncon-

stitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained." This quotation from Cooley's Constitutional Limitations is found in plaintiff's brief, and was dwelt upon with emphasis and energy by counsel for plaintiff in their oral argument to the court. It correctly states the rule of law which governs and should control in the construction of a statute valid in part and void in part. Immediately following the above quotation that distinguished author says: "The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void in one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion; and if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them."

Tested by the rule as laid down by Judge Cooley, should that part of the act in question which fixes the representation of the 16 counties, therein named, be sustained? Judge Cooley says, (Const. Lim. § 211:) "The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of the rule. But, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid

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of the invalid portion." The question arises as to what was the intent or purpose of the act under consideration. Was its purpose to provide for the apportionment of but 16 counties of the state? To ascertain the object of this act we will examine its title, for section 16, art. 3, of the constitution provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." Referring to said act, we find that it is entitled "An act providing for the apportionment of the legislature." The title does not indicate that the object of the act was an apportionment of members of the legislature for 16 counties of the state, but it does indicate that the act is intended as an apportionment for the whole state. Referring to the act itself to ascertain its object, we find that it divides the entire state, as the counties then existed, into senatorial and representative districts, and declares the representation that each of the 18 counties is entitled to. The clear intent and object of said act was to apportion the entire state for legislative representation, and not for the apportionment of a part of the state only. Can an act having but one object,—that of a complete apportionment of the entire state,—when part of its provisions have become invalid, and for that reason it fails to apportion the entire state, stand when tested by the rule of law that, if the object of a statute is to accomplish a single purpose only, the whole must fail, unless sufficient remains to accomplish or effect the object of the statute without the aid of the invalid part? We think not. Strike out that portion of said act dividing Alta and Lincoln counties into senatorial and representative districts, and which declares the representation of each, does sufficient remain to effect or accomplish its object, its purpose? Most certainly not. Counsel for plaintiff concede that after striking out the invalid portion of said act sufficient thereof does not remain to accomplish or effect the purpose intended to be accomplished or effected by it, to wit, the apportionment of the entire state for legislative representation, but contend that, after striking out the void portion, the act remains valid so far as it goes towards making a complete apportionment of the state; and to make a complete apportionment the counties not mentioned in said act are relegated to the constitution for their representation. They thus admit

that the object of the act cannot be effected, with the invalid portions stricken out, without the aid of the constitutional apportionment. Therefore the entire act must be held void when tested by the rule of law that when a statute is intended to accomplish a single purpose only, and some of its provisions are void, the whole must fail, unless sufficient remains to carry into effect the object of the statute without the void part. We consider this rule of law as especially applicable to the case at bar.

In *Slauson v. City of Racine*, 13 Wis. 398, the learned court states the rule as follows: "And the only question left is what effect the invalidity of this provision should have upon the operation of the statute. It is undoubtedly true that parts of a statute may be unconstitutional, and yet other parts, capable of being executed independently, held valid. But the counsel for the plaintiff contend that where parts of a statute are unconstitutional, and other parts valid, the former being evidently designed as compensation for or inducements to the latter, so that the whole, taken together, warrant the belief that the legislature would not have passed the valid parts alone, the whole act should be held inoperative. This position is fully sustained by the case of *Warren v. Charlestown*, 2 Gray, 84, and seems to rest upon solid reasons. We think, also, it is fairly applicable to this case." In *Allen v. Louisiana*, 103 U. S. 80, Chief Justice WAITE states the rule applicable to the construction of statutes like the one under consideration as follows: "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected." "But," as was said by Chief Justice SHAW in *Warren v. Charlestown*, 2 Gray, 84, "if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them. The point to be determined in all cases is whether the unconstitutional provisions are so con-

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nected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the legislature, if those provisions were struck out." In *Com. v. Potts*, 79 Pa. St. 164, the court says: "The section speaks as an entirety in its purpose, and not in parts, which may be severed without violence to the legislative purpose. Where, as here, the parts are so dependent that one cannot take effect without the other, so as to carry out the legislative intent, we cannot legislate by way of substitution." So in the case at bar the void portion of said act cannot be severed without violence to the legislative purpose or intent. In other words, the legislative purpose of said act cannot be accomplished by carrying into effect the valid portion thereof. In *City of Rochester v. Briggs*, 50 N. Y. 553, the court laid down the rule as follows: "It is a universal rule that, where a part of the statute is unconstitutional, that fact does not authorize the court to declare the remainder void, unless the provisions are so connected in subject-matter, meaning, or purpose that it cannot be presumed that the legislature would have passed the one without the other." We think that it would be a very violent presumption to presume that the legislature would have passed said act had they not intended it to provide representation for every county in the state.

The principle announced in the authorities above cited very clearly illustrates the case at bar. We need only to ask the question, would the legislature have passed the act in question had it not been the intention to effect the one purpose, to wit, to apportion the entire state for legislative representation? Would the legislature have passed an apportionment act leaving out the counties of Alturas and Logan, and, not only leaving them without any representation, but thereby reducing the number of members of the legislature to 50? That it did not do so, and had no intention of depriving any part of the state of its proper representation, is apparent from the provisions of the act that was passed, and it will scarcely be contended by counsel who seek to uphold this act that the legislature had any such intention. An apportionment law which seeks to give its proper representation to every part of the state must necessarily be an entirety; the one part compensating the other, and the various parts thereof mutually dependent upon each other.

In no other way can a just and fair representation be given to every part; and it is the history of such legislation that it requires more skill, and the joint action of more minds, to make a just and fair apportionment of the state, giving to each part proper and just compensations for every other part, than for any other class of legislation. The constitution has, therefore, wisely conferred this power upon the legislature alone. The counsel for plaintiff construe the rule as laid down by the eminent authorities above quoted to mean that, if an act having but one intent, one purpose, contains provisions that are unconstitutional, and that by reason thereof but one half, or even less, of such intent or purpose can be carried into effect by the valid portion of such act, such valid portion should be given effect. We cannot consent to such a construction. The insurmountable difficulty in the way of holding a portion of this act valid and a portion invalid is apparent. The governor, with a laudable desire to enforce the law, when issuing his election proclamation adopted a portion of the act in question, and, coming to the counties surrounding Alturas and Logan, he found that said act provided one senator for Alta and Custer counties. The governor could not give this senator to Custer and Alturas, because that officer, under the law, would represent a much larger voting population than he would giving the senator to Custer and Alturas, and a larger territory also, which would have been a new district; but he gave the senator to Custer county, thus giving a senator to a smaller voting population and territory, and thereby creating a new district not created by the constitution or the law, and gave to Custer county one half a senator more than is given it by said apportionment act or the constitution. A similar condition exists as to other counties. It will thus be seen that said apportionment act, as applied to all counties but Alturas and Logan, cannot be carried into effect. When the supreme court attempts to construe said statute, and apply it to all counties except Alturas and Logan, it is met with the same difficulties that confronted the governor when he came to issue his election proclamation. But neither the governor nor this court has any authority to make a single new district, or to give any district additional representation, and any such attempt is unconstitutional and void. Had the leg-

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islature passed an apportionment act, in which one or more counties of the state were purposely omitted, and its constitutionality called into question, a very different question from that before us would be presented.

It is contended by counsel for plaintiff that two counties were omitted from the act under consideration, and thereby not given representation, and are therefore entitled to the representation given them by the constitution. The reply is that every county of the state, as they existed at the date of the approval of this act, was named therein, and provided with representation; and it appears that the counties of Alturas and Logan were omitted because of a belief of their nonexistence and not because of an intention to allow them the representation provided for them by the constitution.

It is further contended that the only constitutional prohibition in regard to the apportionment of the members of the legislature is that each county shall be given one representative, and that, so long as the legislature provides that each county shall have one representative, the remaining members allowed by the constitution are left to the will of the legislature, and it may give them all to a single county, without regard to either the entire or voting population. An act apportioning the members of the legislature in accordance with that view would be a clear violation of the constitution. One of the very foundation principles of our government is that of equal representation, and the legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis. The reservation of rights by the people is broad enough to prohibit the legislature from passing an apportionment act which is manifestly unequal and unjust to the people of any portion of the state. It has authority to fairly apportion legislative representation, but it is prohibited from disfranchising. Whenever the legislature undertakes to deny the right of the people of any county a just and fair representation in the legislative department of the state, it is not acting within the scope of its authority. The act under consideration shows that the legislature did undertake to make a just and fair apportion-

ment for the entire state for legislation, and failed because of the unconstitutionality of an act creating Alta and Lincoln counties, and for no other reason.

Counsel for plaintiff contend that the law as laid down in the case of *Hampton v. Dilley*, 31 Pac. Rep. 807,¹ (decided at the present term of this court,) is very similar to the case at bar. The distinction between the cases is palpable. In the former case it is held that a person could not be subjected to punishment or deprivation of rights because he obeyed the law as it appeared in the statute, although the statute might be subsequently declared unconstitutional. In the case at bar the apportionment act was to all intents and purposes declared unconstitutional by the decision in the Alta-Lincoln Case. The plaintiff herein is claiming rights under a law already declared unconstitutional. Because the governor or any other executive officer may have thought the apportionment act was still in force, however honest and sincere they may have been in such belief, is no reason why this court should sustain a statute which the court is satisfied is void. The effort of the governor to reconcile the differences between the apportionment by the statute and that made by the constitution, while perhaps commendable as an effort in behalf of what the executive believed to be the best interests of the state, nevertheless such action on his part of necessity involved the exercise of powers not germane to his office, but expressly prohibited by the constitution.

The plaintiff cites *State v. Van Duyn*, 24 Neb. 586, 39 N. W. Rep. 612, as an authority in his behalf. The question in that case was as to the constitutionality of an apportionment act passed in 1887, which failed to give Sarpy county any representation. The question was raised by an application for a writ of mandate to compel Van Duyn, as clerk of Saline county, to post election notices for senators and representatives in Saline county under the apportionment act of 1881, instead of the apportionment act of 1887, upon the ground that the latter act was void, for the reason that said act was not regularly passed by both houses of the legislature as provided by law. It appears that that part of the act which relates to Sarpy county had not passed both houses of the legislature, and was held null and void. The act

¹ Ante, 1157.

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was regularly passed as to all counties except Sarpy, but for some reason it was not mentioned in said act as passed by the legislature, but by some means the name "Sarpy county" was inserted into the enrolled bill as signed by the governor. The court says: "The record tends to show that that portion of the act relating to Sarpy county was not passed by both houses of the legislature, perhaps not by either, and submitted to the governor, and because of this defect we are asked to declare the whole act unconstitutional." It will be observed that the court was asked to declare said act unconstitutional because the enrolling clerk or some one had inserted a provision concerning Sarpy county into said act, and the court says because of that defect "we are asked to declare the whole act unconstitutional." The court further says: "An act may be void in part and a portion of it valid. In such case the court, if it can separate that portion which is not in conflict with the constitution from that which is clearly in conflict therewith, and the former is complete in itself, and capable of enforcement, it will be sustained." We do not think the learned court states the rule of law applicable to the construction of a statute in part valid and in part invalid, the object of which is to accomplish a single purpose only. The rule as stated in that case falls short of the rule as stated by Mr. Cooley and the other authorities above cited. If the learned court had added: "But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion,"—it would have stated the rule applicable to the case at bar. That case, if we rightly apprehend it, did not involve the construction of a statute that was in part valid and in part invalid. An apportionment act had been passed that left out or did not mention Sarpy county, and by some means the provision concerning Sarpy county appeared in the enrolled bill or printed statute. The record showed that that part relating to Sarpy county was no part of

the act passed; therefore that case did not involve the construction of a statute part valid and part invalid, for the reason that the part held to be invalid was not a part of the statute as passed by the legislature. The court holds that the part relating to Sarpy county was no part of said act, and that the act as passed by the legislature was valid. We fail to see any reason for the application of the rule applicable to the construction of statutes in part constitutional and in part unconstitutional. However, if we fail to comprehend the facts as therein stated, and the rule of law applicable thereto, we maintain that, if it was the intention of the legislature to apportion the whole state for legislative representation, and the act, if carried into effect without the void part, failed of its purpose and intent, the whole act should be held void. The court says: "All that the constitution requires is a fair apportionment; the mode by which it is secured being left to the legislature." This, we think, applies to the case at bar. The legislature undertook to make a fair apportionment of the entire state by the act in question. A part of said act is invalid. The representation given by said act applies to only a part of the state, and is made on a different basis, or gives a different representation, from that given by the constitution. We are confronted with the proposition whether the requirement of the constitution as to a fair apportionment can be secured by an act which was intended as a complete and entire apportionment of the state, where part of such act is void, and certain counties or districts are relegated to the apportionment allowed by the constitution, thus giving the people of certain counties a representation on one basis and the people of certain other counties representation on an entirely different basis. We are of the opinion that a just and fair apportionment cannot be secured in that way. It is the opinion of this court that the peremptory writ should not issue, and that the application therefor be denied, and it is so ordered. Costs in favor of defendants.

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1. Objections for want of jurisdiction may be made at any time.—*Tootle v. French*, 745; *Durant v. Comegys*, 809; *Ah Kle v. McLean*, 812.

Another action pending.

2. Under Code, § 468, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon personal property, the dismissal was proper of an action of claim and delivery, begun after the institution and during the pendency of an action to foreclose a chattel mortgage upon the same property.—*Cederholm v. Loofborrow*, 176.

Death of party.

3. Rev. Laws, p. 267, § 140, providing that, "if any action be pending against the testator or intestate at the time of his death, the plaintiff shall present his claim to the executor or administrator for allowance or rejection, and no recovery shall be had in the action unless proof be made of the presentation," applies to actions in which the United States is a party plaintiff.—*United States v. Hailey*, 26.

4. Where one of the defendants dies after judgment was rendered against them, but before notice of appeal was filed or served, and no substitution is made, all proceedings on the appeal are void as to the representatives of the deceased defendant.—*Coffin v. Edgington*, 595.

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To determine adverse claims, see "Mines and Mining," 17-26.

Consolidation.

Error cannot be predicated on the action of the court below, in consolidating, for the purposes of the trial, two actions, where it appears that both parties consented to the consolidation; that defendants were the same in both actions; and that the same questions were involved.—*Rosenthal v. Ives*, 244; *Lansdale v. Same*, Id.

Adjutant General.

See "Militia."

Administration.

See "Executors and Administrators."

Admissions.

In evidence, see "Evidence," 2, 3.

In pleading, see "Pleading," 6, 7.

Adverse Claims to Land.

See "Mines and Mining;" "Quieting Title."

Adverse Possession.

See "Boundaries."

Affidavit.

On attachment, see "Attachment," 2.

Agents.

Location of claim by, see "Mines and Mining," 8-10.

Amendment.

Of statutes, see "Statutes," 1, 2.

Answer.

See "Pleading," 3-7.

APPEAL.

See, also, "Error, Writ of;" "Exceptions, Bill of;" "New Trial;" "Practice in Civil Cases;" "Trial."

In criminal cases, see "Criminal Law," 18-24.

When lies.

1. When there is no judgment in the court below, this court has no jurisdiction.—*Durant v. Comegys*, 809; *Ah Kle v. McLean*, 812.

2. Where the docket entries of the probate court merely show that a complaint was filed, a summons issued and served, and a demurrer to the complaint filed, there being no entry showing what disposition was made of the demurrer, or for which party judgment was rendered, an entry of "damages, \$310," is not sufficient to constitute a judgment, even though the fee bill made by the court contains a charge for the overruling of defendant's demurrer, and the entry of default for want of answer; and from such judgment no appeal will lie.—*Gray v. Cederholm*, 41.

— Final judgment.

3. When there is no final judgment no appeal can be taken.—*Durant v. Comegys*, 809; *Ah Kle v. McLean*, 812.

4. When the party entitled to costs fails to file his memorandum thereof within the time prescribed by section 4912, Rev. St., he thereby waives his right to costs, and the clerk has no right thereafter to insert them in the record of judgment. In such a case the fact that the costs do not appear in the record of judgment does not make the judgment any the less final and appealable.—*Cantwell v. McPherson*, 1044.

5. Upon the minutes of the court the following entry was made: "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiffs' costs, taxed at \$3.40." *Held* not a final judgment.—*Durant v. Comegys*, 809; *Ah Kle v. McLean*, 812.

6. An appeal from an order of the district court overruling a motion for a new trial is a final judgment within Rev. St. U. S. § 1869, allowing appeals from such orders.—*Schultz v. Keeler*, 305.

7. A judgment of nonsuit is a final judgment within the meaning of Idaho Code, from which an appeal will lie.—*Lalande v. McDonald*, 283.

— Interlocutory order.

8. After judgment on a money demand in the probate court, and issuance of execution, defendant applied to the court to quash the writ. The court refused, and defendant appealed to the district court, where, before trial, plaintiff moved to dismiss. *Held*, that the denial of this motion was an interlocutory order, and not a "special order made after final judgment" appealable to the supreme court under Rev. St. § 4807.—*Connell v. Warren*, 855.

— Allowance of alimony.

9. An order in an action for divorce, awarding counsel fees and alimony *pendente lite*, is not appealable.—*Wyatt v. Wyatt*, 219.

— From order of board of equalization.

10. No appeal will lie from an order of the county board of equalization reducing the amount of an assessment of taxes.—*General Custer Min. Co. v. Van Camp*, 44.

11. No appeal will lie from a judgment of the district court, upon an appeal from an order of the board of county commissioners reviewing an assessment of taxes; the remedy of the aggrieved party in such case being by writ of error. *Rupert v. Board*, 2 Pac. Rep. 718, followed.—*Van Camp v. Board of Com'rs of Custer County*, 33.

— From order of county commissioners.

12. No appeal will lie from a judgment of the district court upon an appeal from an order of the board of county commissioners declaring the result of an election, the remedy of the aggrieved party in such case being by writ of error.—*Rupert v. Board of Com'rs of Alturas County*, 21.

Notice.

13. Any party to an action, whether plaintiff or defendant, may appeal; but the notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or interveners.—*Coffin v. Edgington*, 595.

14. Where, in an action to foreclose a mortgage against the joint makers of the same, judgment is entered against them jointly, and one defendant appeals, but does not serve notice of appeal to his codefendant, the appeal will be dismissed, as such codefendant is an "adverse party," within the meaning of Code, § 643, providing that notice of appeal must be served on the adverse party.—*Jones v. Quantrell*, 141.

Notice—Service.

15. Under Code Civil Proc. § 685, providing that service may be made upon an attorney during his absence from his office by leaving the notice with his clerk therein, or with a person having charge thereof, or, when there is no person in the office, by leaving it between the hours of 8 A. M. and 6 P. M. in a conspicuous place in the office, sufficient service of a notice of appeal was not shown by the affidavit of the attorney making the same, reciting that "affiant served the notice upon the attorney for respondent by leaving a true copy thereof at his office."—*Warner v. Teachenor*, 39.

— On appeal from justice's court.

16. Code Civil Proc. § 665, provides that any person dissatisfied with a justice's judgment may appeal therefrom to the district court, at any time within 30 days after the rendition of the judgment, by filing a notice of the appeal with the justice, and serving a copy on the adverse party. Section 669 provides that such appeal is not effectual until an undertaking is filed. *Held*, that an appeal from justice's judgment rendered October 2d was well taken, where it appeared that the notice and undertaking were filed with the justice on the 6th, and a copy of the notice on the adverse party on the 15th; the order of the filing of the undertaking and the service of the copy being immaterial.—*Salt Lake Brewing Co. v. Gillman*, 180.

Bond.

17. Rev. St. § 4808, requires an undertaking on appeal to be filed within five days after the service of notice of appeal, in order to render an appeal effectual for any purpose.—*Brown v. Hanley*, 950.

18. An undertaking given under Rev. St. § 4809, providing that, where more than one appeal in an action at the same time, but one undertaking need be filed, is not sufficient unless it specifies each of the appeals to which it is intended to apply.—*Sebree v. Smith*, 327.

19. Where an appeal is taken from a judgment and an order denying a new trial, and the bond is void for uncertainty, the filing of two good and sufficient undertakings on the hearing of a motion to dismiss will not cure the defect.—*Motherwell v. Taylor*, 139.

20. Where appellants file and serve notice of appeal both from the order denying their motion for a new trial and from the judgment, an undertaking reciting that it is given "on such appeal" is void for uncertainty, and the appeals will be dismissed.—*Eddy v. Van Ness*, 93.

21. Where an appeal is taken both from the judgment and from an order denying a motion for a new trial, an undertaking reciting that it is given "on such appeal" is void for uncertainty, and both appeals will be dismissed.—*Motherwell v. Taylor*, 139.

Assignment of errors.

22. An exception in the court below is not necessary to a review of a judgment on the pleadings.—*Johnson v. Manning*, 1073.

Record.

23. Under Code, § 653, providing that a statement once made may be used on appeal from the judgment, exceptions to rulings on evidence embodied in a statement of the case may be considered on appeal from the judgment, where it appears that such statement had been used at the hearing on the motion for a new trial.—*Bradbury v. Idaho & O. Land Imp. Co.*, 221.

24. To give the supreme court jurisdiction of an appeal the record must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney, within the time required by the statute.—*Tootle v. French*, 745.

25. Where a paper containing a stipulation between the parties to an action is, without objection, made a part of the transcript, and both parties refer to it in their arguments on appeal, such paper will be considered as part of the record by consent of parties.—*Grete v. Knott*, 18.

— Time of filing transcript.

26. Where the first day of a term of the supreme court is Monday, a transcript on appeal, filed on Friday preceding Monday, is in time under Sup. Ct. Rule 2, requiring transcripts to be filed three days before the first day of the term.—*Sebree v. Smith*, 327.

27. An appeal perfected September 14, 1891, was dismissed January 12, 1892, on respondent's motion, for failure of appellants to file transcript within 60 days. January 25th appellants moved to restore the cause on affidavit that the transcript was given their attorneys in October, and that, by pressure of business and inadvertence, they failed to file it. Motion denied.—*Fahey v. Belcher*, 1076.

28. Under rule 4 of the supreme court, which provides that the transcript of the record shall be filed and served within 60 days after the appeal is perfected, and the bill of exceptions settled, where the trial judge undertakes to settle the bill of exceptions on August 22d, but because of a mistake it is not in fact certified until October 7th, the time for filing the transcript does not commence to run until the latter date.—*Miller v. Pine Min. Co.*, 1140.

29. An appeal will be dismissed, on motion of respondents, where appellant has filed no transcript, though two months have elapsed since the expiration of the time for filing it, prescribed by the rules of the supreme court, and where appellant, in his application for an extension of the time for filing it, gives no sufficient excuse for his laches.—*Mahony v. Mahon*, 1065.

Appeals from justice's court.

30. Where, in a suit before a justice for \$150, being above the amount of which justices have exclusive original jurisdiction, all the allegations of the complaint were denied, but, to expedite an appeal, defendant, by agreement of both parties, consented to a "*pro forma* judgment" against him, "reserving all his rights under an appeal," this consent does not deprive him of his right to be heard in the circuit court, and his appeal was improperly dismissed.—Harvey v. Bunker Hill & Sullivan Mining & Concentrating Co., 732.

31. Under Rev. St. § 4841, providing that the district court has the same power to allow amendments on appeal from justices' or probate courts that it does in suits commenced in the district court, an amendment to an answer in replevin on appeal from a justice is in the court's discretion.—Sebree v. Smith, 329.

Review.

32. On appeal the court will only notice the errors committed against the appellant, and not those committed against the appellee.—Jones v. St. John Irrigating Co., 58.

— Objections not raised below.

33. Objection to the admissibility of evidence cannot be made for the first time in the appellate court.—Darby v. Heagerty, 260.

34. Where an action is tried upon the theory that the answer denies the allegations of the complaint, the objection that certain allegations in the complaint are admitted through defective denials cannot be raised for the first time in the appellate court.—Toulouse v. Burkett, 265.

35. An objection that an affidavit on motion for a new trial was void, in that it did not have a proper jurat, cannot be raised on appeal for the first time.—Heilner v. Brown, 242.

— Discretion of trial court.

36. The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same, where there is no abuse of discretion.—Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co., 405.

— Presumptions.

37. Where the record shows that a general demurrer was filed, but is silent as to any disposition of the same, the presumption will be indulged, on appeal, that the demurrer was overruled or abandoned.—United States v. Alexander, 354.

38. Where a refusal to give instructions requested by a party is assigned as error, the supreme court will look into the entire charge to determine whether such refusal was prejudicial; and, where the record shows that a charge was given which is not brought here for consideration, it will be presumed that the

trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.—Hopkins v. Utah Northern Ry. Co., 277.

39. Where the record on appeal does not affirmatively show error in the court below, the judgment will be affirmed, as every intendment is in favor of the regularity of the trial court.—Toulouse v. Burkett, 265.

40. Where, on appeal from a judgment entered upon the report of a referee, the record does not disclose the time of the filing of the report, it will be presumed that it was filed within the time prescribed by the statute.—Montandon v. Walker, 152.

— Sufficiency of evidence.

41. Where, in an action to recover damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, evidence was submitted tending to show leakage and damage from such leakage, defendant's contention on appeal that a verdict for plaintiff was unsupported by the evidence will not be sustained.—McCarty v. Boise City Canal Co., 225.

42. A judgment will not be reversed when there is a substantial conflict in the testimony, or unless it seems the result of passion or prejudice.—Chamberlain v. Woodin, 609.

43. Where the evidence is conflicting, the verdict of a jury will not be disturbed.—O'Connor v. Langdon, 803.

— Matters not apparent of record.

44. Where the record on appeal does not contain all the evidence adduced in the court below, an objection that a finding of fact is not supported by the evidence will not be sustained.—Riborado v. Quang Pang Min. Co., 131; Toulouse v. Burkett, 170.

45. Where, in an action to foreclose a mortgage, the transcript on appeal does not show affirmatively that one of the defendants is a married woman, an objection that a judgment could not be entered against such defendant, in that she is a married woman, will not be considered.—Murphy v. Fuld, 161.

46. Where an exception to the order of the court sustaining a motion for judgment on the pleadings is not incorporated into the record by bill of exceptions, an objection that the court erred in sustaining such motion will not be considered on appeal.—Purdum v. Taylor, 153.

— Harmless error.

47. An offer of oral proof being made and rejected, and exception duly taken, the appellate court must be satisfied, from the record, that the offered evidence was material, or tended to support some issue involved, before it will be treated as error.—United States v. Alexander, 354.

Review—Objections waived.

48. When a motion for nonsuit is made by defendant at the close of plaintiff's testimony because of its insufficiency, and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.—*Chamberlain v. Woodin*, 609.

49. If a bill of exceptions is presented for settlement after the trial of the cause, and is certified to as correct by respondent's attorneys, and such bill is thereafter settled by the judge and used on the hearing of the motion for a new trial, it is too late for the respondents to raise the objection for the first time in this court that such bill was not settled in time.—*Stufflebeam v. Montgomery*, 763.

50. Where defendants, in the trial court, question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and defendants waive their rights to save the question so raised by not taking a bill of exceptions, only appealing from the judgment, another demurrer raising the same question cannot be interposed on appeal.—*Guthrie v. Phelan*, 89; *Same v. Fisher*, 101.

Decision—Affirmance.

51. Where the findings are responsive to all the material issues raised by the pleadings, and are warranted by the testimony, and they support the judgment, and no error of law appears, the judgment will be affirmed.—*Cooper v. Kellogg*, 304; *McGuire v. Lamb*, 346.

Dismissal.

52. Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.—*Adams v. McPherson*, 855.

53. Where two appeals are taken,—one from a judgment, and the other from an order denying a new trial,—an undertaking, promising, in consideration "of such appeal," to pay all damages and costs which may be awarded against appellant "on the appeal," not specifying which one, is void for uncertainty as to both appeals, and both will be dismissed. *Eddy v. Van Ness*, ante, 93, 6 Pac. Rep. 115, followed.—*Cronin v. Bear Creek Gold Min. Co.*, 1146.

54. Under rules 2 and 4 of the supreme court, which provide that if appellant shall not, within 60 days after the bill of exceptions is settled, file a transcript of the record, the appeal shall be dismissed, an appeal will not be dismissed where it appears that the attorney for appellant frequently called on the clerk to ascertain if the bill of exceptions had been allowed, and was on each occasion informed by the clerk that it had not; that he never learned the contrary until October 20th, when, on an examination of the files, he discovered the bill of exceptions, with the allowance of the judge indorsed thereon, dated July —; that he at once filed his praecipe for a tran-

script, and had the same printed as speedily as possible.—*Westheimer v. Thompson*, 1137.

55. Sup. Ct. Rule 3 provides that, "if the transcript of the record is not filed within the time prescribed, the appeal or writ of error may be dismissed, on motion, without notice." Rule 4 provides that "on such motion there shall be presented the certificate of the clerk below" as to certain facts. *Held*, that an appeal would not be dismissed on such motion unless the clerk's certificate contained all the facts required by rule 4.—*Dunniway v. Lawson*, 600.

56. Under Sup. Ct. Rule 3, providing that, "if the transcript of the record is not filed within the time prescribed, the appeal or writ of error may be dismissed on motion," is not mandatory, but merely authorizes the court to dismiss an appeal when the interests of justice require it.—*Dunniway v. Lawson*, 600.

Reversal.

57. Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed.—*Bowman v. Ayers*, 282.

Proceedings below after reversal.

58. A suit was brought under Act Jan. 30, 1885, to contest the election of a sheriff who had received a certificate of election from the canvassing board of the county. On appeal to the supreme court the act was declared unconstitutional, and the judgment reversed. *Held*, the effect of such reversal was to declare the suit a nullity, and it should have been dismissed by the court below.—*In re Havird*, 652.

APPEARANCE.**Effect.**

Voluntary appearance by an attorney, and participation in the argument of a motion, waives notice of such a motion.—*Curtis v. Walling*, 383.

Apportionment.

Of members of legislature, see "State Legislature," 2, 3.

Argument of Counsel.

See "Criminal Law," 5.

ARSON.**Inhabited building.**

A jail occupied by two prisoners is an "inhabited building," within the meaning of

Rev. St. 1887, § 7007, which defines arson in the first degree as maliciously burning in the nighttime an "inhabited building" in which there is at the time some human being.—*State v. Collins*, 1182.

Assignment.

Of errors, see "Appeal," 22.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

By non-resident—Validity.

1. An assignment by a non-resident, made in accordance with the laws of his domicile, and providing for preferences, is invalid, as to property situate in Idaho, as against attaching creditors, under Rev. St. §§ 5875-5932.—*Barnett v. Kinney*, 706.

2. It is immaterial that the attaching creditor is also a nonresident.—*Barnett v. Kinney*, 706.

ASSUMPSIT.

Pleading—Common counts.

Under Code Civil Proc. § 251, providing that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged," in an action for the balance of an account all the common counts may be united in one count as one cause of action, without any specification of the sums due upon each.—*Mills v. Glennon*, 95.

ATTACHMENT.

See, also, "Execution;" "Garnishment."

Expense of keeping attached property, see "Sheriffs and Constables," 2.

Priority of lien, see "Assignment for Benefit of Creditors."

Grounds—Giving fraudulent mortgage.

1. A creditor has the right to attack the validity of a chattel mortgage by attaching the property described therein, giving indemnifying bond to sheriff, and selling the property.—*McConnell v. Langdon*, 892.

Affidavit.

2. If an affidavit for an attachment is defective in not stating all the statute requires, or if it is false, the court has no jurisdiction to issue the attachment.—*Murphy v. Montandon*, 1048.

Bonds.

3. Where an attachment is issued on a false or defective affidavit, the obligors on the bond given to procure the release of the at-

tachment may prove such fact in defense of a suit on the bond.—*Murphy v. Montandon*, 1048.

4. In an action on a bond given to procure the release of an attachment, the affidavit in the original cause may be introduced in evidence for the purpose of showing that it was defective or false.—*Murphy v. Montandon*, 1048.

5. Where, in an action against the sureties on an undertaking in attachment, the answer alleges that the action in which the undertaking was given was prematurely brought, a motion to strike out such answer, as not constituting a defense, was properly granted.—*Guthrie v. Fisher*, 101.

Abandonment.

6. The issuance and levy of a second attachment on the same land is not an abandonment of the first levy, where the second levy was made, not with the intention of abandoning the first levy, but merely as a precautionary measure, because the defendant had "come into more open and notorious assertion of rights and ownership" of the land.—*Wright v. Westheimer*, 962.

ATTORNEY AND CLIENT.

Arguments of counsel, see "Criminal Law," 5. Competency of attorney as witness for client, see "Witness," 1.

Fees on foreclosure, see "Mortgages," 6.

Death of client—Authority of attorney.

If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.—*Coffin v. Edgington*, 595.

BAIL.

Sufficiency.

1. A bond payable to the "people of the United States" will not sustain a judgment in favor of the "people of the United States of the territory of Idaho." Before such judgment can be allowed the instrument must be reformed.—*United States v. Shoup*, 459.

Action on bond—By county.

2. Under Rev. St. § 4090, providing that all actions must be brought in the name of the party in interest, section 1732 that all acts respecting the property and rights of counties shall be in the name of the county, and section 1733 allowing counties to sue and be sued, an action on a bail-bond must be brought in the name of the county interested.—*United States v. Shoup*, 459.

Action on bond—Defenses.

3. In an action on a recognizance, the fact that an order of the magistrate for the release of the prisoner after the giving of the recognizance does not appear in the record is no defense.—*Dilley v. State*, 1012.

4. The sureties in the recognizance cannot, when sued thereon, attack the jurisdiction of the magistrate who took the bond or the grand jury which found the indictment.—*Dilley v. State*, 1012.

Bills and Notes.

See "Negotiable Instruments."

Bonds.

See "Bail;" "Principal and Surety."

In attachment, see "Attachment," 3-5.

Of sheriff, action on, see "Sheriffs and Constables," 4, 5.

On appeal, see "Appeal," 17-21.

BOUNDARIES.**Recognition—Adverse possession.**

When coterminous owners of land establish a boundary line, and take possession to the line so agreed upon, and one of them erects valuable improvements thereon, and holds quiet and peaceable possession thereof, without objection from the other coterminous owner or his grantees, for a period of more than eight years, such line is binding upon them, and those holding under them.—*Idaho Land Co. v. Parsons*, 1191.

Brokers.

See "Factors and Brokers."

BURGLARY.**Indictment.**

Under Rev. Laws, p. 332, § 59, providing that any person who shall forcibly break and enter, in the night-time, any house with intent to commit larceny or other felony, shall be guilty of burglary, an indictment charging a breaking and entering with intent to commit larceny need not allege the value of the property intended to be stolen.—*People v. Stapleton*, 49.

Cancellation.

Of land patent, see "Public Lands," 5, 6.

CHATTEL MORTGAGES.**Validity—Right of sale in mortgagor.**

1. Rev. St. Idaho, § 3386, provides that, where the mortgagor retains possession of mortgaged chattels, the recording of the mortgage shall protect the mortgagee against attaching creditors. *Held* that, in the absence of further statutory enactment, a chattel mortgage providing that the mortgagor shall continue in possession, doing a retail business, is invalid as against attaching creditors, in the absence of a provision that the proceeds of the business shall be applied on the mortgagee's debt.—*Lewiston Nat. Bank v. Martin*, 700.

—Description.

2. A crop mortgage, which describes the grain as the "crop of wheat and flax now being, standing, and growing, or all the wheat and flax now growing, upon the land known as the 'timber claim' of the mortgagor in Nez Perces county, Idaho," is good.—*McConnell v. Langdon*, 892.

3. The description, "all wheat and flax to be sown and grown upon the land described," without specifying the year in which it is to be sown and grown, is insufficient.—*McConnell v. Langdon*, 892.

Recording.

4. On October 1, 1889, R. leased to D. certain lands for the year 1890, at a rental of one-third of the crop grown, term to commence October 1, 1889. The lease contained a provision reserving to lessor "the right to seed said ground, provided the said second party [lessee] fail to do the same in good season." No provision of forfeiture or right of re-entry in lease. D. entered under lease, and worked the ranch to end of term. On 28th January, 1890, D. executed chattel mortgage on said crop to S., which mortgage was duly recorded. On 24th March, 1890, D. executed to R. (lessor) a release of the lease. There was no change in the possession, management, or operating of farm after the execution of release. Crop was divided as provided for in lease. *Held*, that the record of the chattel mortgage was notice to all acquiring an interest from D. in the crop subsequent to record thereof that R. took release subject to rights of S. under mortgage. *Pierce v. Langdon*, ante, 878, 28 Pac. Rep. 401, (decided at present term,) followed.—*Shields v. Ruddy*, 884.

Foreclosure.

5. The plaintiff held a chattel mortgage given by defendant to secure the payment of three promissory notes given for the price of certain personal property. Default having been made by defendant, plaintiff foreclosed by notice and sale, as provided by statute. The return of the sheriff showed a deficiency of some \$900, to recover which amount plaintiff brings this action. To a complaint setting forth all the details of the transaction, including the foreclosure sale, and report of sheriff showing deficiency, in proper

form, defendant enters a general demurrer, which was sustained by the court. *Held*, that the action was properly brought, and that the action of district court, in sustaining demurrer to complaint, was error.—*Advance Thresher Co. v. Whiteside*, 806.

Willful sale by mortgagee.

6. Under Laws 11th Sess. p. 307, making the willful sale of property upon which there is a chattel mortgage, without the written consent of the mortgagor, larceny, and declaring such sale void, evidence of an oral consent of the mortgagee to the sale is admissible as explaining the intent of the mortgagor in making such sale.—*Mills v. Glennon*, 95.

CLAIM AND DELIVERY.

Pleading.

1. In an action of claim and delivery, the description of the property sought to be recovered simply as "590 sacks of wheat" *held* to be insufficient, and a verdict and judgment which refer only to "the property described in the complaint," giving value, are fatally defective.—*Pierce v. Langdon*, 878.

— Aider by verdict.

2. Where, in an action of claim and delivery, the evidence shows that the ownership of the property was the only issue, an allegation in the complaint that the plaintiff was the owner of and entitled to the property at the time of the commencement of the suit is sufficient after verdict.—*Pierce v. Langdon*, 878.

Submission of issues to jury.

3. In an action of claim and delivery it appeared that A., in the employ of defendant, and threatened with attachment suits, executed a bill of sale to defendant of certain mules; that on the following day, to effect a delivery, A. and defendant went to where the mules were, in the charge of plaintiff; that A., being indebted to plaintiff, in the presence and with the acquiescence of defendant, sold to plaintiff by bill of sale and actual delivery five of the mules covered by defendant's conveyance; and that A. "then" made a delivery to defendant. *Held*, that the question as to the ownership of the five mules was properly submitted to the jury.—*Lufkins v. Collins*, 234.

Finding as to value.

4. In an action of claim and delivery, where several articles are sought to be recovered, if either party desire a finding of value of each article, he should request that such findings be made, or he cannot take advantage of a failure to do so.—*Johnson v. Fraser*, 371.

Verdict.

5. In an action of claim and delivery, a general verdict, finding for or against either

party, is sufficient to enable the court to enter judgment thereon for the return of the property when such a return is the appropriate remedy.—*Johnson v. Fraser*, 371.

6. In an action of claim and delivery, where neither the ownership or value of the property is put in issue, but defendant claims a lien upon the property (cattle) for the care and keeping of the same under a contract with plaintiff, a verdict that "defendant recover of and from the plaintiff the sum of six hundred seventy-nine and 50-100 dollars for keeping and care of the cattle mentioned in the complaint, and that defendant have a lien on said cattle until said amount is paid," is sufficient, after judgment, under the Statutes of Idaho.—*Blackfoot Stock Co. v. Delamue*, 1017.

Judgment.

7. The judgment in an action of claim and delivery, when verdict is given for defendant, should be in the alternative for the return of the property or its value, unless a return cannot be had.—*Johnson v. Fraser*, 371.

Damages.

8. In an action of claim and delivery, where the property sought to be recovered is valuable for use, aside from its intrinsic value, and the prevailing party claims damages for the loss of its use, the measure of damages is the value thereof, and the reasonable value of its use during its detention; and in determining the reasonable value of its use the taxes which the prevailing party would have paid had he retained possession thereof, and the usual and ordinary risk incident to the possession thereof, should be considered.—*Sebree v. Smith*, 329.

Cloud on Title.

See "Quieting Title."

Community Property.

See "Husband and Wife."

Compensation.

Of adjutant general, see "Militia."

Of court stenographer, see "Stenographers."

Of members of legislature, see "State Legislature," 1.

Of sheriffs, see "Sheriffs and Constables," 1, 2.

Competency.

Of witnesses, see "Witness," 1, 2.

Condemnation Proceedings.

See "Eminent Domain."

Conflict of Laws.

See "Usury."

Consideration.

Of note, see "Negotiable Instruments," 1, 2.

Consolidation.

Of actions, see "Actions."

CONSTITUTIONAL LAW.

Apportionment of members of legislature, see "State Legislature," 2, 3.

Due process of law, see "Railroad Companies," 9.

Right to jury trial, see "Quo Warranto."

Legislative powers—Appointment of prison commission.

1. 13th Sess. Laws Idaho, p. 154, creating a prison commission, to consist of the governor, treasurer, and one other person whom they may select, being in conflict with Rev. St. U. S. § 1857, providing that all territorial officers shall be appointed by the governor, by and with the consent of the legislative council, is void.—Taylor v. Stevenson, 166.

Ex post facto laws—Qualification of electors.

2. Const. art. 6, § 3, provides that no person shall be permitted to vote who is a bigamist or polygamist, or is living in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime, etc. Section 4 provides that the legislature may prescribe conditions for the right of suffrage additional to those prescribed in section 3, but shall never annul any of these provisions. Act Feb. 25, 1891, provides that each elector, before registering, must take an oath that "since the first day of January, 1888, and since I have been eighteen years of age, I have not been a bigamist or polygamist, or have lived in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime," etc. *Held*, that the act was not an ex post facto law, nor in the nature of a bill of attainder, and was clearly within the constitutional power of the legislature.—Shepherd v. Grimmett, 1123.

Interstate commerce.

3. Section 7193, Rev. St. Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, art. 1, of the constitution of the United States, providing for the regulation by congress of commerce between the states, is void.

—Territory v. Evans, 634; Same v. Nelson, 638.

Continuance.

In criminal cases, see "Criminal Law," 3.

CONTRACTS.

See, also, "Assignment for Benefit of Creditors;" "Bail;" "Factors and Brokers;" "Fraudulent Conveyances;" "Indemnity;" "Master and Servant;" "Mortgages;" "Negotiable Instruments;" "Partnership;" "Principal and Surety;" "Specific Performance;" "Usury."

Time of essence, see "Specific Performance."

Rescission.

There being evidence that defendant had accepted a proposition from plaintiffs; had partly performed and offered to complete performance of his part, but was stopped by plaintiffs, the court refused to charge that on this evidence defendant was entitled to his rights under the contract, but instead charged that he was so entitled if he accepted, proceeded to do the work, and performed all the conditions on his part. *Held*, error.—Bowman v. Ayers, 431.

Contributory Negligence.

See "Master and Servant," 8; "Negligence."

Conveyances.

See "Chattel Mortgages;" "Fraudulent Conveyances;" "Mortgages."

Of mines, see "Mines and Mining," 27, 28.

CORPORATIONS.

See, also, "Railroad Companies;" "Schools and School Districts;" "Towns."

Powers.

1. A corporation "to mine, smelt, refine, and operate in mining property" has not the power to purchase a chose in action.—Salmon River Mining & Smelting Co. v. Dunn, 30.

Action against—Pleading.

2. In a suit against a private corporation, the complaint is fatally defective unless it contains an unequivocal averment that it is a corporation.—Miller v. Pine Min. Co., 1206.

3. Without this averment, the complaint does not state facts sufficient to constitute a cause of action, and this defect is never waived.—Miller v. Pine Min. Co., 1206.

Liabilities of stockholders.

4. Act 1875 (Rev. Laws 1874-75, p. 618) makes the stockholders of a corporation personally liable for their proportion of debts incurred in the conduct of the corporate business, and gives the right of joint or several action against them on such liability. Act 1887 (Civil Code, tit. 4) superseding said act, in addition to said remedy, empowers the corporation to assess his paid-up stock, and, on default in payment, to sell it out. *Held*, that the latter act does not increase the liability, but simply gives another remedy, and a stockholder in a company organized under the former act, but which has taken proper steps to continue its existence under the latter, cannot object to the latter as impairing the obligation of his contract.—*Sparks v. Lower Payette Ditch Co.*, 1030.

5. The following instrument in writing was issued by the president and manager of a corporation: "Montpelier, Idaho, April 29, 1884. Be it known by these presents, that I, as manager and president of this institution, do agree to refund to Jacob Jones the sum of \$926 80-100 dollars at one year's notice from date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares in the institution. [Signed] H. S. WOOLLEY." *Held*, that it was the obligation of the corporation, and that an action could be maintained thereon by the payee named therein against the stockholder under section 2609 of the Revised Statutes of Idaho.—*Jones v. Woolley*, 790.

COSTS.

Taxation.

1. Defendant moved the court for a retaxation of the costs claimed by plaintiff, agreeing that if the motion should be allowed he would pay the damages and the costs found due on retaxation, to which proposition plaintiff consented. The court retaxed the costs, and struck out \$123.77. The defendant immediately paid the judgment and costs, less the amount so struck out. Plaintiff thereafter filed a demand for a writ of execution for the balance of said costs, disallowed by the court. The court refused to issue the writ. *Held*, that the writ was properly refused; that plaintiff was bound by his agreement in accepting the defendant's proposition to pay the judgment and the costs found due by the court.—*Bowen v. Weatherman*, 1184.

2. Expenses incurred by a party to a suit in the employment of experts are not taxable as costs.—*McDonald v. Burke*, 995.

3. To entitle a party to tax as costs the fees or charges of a stenographer, it must appear that the services were rendered by the court stenographer, or the charges incurred under the provisions of Laws 1st Sess. p. 234.—*McDonald v. Burke*, 995.

COUNTIES.

See, also, "Schools and School Districts:" "Towns."

Action on recognizance, see "Bail," 2-4.

Appeal from order of county commissioners, see "Appeal," 12.

Removal of county seat, see "Injunction," 4.

Division.

1. The act of March 3, 1891, entitled "An act to create and organize the counties of Alta and Lincoln, to locate the county-seats of said counties, and to apportion the debt of Logan county," inasmuch as it divides Logan county without submitting the proposition to the people in the segregated part, as provided by Const. § 3, art. 15, is unconstitutional.—*People v. George*, 813.

— Apportionment of debts.

2. Act Cong. May 14, 1888, divided N. county, and created L. county out of part of the former's territory. Section 7 provided that L. county should remain a part of N. county for judicial purposes until 30 days after the next meeting of the judges of the supreme court, which was December 1, 1888. *Held*, that L. county was liable for her proportion of the salaries of sheriff, clerk of the district court, and district attorney for N. county until December 31, 1888.—*Nez Perce County v. Latah County*, 1131.

Location of county seat.

3. Const. § 2, art. 18, providing that no county seat shall be removed except on petition and after election by the voters, does not affect Act 15th Sess. § 6, temporarily locating the county seat of Logan county at Shoshone, and providing for a vote, as to its permanent location, in 1890.—*Doan v. Board of Com'rs of Logan County*, 781.

4. The election held in the state on October 1, 1890, was the general election for that year, and the county commissioners of Logan county were authorized under Act 15th Sess. to submit the question of the permanent location of the county seat for said county to the voters at said election.—*Doan v. Board of Com'rs of Logan County*, 781.

Compensation of officers.

5. Const. art. 5, § 16, provides for the election of a clerk of the district court for each county. Article 18, § 6, provides that the clerk shall be ex officio auditor and recorder. Section 7 provides that the compensation of this officer, for all duties, shall not exceed \$3,000, nor fall below \$500, for any one year. *Held*, that these sections are self-operative; that the clerk, as such clerk, and as auditor and recorder, for the performance of all duties, cannot receive, for his own use, a greater sum than \$3,000 to be derived from fees and commissions. Any deficit below \$500 must be made

up by the county.—*Hillard v. Shoshone County*, 843; *Id.* 848.

6. Rev. St. §§ 1679, 2157, so far as they allow the county auditor 3 per cent. commission on all state taxes turned over from his county, are repealed by 1 Sess. Laws, p. 179, § 4, compensating him for his services in revenue matters at 10 cents a name.—*Cunningham v. Moody*, 862.

7. Under Const. art. 7, § 7, providing that "all taxes levied for state purposes shall be paid into the state treasury," a county assessor and tax collector is not entitled to any commission on taxes collected in the county and belonging to the state.—*Guheen v. Curtis*, 1151.

County commissioners.

8. The law requiring the county commissioners to divide the county into county commissioners' districts (section 1748, Rev. Laws) is still in force.—*Cunningham v. George*, 1196; *Otterson v. Same, Id.*

9. The electors of the whole county are entitled to vote for one county commissioner for each district, and such vote must be abstracted as provided for the vote for other county officers.—*Cunningham v. George*, 1196; *Otterson v. Same, Id.*

10. On an election to fill the office of county commissioner, the auditor, as auditor, must issue a certificate to the person in each district having the highest number of votes in the whole county.—*Cunningham v. George*, 1196; *Otterson v. Same, Id.*

11. On an election to fill the office of county commissioner, the canvassing board has no authority to declare who is or is not elected.—*Cunningham v. George*, 1196; *Otterson v. Same, Id.*

Illegal issue of warrants—Injunction.

12. As Rev. St. § 1776, provides a remedy for the illegal issuance of warrants by the board of county commissioners by appeal from such action, an injunction will not issue to restrain the payment of such warrants by the county treasurer, and the fact that the statutory remedy would cause great inconvenience, and the institution of a multiplicity of suits, is not ground for the interposition of a court of equity.—*Picotte v. Watt*, 1153.

County Commissioners.

See "Counties," 8-11.

COURTS.

See, also, "Judge."

Territorial courts.

Rev. St. U. S. § 1914, provides that the times and places of holding the district courts

in Montana and Idaho shall be fixed by the supreme court judges assembled at their respective capitals. Section 1874 authorizes the supreme court judges of a territory to hold courts in their respective districts, in counties where the territorial laws may have established courts, for cases to which the United States is not a party. Act March 2, 1867, obliges the Idaho judges or a majority, assembled at the capital, to define the judicial districts, assign the judges to them, and fix the times and places for holding court in the several counties or subdivisions of each district. *Held*, that the Idaho judges had power to designate such place or places within a district as they might think proper and convenient for the disposal of United States causes. — *United States v. Kuntze*, 446; *Same v. Cozzens*, 452.

Credibility.

Of witnesses, see "Witness," 3, 4.

CREDITORS' BILL.

When maintainable.

A judgment creditor is without an adequate legal remedy when the title of defendant's property is clouded by a fraudulent assignment thereof, and by another judgment which, though fraudulent, is held a prior lien, and when such property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment.—*Martin v. Atchison*, 590.

CRIMINAL LAW.

See, also, "Bail;" "Indictment and Information."

Particular crimes, see "Burglary;" "Disorderly House;" "Homicide;" "Incest;" "Libel and Slander;" "Perjury;" "Robbery;" "Unlawful Cohabitation."

Principal and accessory.

1. By Rev. St. § 7697, all persons concerned in a felony, whether as principals or accessories before the fact, are treated as principals, yet an accessory before the fact, indicted as such, cannot complain.—*Territory v. Guthrie*, 398.

Preliminary hearing.

2. Const. art. 1, § 8, provides that no person shall be held to answer for any crime unless on presentment or indictment, "or on information of the public prosecutor after a commitment by a magistrate." Act March 13, 1891, § 8, requires "preliminary examination as provided by law" as a precedent to information. *Held*, that such preliminary examination must have strictly followed the provisions of Rev. St. § 7576, as to the taking and authen-

ticating of the depositions; otherwise no jurisdiction is acquired.—*State v. Braithwaite*, 857.

Continuance.

3. Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witness, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive, of its contents; and it is not error for the court, after such admission, to deny the continuance.—*Territory v. Guthrie*, 398.

Nonsuit.

4. On a criminal prosecution, error cannot be predicated on the overruling of defendant's motion for a nonsuit, on the ground of insufficient evidence, as such motion is unknown in criminal practice; the remedy in such case being to request an instruction directing the jury to acquit.—*People v. Barnes*, 148.

Arguments of counsel.

5. The district attorney having in his argument referred to the fact that defendant had failed to testify in his own behalf, though he had the right to, the court later at defendant's request charged the jury that this fact must be in no way considered against him. *Held*, that the error was cured.—*United States v. Kuntze*, 446; *Same v. Cozzens*, 452.

Instructions.

6. In criminal as well as in civil cases, instructions must be based on some evidence in the case.—*Territory v. Evans*, 391.

7. Under Criminal Practice Act, § 354, providing that the court, in charging the jury, may state the testimony and declare the law, error cannot be predicated on an instruction in a criminal prosecution that there was evidence tending to show that defendant fired a revolver, and inflicted upon deceased a wound, from which he died.—*People v. Bernard*, 178.

8. On a trial for embezzlement, the refusal is proper of defendant's requested instruction that the jury must acquit if they believe from the evidence that the circumstances point as strongly to some other person as being guilty.—*United States v. Camp*, 215.

9. Under Rev. St. Idaho, § 7877, providing that the court may advise the jury to acquit, and section 7855, subd. 6, providing that the court must not charge the jury in respect of matters of fact, the court properly refused to instruct the jury peremptorily to acquit.—*Territory v. Neilson*, 579.

10. Where, on a trial for assault with intent to murder, it does not appear that defendant requested the court to charge the jury that they might convict of the lesser offense, an assignment of error predicated on the court's neglect

to so charge will not be considered on appeal.—*People v. Biles*, 103.

— Reasonable doubt.

11. On a trial for murder, an instruction that "a reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but it is such a doubt as a reasonable and prudent man would be likely to act upon in determining important affairs of life," is unobjectionable.—*People v. Dewey*, 79.

12. On a trial for burglary, error cannot be predicated on the refusal of defendant's requested instruction that, "if the jury are in doubt upon any material fact sought to be proved by the prosecution, they should give the defendant the benefit of the doubt, and acquit," as such instruction would require the jury to acquit in case of "any" doubt.—*People v. Stapleton*, 49.

— Necessity of exceptions.

13. Where, on the trial of a criminal cause, no exceptions were taken to the instructions at the time they were made, an assignment of error that the trial court erred in giving certain of the instructions will not be considered.—*People v. Biles*, 103.

Verdict.

14. Where, on a trial for assault with intent to "murder," the jury render a verdict of guilty of assault with intent to "kill," error cannot be predicated on the action of the court in directing that the word "kill" in the verdict be changed to "murder," it appearing that the verdict, as amended, was read to the jury, and was assented to by them.—*People v. Biles*, 103.

Arrest of judgment.

15. Under Act Jan. 14, 1875, § 293, (Criminal Practice Act,) providing that any objection appearing on the face of an indictment can only be taken advantage of by demurrer, an objection to an indictment for burglary that it does not give the legal appellation of the offense attempted to be charged, and is not certain as to the offense attempted to be set forth, cannot be raised for the first time by motion in arrest of judgment.—*People v. Stapleton*, 49.

New trial.

16. The action of a district attorney, in a criminal prosecution, in demanding the arrest, for perjury, of a witness for the defense as he came off the stand, though improper, is not sufficient ground for the granting of a new trial.—*People v. Biles*, 103.

17. Where affidavits as to the alleged misconduct of a juror on a criminal prosecution are conflicting, the ruling of the court below denying a new trial will not be disturbed on appeal.—*People v. Biles*, 103.

Appeal—Review.

18. Where no part of the evidence in a criminal case is brought to the supreme court, by bill of exceptions or otherwise, and the indictment is sufficient to support the judgment, it will not be disturbed on appeal.—*People v. Woods*, 334; *Same v. Williams*, 335.

19. Presumptions are in favor of the decision of the court, and, where a reversal of a judgment is sought on the ground of error, the rulings of the court will be sustained, unless sufficient facts appear in the record to show that error was committed.—*Territory v. Evans*, 391.

20. In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and, if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment.—*Territory v. Evans*, 391.

21. By introducing testimony after an order overruling his motion for a peremptory instruction to acquit, defendant waives his right to assign such order as error.—*Territory v. Neilson*, 579.

— Weight of evidence.

22. Under Rev. Laws, p. 432, § 465, subd. 2, providing that an appeal to the supreme court from the district court shall be on questions of law alone, an objection that the evidence does not support the conviction in a criminal cause cannot be considered on an appeal from the judgment.—*People v. Pierson*, 71.

23. An objection, on appeal in a criminal cause, that the verdict is contrary to the evidence, will not be considered.—*United States v. Camp*, 215.

24. A conviction will not be disturbed on appeal though the evidence for the prosecution, as it appears in the record, is not sufficient to justify a conviction, when defendant introduced testimony which is not given in the record.—*Territory v. Neilson*, 579.

Remand for proper judgment.

25. Where a sentence is void for uncertainty, but no other error appears, the appellate court may remand the case to the court below, with direction to enter a proper judgment on the verdict.—*Territory v. Guthrie*, 398.

Crop Mortgages.

See "Chattel Mortgages," 2, 3.

Cross Bill.

See "Equity," 4.

Custom and Usage.

Miners' customs, see "Mines and Mining," 15, 16.

DAMAGES.

In action of claim and delivery, see "Claim and Delivery," 8.

In condemnation proceedings, see "Eminent Domain," 3, 4.

Stipulation as to, see "Practice in Civil Cases," 4-6.

Leakage of water.

Where, in an action to recover damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, it appeared that defendant knew of the defect in its ditch, and permitted the leakage to continue for over a year, error cannot be predicated on the court's refusal to permit defendant to show that, at small expense, plaintiff might have prevented the injury to her land.—*McCarty v. Boise City Canal Co.*, 225.

Death.

Of party, see "Abatement and Revival," 3, 4.

Decedents.

See "Executors and Administrators."

Decision.

On appeal, see "Appeal," 51-58.

Dedication.

Of highways, see "Highways."

Deed.

See "Boundaries;" "Fraudulent Conveyances." When a mortgage, see "Mortgages," 1, 2.

Demurrer.

See "Pleading," 1, 2.

DEPOSITION.

See, also, "Evidence;" "Witness."

Certification.

1. In determining the admissibility of a deposition taken under the provisions of Code

Civil Proc., the presumption is that the commissioner discharged his duty by doing all that the statute requires, except as to matters which he must return specifically as done.—*Darby v. Heagerty*, 260.

When admissible.

2. Depositions taken in the presence of the accused may be used on trial, when, on account of death or other good cause, the presence of the witness cannot be had.—*Territory v. Evans*, 627.

DETINUE.

Complaint.

Where, in an action of detinue, the complaint alleges the wrongful taking of the property, the detention, the demand, and damages for wrongfully withholding the same, an objection that it is not sufficient to support a judgment for plaintiff will not be sustained on appeal.—*Crews v. Baird*, 94.

Disincorporation.

Of town, see "Towns," 2, 3.

Dismissal.

Of appeal, see "Appeal," 52-56.

DISORDERLY HOUSE.

Evidence—Reputation.

To establish the fact that a house is kept for the purpose of prostitution, evidence of its general reputation as such is competent.—*Territory v. Bowen*, 607.

Dissolution.

Of corporation, see "Towns," 2, 3.

DISTRICT AND PROSECUTING ATTORNEYS.

Employment of assistant.

Under the criminal practice act, (section 354, par. 2,) providing that the district attorney or "other counsel" for the people must open the cause, and offer the evidence in support of an indictment, by implication counsel may be employed to assist the district attorney in the trial of criminal causes.—*People v. Biles*, 103.

Division.

Of counties, see "Counties," 1, 2.

EJECTMENT.

Pleading title—Certainty.

In ejectment a complaint claiming the property as community property of plaintiff's mother and her husband, K., (under whom defendant claimed,) alleging the coverture, and that the property is community, is not bad on general demurrer, as failing to exclude the statutory exception, by denying that it was obtained by "gift, bequest, devise, or descent." A special demurrer for uncertainty is needed.—*Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 863.

ELECTIONS AND VOTERS.

Location of county seat, see "Counties," 3, 4.
Qualification of electors, see "Constitutional Law," 2.

Qualification of voters.

1. Act Feb. 3, 1885, providing that no person practicing or promoting plural marriage, or belonging to any organization which encourages that crime, shall vote or hold office, and prescribing an "elector's oath" that he is not so disabled, is not invalid, either as an infringement on religious opinions, as an ex post facto law, or as depriving a person of life, liberty, or property without due process of law.—*Wooley v. Watkins*, 555.

2. The right of suffrage is not a natural right, nor an unqualified personal right, but in a territory is a right conferred by law, which may be abridged or withdrawn by the authority that conferred it, subject to constitutional limitations and restrictions.—*Innis v. Bolton*, 407; *Hayward v. Same*, 417.

3. The act of the legislative assembly of the territory of Idaho, passed at its thirteenth session, creating additional disqualifications for voting, and prescribing a test oath as a mode of ascertaining the qualifications of persons offering to vote, is not in violation of the constitution of the United States.—*Innis v. Bolton*, 407; *Hayward v. Same*, 417.

4. The act of congress of March 22, 1882, touching the qualifications of electors in the territories, does not repeal Rev. St. U. S. §§ 1851, 1860, which gives the territorial legislature power to prescribe the qualifications of voters of the territory.—*Wooley v. Watkins*, 555.

Registration—Elector's oath.

5. Although the general act omits him from the category of officers authorized to administer oaths, Rev. St. §§ 504, 505, confer on the registrar the power to administer the "election oath."—*Territory v. Anderson*, 537.

Canvass.

6. When an election is so irregular and fraudulent that the true result cannot be ascertained

from the returns of the poll, they should be rejected, and the true result shown by other evidence.—*Chamberlain v. Woodin*, 609.

EMBEZZLEMENT.

Evidence.

On a trial for embezzlement, evidence is competent of defendant's pecuniary condition immediately prior to and during the time the offense is alleged to have been committed.—*United States v. Camp*, 215.

EMINENT DOMAIN.

Public use.

1. Rev. St. § 933, providing for the laying out of private or by roads, for the convenience of one or more residents of any road-district, in the same manner as public roads are laid out, since thereunder the private road may be used by the general public for any purpose to which it is adapted, is valid as within Const. art. 1, § 14, declaring that the necessary use of land for rights of way, for canals, etc., "or any other use necessary to the complete development of the material resources of the state," is a public use.—*Latah County v. Peterson*, 1118.

Right to compensation.

2. A tract of unsurveyed land of the United States, of an agricultural character, was located and settled, and buildings were erected on it. Defendant, who was qualified to take proceedings to obtain title under the pre-emption laws, bought the right of possession and improvements, took possession, made improvements, and continuously resided thereon, located the section, and filed his declaration to hold it under the pre-emption laws, and intended to obtain title thereunder when the land should be surveyed. Provision for the condemnation of possessory claims for rights of way was made by act Cong. March 3, 1875, and Rev. St. Idaho, tit. 7. *Held*, that defendant's possessory claim could not be taken for a right of way by a railroad company having no right to the land, without compensation.—*Washington & I. R. Co. v. Osborne*, 527.

Measure of damages.

3. In proceedings for the condemnation of land for railroad purposes under the statutes of Idaho, the value of the land at the time it is taken is the measure of damages, and it is error to admit evidence of value at time of trial. Where, however, one witness stated the basis of his estimate of damages to be the value of land at the time of the trial, and several others stated that their estimate was based upon the value at the time of the taking, and the court repeatedly charged the jury that the value of the property at the time of the taking was the true basis, the refusal of the court to strike out the testimony

of such first witness *held* not to be reversible error.—*Spokane & P. Ry. Co. v. Lieuallen*, 1101.

4. It is error to estimate damages on what has been paid by the petitioning corporation to owners of adjacent property.—*Spokane & P. Ry. Co. v. Lieuallen*, 1101.

Equalization.

Of taxes, see "Taxation," 1, 2.

EQUITY.

See, also, "Creditors' Bill;" "Fraud;" "Fraudulent Conveyances;" "Injunction;" "Mortgages;" "Partnership;" "Quieting Title;" "Receivers;" "Reference;" "Specific Performance;" "Trusts."

Reformation of contract—Mistake.

1. In an action to reform a mining lease, by including in it certain ground alleged to have been omitted by mistake, error cannot be predicated on an instruction, on the ground that it does not state that the evidence must show the mistake beyond a reasonable doubt, that "if it is clearly established that the verbal understanding of the parties included the ground in dispute, and that the same was omitted from the writing by mutual mistake, a case is made out for a reformation of the written lease," where it appears that the court had already charged that such mistake must be shown beyond a reasonable doubt.—*Houser v. Austin*, 188.

2. In an action to reform a mining lease, by including in it certain ground alleged to have been omitted by mistake, it appeared that the lessors desired to limit the area of the lease; that the ground in dispute was suggested by A., one of lessees, as the limit; that a lease was written out, and handed to the lessees, who kept it for a week; that it was then altered in some minor details; and that A. was familiar with the premises. *Held* evidence insufficient to warrant a judgment of reformation.—*Houser v. Austin*, 188.

3. In an action to reform a mining lease by including certain ground alleged to have been omitted by mistake, an instruction that "if the jury find that the lessors told the lessees that the lease extended to the ground in dispute, and the lessees, so believing, went to work therein with the knowledge of the lessors, and the lessors received a royalty from the ore sold therefrom, then the lessors would be estopped from claiming that the lease did not include the land in dispute," is error, in that it fails to state that the party to be estopped must have had knowledge that his representations were false, and that the party claiming the benefit of the estoppel was ig-

norant of the truth, and honestly acted on the statement.—Houser v. Austin, 188.

Cross bill.

4. Where it appears, either from the pleadings or proof, that a complete determination of the rights of all the parties cannot be made without making other persons parties, it is the duty of the court to order such persons brought in, and it should permit the defendant to file a cross bill for that purpose.—First Nat. Bank v. Bews, 1175.

Practice—Submission of issues.

5. On the trial of a cause in equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.—Houser v. Austin, 188.

ERROR, WRIT OF.

See, also, "Appeal;" "New Trial."

Jurisdiction.

1. Where a mining company appeals to the county board of equalization from an assessment of taxes levied against it, and the board orders a reduction in the assessment, and from this order an appeal is taken by a taxpayer to the district court, resulting in a reversal of the action of the county board, a writ of error will lie at the instance of the mining company to review the action of the district court.—Van Camp v. Board of Com'rs of Custer County, 33.

2. It is not ground for the dismissal of a writ of error to an order of the district court reversing a reduction of taxes made by the board of equalization that there were no allegations in it pleading payment or tender of the taxes as fixed by the board of county commissioners.—Van Camp v. Board of Com'rs of Custer County, 33.

3. When a mining company appeals to a county board of equalization from an assessment of taxes, and the board reduces the assessment, and, on appeal by a taxpayer, the district court reverses its decision, the fact that the name of the mining company did not appear in the title of the original notice of appeal, or in the judgment of the district court, is not prejudicial to the company's right to a writ of error to the district court, under Code Civil Proc. § 711, providing that an affidavit, notice, or other paper with a defective title is as valid and effectual for any purpose as if duly entitled if it intelligibly refer to such action or proceeding.—Van Camp v. Board of Com'rs of Custer County, 33.

Estoppel.

Equitable, see "Equity," 3.

EVIDENCE.

See, also, "Deposition;" "Witness."

Admissions, see "Executors and Administrators," 2.

Competency, accidents to trains, see "Railroad Companies," 4-7.

In action for wrongful seizure of goods, see "Sheriffs and Constables," 3.

—on sheriff's bond, see "Sheriffs and Constables," 4, 5.

Of particular crimes, see "Disorderly House;" "Embezzlement;" "Robbery," 1; "Unlawful Cohabitation," 3.

Of partnership, see "Partnership."

Opinion evidence, see "Witness," 3.

Review on appeal, see "Appeal," 41-43.

Best and secondary.

1. A copy of the original entries in an account book is admissible in evidence, in an action on the account, where it appears that the book of original entries has become lost.—Mills v. Glennon, 95.

Admissions.

2. Offers of settlement of a suit, not accepted, are not admissible against the party making them on the trial of the action.—Sebree v. Smith, 329.

3. A receipt and relinquishment signed by defendants in an action, although made without the knowledge or consent of the attorneys of record, is competent testimony in favor of plaintiffs.—Pence v. Sweeney, 914.

Parol to vary writing.

4. Conversations or agreements had or made prior to the making of a written contract, tending to vary or dispute its provisions, are inadmissible.—Jacobs v. Shenon, 1002.

5. In an action on an acceptance for the construction under a written contract of an irrigating ditch, evidence of a conversation between the parties at the time of making the contract was properly excluded.—Bradbury v. Idaho & O. Land Imp. Co., 221.

6. In an action on a promissory note, it appeared that plaintiff wished defendant to manage a mine which he was about to purchase, and that defendant was unwilling to do so without an interest in it; that plaintiff paid for the mine, and had it conveyed to them jointly, and took defendant's note for half the purchase price. *Held*, that parol evidence of a contemporaneous agreement that defendant might examine the mine, and, if dissatisfied, convey his interest to plaintiff, and the note should be canceled, was inadmissible, as varying the terms of the note. Berry, J., dissenting.—Dulaney v. Burke, 686.

EXCEPTIONS, BILL OF.

See, also, "Appeal;" "Error, Writ of;" "New Trial."

What constitutes.

1. A bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a "statement."—*Schultz v. Keeler*, 305.

2. A bill of exceptions, settled and signed by the trial judge, will be treated as such, although it is called a statement on motion for a new trial.—*United States v. Alexander*, 354.

Time of settlement.

3. An agreement of the parties to an action on trial appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial.—*Sebree v. Smith*, 329.

4. Where the judge certifies that the case with assignments of error included was "examined, settled, and allowed in the presence of the attorneys of the respective parties," no objection to the time of said settlement can be made under Rev. St. § 4426, declaring that exceptions must be taken and settled at the time of the ruling, unless the parties agree otherwise; the attorney's presence is a tacit consent.—*Lockhart v. Rollins*, 503.

Contents.

5. An exception to the order sustaining a demurrer, which was not settled in a bill of exceptions, and brought to the supreme court, will not be considered.—*Berry v. Alturas County*, 274.

EXECUTION.

See, also, "Attachment;" "Garnishment."

Issuance of writ.

1. The officer who has seized goods under a writ of attachment is the officer to whom the execution on the judgment should issue.—*Pecotte v. Oliver*, 230.

2. The fact that an execution on a judgment in attachment, delivered to the constable, who held the property by virtue of the levy made by him, was directed "to the sheriff of the county," does not render the execution void, as such direction was an improper one, and amendable.—*Pecotte v. Oliver*, 230.

Sale.

3. An execution having been duly issued, placed in the hands of the sheriff, and by him levied on property during its life-time, the property so levied on may be sold after the date when said execution must have been returned had such levy not been made.—*Ollis v. Kirkpatrick*, 976.

4. When real property consists of several known lots or parcels, they must be sold separately or offered for sale in parcels; and if no bids are received, and the lots or parcels are

adjacent, they may then be sold in a lump.—*Ollis v. Kirkpatrick*, 976.

5. Notice of sale of real estate levied upon under execution may, under our statute, be given by posting written or printed notices, or by publication in a newspaper published in the county, and the sale may be postponed by announcing the fact at the time advertised, and giving notice by writing same on original notice, or putting notice thereof under the original.—*Ollis v. Kirkpatrick*, 976.

EXECUTORS AND ADMINISTRATORS.

Presentation of claim, see "Abatement and Revival," 3.

Actions on claims.

1. An action against the administrator of an estate to declare a vendor's lien on certain property sold by plaintiff to the intestate is not a "claim" that must be presented to the administrator for rejection or allowance before action is brought, within the meaning of Probate Practice Act, § 138, requiring such presentation.—*Toulouse v. Burkett*, 170.

2. The admissions of an administrator, made in the allowance of a claim, although the claim is only allowed in part, bind the estate.—*Meinert v. Snow*, 851.

EXEMPTIONS.

See, also, "Homestead."

Wages.

When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under control of the debtor, although temporarily in the hands of another.—*Elliot v. Hall*, 1142.

FACTORS AND BROKERS.**Commissions on sales.**

1. Where a person employs another to sell a mine, agreeing to pay such agent as commission any amount received over a certain price, and the agent negotiates a sale in accordance with the agreement, the fact that the agent received a commission from the purchaser at such sale will not affect its validity. *Buck, J.*, dissenting.—*Synnott v. Shaughnessy*, 111.

2. A broker claiming commissions upon an agreement which provides that the party of the first part offers to sell certain mining property at a fixed price, and to pay the parties of the second part a certain sum for services ren-

dered in selling or placing said property upon terms acceptable to the party of the first part, must allege that the party of the second part did render services which resulted in the sale thereof, or that he produced a party ready, willing, and able to purchase said property upon the terms named.—*Jacobs v. Shenon*, 1002.

3. Plaintiff was employed by the defendants to find a purchaser for a certain piece of property, at a named sum. The plaintiff had some conversations with one P. with regard to the purchase of the property, and introduced him to the defendants. Plaintiff also advertised the property for sale. The defendants afterwards notified plaintiff that he was not to act for them any longer in procuring a purchaser for the property, as they did not desire to sell it; but about a month after such notice they sold the property to P. for a less sum than that named in their agreement with plaintiff. *Held*, in an action by plaintiff for his commission, that the refusal of a nonsuit was proper.—*Smith v. Anderson*, 495.

Fees.

Of sheriff's, see "Sheriffs and Constables," 1, 2.

Findings.

See "Trial," 12-16.

In action of claim and delivery, see "Claim and Delivery," 4.

Foreclosure.

Of chattel mortgage, see "Chattel Mortgages," 5.

Of mortgage, see "Mortgages," 3-6.

FRAUD.

See, also, "Fraudulent Conveyances."

As ground for attack on records, see "Records."

Findings.

In an action of fraud, findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof.—*Tage v. Alberts*, 249.

FRAUDULENT CONVEYANCES.

Change of possession.

1. G., being largely indebted, sold a stock of merchandise to plaintiff, who was one of his principal creditors, and who held a chattel mortgage upon the stock as security. The sale was made at the residence of plaintiff, 25 miles from the place where the merchandise was. No invoice was taken, and there was no inspec-

tion or examination of the stock, and no change in the clerical force, nor in the conduct or management of the business. G. continued to conduct the business as before, except that he added the abbreviation "Mgr." when signing letters, checks, etc., and used letter-heads containing plaintiff's name. *Held*, that the sale was void as to G.'s creditors, under Rev. St. § 3021, making all sales of personal property in the possession of the vendor, except things in action unaccompanied by immediate delivery, and followed by an actual and continued change of possession, void as to subsequent purchasers, creditors, etc.—*Harkness v. Smith*, 952.

2. Where a sale of a stock of goods by a debtor, without delivery or change of possession, is void under the statute as against subsequent purchasers, creditors, etc., the fact that a subsequent attaching creditor knew of the sale, and continued to deal with the debtor as "manager," is immaterial.—*Harkness v. Smith*, 952.

GARNISHMENT.

Property subject to.

1. Notes transferred by defendant in attachment in fraud of creditors may be reached by the creditors by process of garnishment, though the defendant could not recover them himself.—*Van Ness v. McLeod*, 1147.

Practice.

2. Under Rev. St. § 4309, which makes the garnishee liable to the attachment creditor for the amount of the indebtedness due from the garnishee to the attachment debtor, if the garnishee is sued by his creditor (defendant in attachment) he can procure a suspension of proceedings in such action, until his liability to the attaching creditor shall be determined.—*Van Ness v. McLeod*, 1147.

3. On examination of a garnishee under Rev. St. § 4310, where the garnishee denies the debt, the court cannot enter judgment against him, but rather must proceed under section 4510 to authorize plaintiff to sue the garnishee, and restrain the latter from transferring defendant's property meanwhile.—*Lin-denthal v. Burke*, 535.

GRAND JURY.

Proceedings—Presence of challenged juror.

1. In case a challenge to an individual grand juror is allowed, he should not be present during the consideration of the charge as to which he is challenged.—*Territory v. Staples*, 778.

2. The last clause of section 7640, Rev. St. Idaho, which reads, "and no other person must be permitted to be present during the expressions of their opinion or giving their votes upon any matter before them," means no person except members of the grand jury, and does not refer to

any member of the panel.—Territory v. Staples, 778.

3. Where a challenge to a grand juror is allowed, but he remains present during the consideration of the charge, in violation of Rev. St. § 7640, he is liable to punishment for contempt; but the indictment should not be set aside for that cause.—Territory v. Staples, 778.

Grant.

To railroad company, see "Public Lands," 3, 4.

HIGHWAYS.

Dedication.

Where the owner of land platted a town-site and left 100 feet running through the central part of said town, and designated it on the plat as "West Main Street," and he and his grantee permitted the public to use it as a street for 10 years, he and his grantee are estopped to deny that the street was dedicated.—Smith v. Montgomery, 1187.

HOMESTEAD.

Entry of public lands, see "Public Lands," 2.

Selection.

1. Under the homestead laws (page 627, Rev. Laws, Ed. 1874-75) the widow may select a homestead after the death of her husband, under section 1 of said act, and have the same set apart by the probate court for the benefit of herself and children, under section 4 of said act. The widow is the head of a family, in contemplation of the first section of said act, and the benefits of the act are secured to her, as a wife surviving her husband, by section 4 of said act.—Coughanour v. Hoffman's Estate, 267.

2. Rev. St. § 3070, declares that, in order to select a homestead, a declaration of homestead shall be filed for record, containing certain matter. Section 3073 provides that after the filing of the declaration the premises therein described shall constitute a homestead. Section 3038 declares that the homestead shall be exempt from execution and forced sale, except for certain debts, and in an action in which an attachment was levied before the filing of the declaration of homestead. Section 3041 declares that a homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof acknowledged by the husband and wife. *Held*, that the mere purchase of land with the proceeds of the sale of an old homestead, sold with the intention of reinvesting such proceeds in a new homestead, does not make such land a homestead,

unless a declaration of homestead is filed; and the new homestead is not exempt from sale under an attachment prior to the filing of the declaration.—Wright v. Westheimer, 961.

3. Under Act 1881, permitting either husband or wife to select a homestead to be exempt from forced sale, the selection to be in writing and filed with the recorder, a judgment lien acquired before the filing of the declaration of homestead subjects the property to execution.—Smith v. Richards, 464.

HOMICIDE.

Murder.

1. It appeared that B., one of the three defendants, quarreled with deceased in a saloon; that, after talking with the other two, B. went out to his rooms; that, when deceased started soon after to leave the saloon, the other two detained him in conversation on the sidewalk; that B. then returned, and, springing on him, cut his throat. B. escaped. The other two defendants denied the conversation with deceased and with B. *Held* sufficient evidence for a verdict of murder in the second degree.—State v. O'Brien, 1094.

2. On a trial for murder, error cannot be predicated on an instruction that the jury should find defendant guilty if they believed from the evidence that defendant was actuated by a desire to kill deceased in revenge for some real or imagined injury deceased inflicted upon defendant's wife.—People v. Pierson, 71.

Assault with intent to kill.

3. On a trial for assault with intent to murder, it appeared that defendant, meeting U., the assaulted party, in a saloon, provoked a quarrel by calling U. vulgar names; that the parties left the saloon quarreling; that defendant went into a shop, and procured a revolver; that they then went together to U.'s shop, where defendant again abused U.; and that U. tried to push defendant out of the shop, when defendant drew the revolver, and fired three shots. *Held* evidence sufficient to warrant the jury in finding premeditation and malice.—People v. Biles, 103.

Justifiable homicide.

4. Where, on a trial for murder, defendant seeks to justify the homicide on the ground that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be defendant's wife, and that she kept a house of prostitution, is admissible to show that deceased was on defendant's premises for purposes other than felonious.—People v. Pierson, 71.

5. On a trial for murder, error cannot be predicated on an instruction that, to justify the homicide, "there must be danger of personal

injury, or the fear of personal injury, to that extent that the only means to avoid the loss of life or great personal injury is to kill the assailant."—*People v. Bernard*, 178.

Indictment.

6. Under the statute defining murder in the first degree to be any kind of "willful, deliberate, and premeditated killing," a conviction of murder in the first degree is not warranted under an indictment alleging a killing with "malice aforethought."—*People v. O'Callaghan*, 143.

Evidence—Dying declarations.

7. Declarations of deceased, made from half to three-quarters of an hour after an affray in which he was fatally shot, and after he had been carried from the scene of the affray to his home, are inadmissible as part of the *res gestae*.—*People v. Dewey*, 79.

8. On a trial for murder, declarations of defendant, made to a sheriff shortly prior to the homicide, seeking protection for an alleged assault upon his wife by deceased, are not admissible, as part of the *res gestae*. *Buck, J.*, dissenting.—*People v. Pierson*, 71.

Instructions.

9. Where, on a trial for murder, the entire evidence is that of eyewitnesses to the homicide, error cannot be predicated on the refusal of defendant's requested instruction that, "if the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances by themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive for committing the offense charged," as such instruction is not pertinent to the evidence in the case.—*People v. Ah Too*, 47.

10. An instruction to the jury upon which defendant is convicted of murder in the second degree, though objectionable as defining murder in the first degree, is sufficient to sustain the verdict as found.—*Territory v. Evans*, 391.

11. Under Act Jan. 14, 1875, c. 4, § 17, (Crimes and Punishments Act,) providing that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," a charge in a prosecution for murder that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart" is unobjectionable.—*People v. McDonald*, 14.

12. Nor, in such case, can error be predicated on the omission of the word "all" from the instruction; "all" being used in the statute by way of emphasis only.—*People v. McDonald*, 14.

13. Under Act Jan. 14, 1875, § 17, (Crimes and Punishments Act,) providing that all mur-

der which shall be committed in the perpetration of or attempt to perpetrate robbery shall be deemed murder in the first degree, error cannot be predicated in a charge in a prosecution for murder that "if the jury believe from the evidence, beyond a reasonable doubt, that the killing was perpetrated while the defendant, either by himself or any other person, was attempting to commit a robbery, then they may find the defendant guilty of murder in the first degree."—*People v. Mooney*, 24.

Verdict.

14. Where an indictment for murder in the first degree is defective, in that it does not allege that the killing was deliberate and premeditated, as required by the statute, and the verdict is guilty in the first degree, such indictment being sufficient to charge the second degree, on appeal the verdict will be deemed a verdict of guilty in the second degree, and the judgment of the court below will be modified accordingly.—*People v. O'Callaghan*, 143.

HUSBAND AND WIFE.

As witnesses for or against each other, see "Witness," 2.

Community property, pleading, see "Ejectment."

Community property.

The fact that a wife never actually lived in the territory did not deprive her of her community rights in property acquired by her husband in the territory during coverture.—*Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 863.

INCEST.

Common consent.

1. The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto.—*People v. Barnes*, 148.

Instructions.

2. Under Rev. Laws 1875, c. 10, § 129, providing a penalty for persons who, being within the degrees of consanguinity within which marriages are declared to be incestuous and void, shall commit fornication with each other, error cannot be predicated on an instruction, given in the prosecution of an indictment drawn under this section, that persons violating it are guilty of incest.—*People v. Barnes*, 148.

Incorporation.

Of towns, see "Towns," 1.

INDEMNITY.

Scope of contract.

A sheriff levied an attachment in favor of W. on property already in his possession under a former attachment, and took a bond from W. to indemnify him for acts done under the second attachment. He then sold the property under the first attachment, and paid all the proceeds to the first attaching creditor. Afterwards a third person recovered judgment against him for the value of the property sold. *Held*, that the sheriff cannot recover on the indemnifying bond of W., as he did no act by which he was damaged under the second attachment.—*Fury v. White*, 639.

INDICTMENT AND INFORMATION.

See, also, "Burglary;" "Homicide," 6; "Libel and Slander;" "Perjury;" "Unlawful Co-habitation," 2.

Description of offense.

1. In determining the offense charged in an indictment, all parts of the instrument will be considered together, and if, from the whole, it appears that a crime is sufficiently alleged, it will be sustained.—*Territory v. Evans*, 391.

2. Under our practice, the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. *Held*, that the indictment charging one defendant as principal, and the other as accessory before the fact, charges but one offense.—*Territory v. Guthrie*, 398.

Information.

See "Indictment and Information."

INJUNCTION.

Review of order granting, see "Appeal," 36.

To restrain collection of illegal tax, see "Taxation," 4.

—illegal issue of warrants, see "Counties," 12.

—nuisance, see "Nuisance," 1.

Wrongs prevented.

1. An interlocutory injunction will not be granted unless plaintiff shows some clear legal or equitable right, and an apprehension of immediate injury thereto.—*McGinnis v. Friedman*, 361.

2. Courts of equity will not interfere by injunction to prevent the pasturing of sheep on public lands, where petitioner has no property rights to be invaded.—*McGinnis v. Friedman*, 361.

3. Rev. St. Idaho, § 4288, provides that an injunction may be granted (1) when the complaint shows that plaintiff is entitled to the relief demanded, which consists in restraining the commission or continuance of the act complained of; (2) when the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to the plaintiff; and (3) when the defendant is doing some act in violation of the plaintiff's rights, having a tendency to render the judgment ineffectual. *Held*, that injunction would lie to restrain continuance of the unlawful removal of ore from plaintiff's mine, whether or not the injury, if consummated, would be irreparable.—*Gilpin v. Sierra Nevada Consol. Min. Co.*, 662.

Adequate remedy at law.

4. Citizens who are residents, electors, and tax payers of a county may sue to enjoin the removal of the county records from a place alleged to be the county seat to a place claiming to be legally selected as the county seat of the county, and to test the legality of such selection, when there is no speedy and adequate remedy at law.—*Doan v. Board of Com'rs of Logan County*, 781.

5. Where, in an action to enjoin a railroad company from entering upon plaintiff's right of way, and from further constructing its railroad thereon, and from interfering with plaintiff's occupancy thereof, and praying that the title thereto be decreed to be in plaintiff as against defendant, it appears that defendant has completed its road over the property in dispute, and is in the actual use and possession thereof, the court should not pass upon the title, but should leave plaintiff to his remedy at law. *Berry, J., dissenting.*—*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.*, 544.

Insanity.

Of maker of note, defense by surety, see "Principal and Surety," 1.

Insolvency.

See "Assignment for Benefit of Creditors;" "Creditors' Bill;" "Fraudulent Conveyances."

Instructions.

See "Trial," 2-6.

In criminal cases, see "Criminal Law," 6-13.

Interest.

See "Usury."

Interstate Commerce.

See "Constitutional Law," 3.

Intervention.

See "Parties."

INTOXICATING LIQUORS.

Licenses.

Const. art. 7, §§ 2, 5, requiring equality and uniformity of taxation upon the same class of subjects, is not applicable to the license tax imposed by section 4 of the act of February 6, 1891, entitled "An act to regulate the sale of intoxicating liquors." Said act is a police regulation, and a graduation of the price of licenses by a reasonable standard is permissible. —*State v. Doherty*, 1105.

IRRIGATION.

Appropriation of whole stream.

1. Act Cong. July 26, 1866, § 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Act Cong. July 9, 1870, § 17, provided that "all patents granted * * * shall be subject to any vested and accrued water-rights." In Idaho, the superior rights of prior appropriators were acknowledged by statute and decisions of courts. *Held*, that a prior appropriator of the water of a stream, all of which he claimed, had used, and needed for irrigation, was entitled to the whole as against a patentee of land through which the stream flowed, though no custom to that effect was shown. *Berry, J., dissenting.* — *Drake v. Earhart*, 716.

2. Under Rev. St. § 3159, providing that as between appropriators for irrigation the one first in time is first in right, one who by himself and his grantors has appropriated first all the waters of a creek, and has continually used the same for the purpose of irrigating the lands owned by him along said creek, is entitled to all of said waters, to the extent of the capacity of his ditches necessary to the proper irrigation of his said lands, as against subsequent locators. — *Hillman v. Hardwick*, 983.

3. Prior appropriation of all the waters of a stream, applied to irrigating purposes, gives the better right to the tributaries, and all the direct and immediate sources of supply of the stream; and, when this right once vests, it must be protected and upheld. — *Malad Val. Irrigating Co. v. Campbell*, 378.

4. Rights cannot be acquired to the waters of springs situated along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against

prior appropriations in good faith of the whole of the waters of the stream. — *Malad Val. Irrigating Co. v. Campbell*, 378.

Priorities—Amount appropriated.

5. In an action to determine the right of the parties to the waters of a creek the court must determine the date and amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by Rev. St. 1887, § 3159, providing that, "as between appropriators, the one first in time is the first in right." — *Geertson v. Bar-rack*, 1066; *Kirk v. Bartholomew*, 1087.

6. In determining the amount of water appropriated for useful or beneficial purposes, the number of acres of land claimed or owned by each party, and the amount of water necessary to the proper irrigation of the same, should be taken into consideration. — *Kirk v. Bartholomew*, 1087.

7. Sale by plaintiffs of a part of the water claimed by prior appropriation does not show that they attempted to appropriate more than they needed, where it appears that all the water of the streams was not sufficient to irrigate their land. — *Drake v. Earhart*, 716.

8. Where plaintiffs claim 600 inches of water in a stream by prior appropriation, and it appears that there were but 150 inches therein, failure to find under what pressure the water is measured is not prejudicial to defendant, who claims as riparian owner. — *Drake v. Earhart*, 716.

JUDGE.

See, also, "Courts."

Election and tenure.

1. Plaintiff was duly elected judge of the probate court of Logan county at the regular election held in 1890, but the legislature on March 3, 1891, and after he had taken office under his said election, passed an act changing Logan county to Lincoln county. Plaintiff was appointed by the governor, under the provisions of this act, probate judge of Lincoln county, and defendant, who was at the time clerk of the probate court of Logan county under plaintiff, was appointed, by the commissioners of Logan county, probate judge of Logan county; said board refusing to recognize the act of March 3, 1891, as law. The supreme court of the state declared the act of March 3, 1891, unconstitutional. Thereupon plaintiff demanded possession of said office of probate judge of Logan county, which defendant refused to deliver. *Held*, in an action to recover possession of the office, that plaintiff was entitled thereto. — *Hampton v. Dilley*, 1157.

Powers at chambers.

2. A district judge in Idaho has no jurisdiction to hear a proceeding for the condemnation of lands, or to enter judgment or decree therein,

under the statute, at chambers.—*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.*, 991.

Salary.

3. As Act Feb. 20, 1879, (10th Sess. Laws, p. 61,) regulating the salary of the probate judge of Boise county, was repealed by Act Feb. 10, 1887, the probate judge of such county is not entitled to salary under the provisions of the former act for the quarter ending July 10, 1887.—*Hart v. Boise County*, 345.

JUDGMENT.

See, also, "Execution."

Arrest of judgment, see "Criminal Law," 15.

For recovery of personal property, see "Claim and Delivery," 7.

On pleadings, see "Pleading," 8.

Default—Torts.

1. In an action for the wrongful sale of personal property, and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment as upon default, but the plaintiff in such case should go into court, and prove his damages.—*Parke v. Wardner*, 263.

Entry.

2. A judgment which recites that defendant was duly summoned and failed to answer, that evidence was heard, cause submitted, and the court, being sufficiently advised, doth adjudge the plaintiff recover of the defendant the sum of \$82.63, with interest and costs, dated and signed by the justice, is a valid judgment.—*Ollis v. Kirkpatrick*, 976.

3. Under Civil Code, § 603, providing that, when trial is by the court, judgment must be entered at the close of the trial, the action of the probate court in such case, in entering a formal judgment for plaintiff *nunc pro tunc* after an appeal had been taken to the district court, was void.—*Gray v. Cederholm*, 41.

4. Where, in an action on a judgment, the record on appeal shows that the cause was heard and evidence taken in open court, and that, by agreement of parties, it was taken under advisement, to be decided in vacation, an objection that the judgment rendered was void because entered in vacation is untenable, as by Civil Practice Act, § 29, final judgment may be entered in term time or vacation.—*Schenk v. Birdseye*, 130.

5. Where, in an action to charge several defendants as partners, the answer denies the partnership and the several liability of the persons sought to be charged, error cannot be predicated on the action of the court in setting aside the judgment as to one of the parties defendant, as by Code Civil Proc. § 352, the court may, in its discretion, render judgment against

one or more of several defendants.—*Gaffney v. Hoyt*, 184.

Res judicata.

6. The decision by the appellate court upon any matter properly before it on the record becomes the law of the case in all subsequent proceedings therein.—*Palmer v. Utah & N. Ry. Co.*, 350.

Revivor.

7. W., having made entry and final proof on lands under the desert land laws, mortgaged them. Default having been made, the mortgage was foreclosed, and at the sale the assignee of the mortgage bought the lands. Before the sale, one R. had instituted proceedings in the proper land office to contest W.'s entry, which was finally canceled by the commissioner of the general land office. *Held*, that plaintiff could file his petition to revive the judgment entered on foreclosure under Rev. St. § 4498, providing that, if the purchaser at sheriff's sale fail to recover possession because the property sold was not subject to execution and sale, the court must, after notice and on motion, revive the original judgment.—*Cantwell v. McPherson*, 1044.

Action on judgment—Pleading.

8. The complaint in an action on a judgment alleged that the judgment was joint as to all defendants, and several as to defendant B.; that B. had been personally served with summons in Brooklyn, N. Y.; that he appeared by counsel; that judgment was duly rendered against him; that the city court of Brooklyn was a court of record; and that, under the constitution and laws of New York, it had jurisdiction of the subject-matter of the action. *Held* facts sufficient to constitute a cause of action against B.—*Schenk v. Birdseye*, 130.

Judicial Sales.

See "Execution," 3-5.

Jurisdiction.

Objections to, see "Abatement and Revival," 1.
On appeal, see "Appeal," 1-12.

JURY.

See, also, "Grand Jury."

Right to jury trial, see "Quo Warranto."

Submission of issues in equity, see "Equity," 5.

—of issues to, see "Claim and Delivery," 3.

Qualification of juror.

1. A juror must have all the qualifications now prescribed for an elector, and a member

of the so-called "Mormon Church" cannot be a juror.—*Territory v. Evans*, 627.

2. The court will not disturb the finding of a trial judge upon the question of implied bias, unless it is so clear a case as would warrant a judge in setting aside the verdict of the jury as against the evidence.—*United States v. Langford*, 519.

3. Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where, on examination for cause, a juror states, in substance, that he has an opinion in favor of the defendant, but in spite of that opinion he could act upon the evidence and law of the case, and the juror was rejected, this court will not interfere with the discretion of the trial court, even though the members of this court should believe, from the record, that the juror so excluded was competent.—*United States v. Alexander*, 354.

Summoning.

4. In the absence of any territorial law for selecting and returning jurors, in a case arising under the federal laws, it is proper for a territorial district court to issue the venire to the United States marshal, directing him to summon jurors from the body of the district at large.—*United States v. Kuntze*, 446; *Same v. Cozzens*, 452.

5. The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury, under § 322, *Crim. Prac. Act.*—*People v. Armstrong*, 275.

Challenges.

6. The statute providing that each party to an action shall have four peremptory challenges does not, where there are several parties on either side, give each individual four peremptory challenges, but requires them to join, and have one set on either side.—*United States v. Alexander*, 354.

7. Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, but he was allowed to serve, *held*, that a substantial right of the party was denied, for which a new trial will be granted.—*United States v. Alexander*, 354.

8. Where a juror who is incompetent under the statute swears falsely upon examination on his *voir dire*, and thereby compels the plaintiff to exhaust one of his peremptory challenges to exclude him, and, before the jury is completed, plaintiff discovers that said juror was incompetent, and offers to make proof thereof, he should be permitted to do so; and, upon satisfactory proof being made, his peremptory challenge should be restored to him.—*Burke v. McDonald*, 1022.

9. Under *Crim. Prac. Act*, § 333, providing that a challenge to an individual juror must be taken when the juror appears, and before he is sworn, error cannot be predicated on the ac-

tion of the trial court, in a criminal cause, in compelling defendant to exercise his peremptory challenges as the jurors were severally called, and before the whole number of 12 jurors were drawn.—*People v. Kuok Wah Choi*, 85.

— Exceptions to rulings.

10. No exception is by statute allowed to an order overruling a challenge to a juror for general cause, hence such order is no error.—*Territory v. Evans*, 627.

11. An exception to the challenge to the panel in a criminal case admits the facts stated therein.—*People v. Armstrong*, 275.

Justices of the Peace.

Appeals from justice's court, see "Appeal," 30, 31.

Notice on appeal, see "Appeal," 16.

Laches.

As a bar to specific performance, see "Specific Performance."

LANDLORD AND TENANT.

Mining lease, see "Mines and Mining," 32-34.

Goods left on premises.

In an action to enjoin defendant from interfering with the removal from his premises of certain wood, the property of plaintiffs, it appeared that L., with defendant's consent, had placed the wood in question upon defendant's land; that subsequently L. leased the land from defendant, covenanting not to sublet any part of it without defendant's consent; that, soon after the execution of the lease, L. sold the wood to plaintiffs, by the terms of the sale giving them until the expiration of the lease to remove the wood; and that plaintiffs knew of the terms of L.'s lease. *Held*, that the overruling of a demurrer to the complaint was error.—*Broderick, J.*, dissenting.—*Aveline v. Ridenbaugh*, 154.

Land Office.

See "Public Lands," 56.

Leases.

Of mine, see "Mines and Mining," 32-34.

Of railroad, see "Railroad Companies," 1.

Legislature.

Of territory, powers, see "Territories."

LIBEL AND SLANDER.

Information.

An information for libel charging that defendant did print and publish defamatory matters concerning M., "that is to say," followed by the obnoxious article; is not bad on demurrer, as not professing to set forth the exact words of the libel, since it falls within the scope of Rev. St. § 7687, declaring that no indictment is insufficient for defect in form not tending to prejudice defendant's substantial rights on the merits, and of other like statutes. —Bonney v. State, 1015.

License.

Liquor licenses, see "Intoxicating Liquors."

LIMITATION OF ACTIONS.

Running of the statute.

Laws 8th Sess. p. 587, § 2, provides that, in cases where the cause of action has already accrued at the passage of this act, a party shall have the whole period prescribed by the act, after its passage, in which to commence action. Laws 8th Sess. p. 869, § 1, provides that the statute of limitations shall take effect at a day subsequent to the date of its actual passage and approval by the governor. *Held*, that the period of limitation did not begin to run until the statute took effect.—Schneider v. Hussey, 12.

Location.

Of mining claim, see "Mines and Mining," 2-10.

MANDAMUS.

To compel payment of sheriff's fees, see "Sheriffs and Constables," 1.

—of stenographer's salary, see "Stenographers."

To territorial officers.

1. Rev. St. § 124, provides that the clerk, at the close of each session of the legislature, must arrange all bills and papers, and deliver them to the secretary of the territory, who must certify to their reception. Section 190 charges the secretary of the territory with the custody of journals of the legislature. Section 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the legislature. *Held*, that mandamus would not lie, on application of the speaker of the house to the secretary to produce a document delivered to him by the clerk and purporting to be the journal signed by the speaker pro tem., in order that petitioner might make corrections therein,

and to receive the corrected journal as the journal of the house. Berry, J., dissenting.—Burkhart v. Reed, 470.

2. Rev. St. § 124, provides that the secretary of the territory must certify to the reception of all bills and papers belonging to both houses of the legislature delivered to him by the respective clerks. Section 1844 of the organic act provides that he "shall record and preserve all the laws and proceedings of the legislative assembly." *Held*, that *mandamus* would not lie, on the application of the president of the council of a session of the legislature, to compel the secretary of the territory to record a report of such president as part of the proceedings of the session, or to expunge from the records of such proceedings part of a former report made by the clerk. BERRY, J., dissenting—Clough v. Curtis, 488.

MASTER AND SERVANT.

Action for services—Evidence.

1. A telegram from P. to M., whom P. had employed to look after his interests in a mine, in these words: "I will leave in about a week, direct for the mine," addressed to M. at the mine—*held* admissible in an action by M. against the administrator of P. for value of services, to prove that the relation of employer and employe existed at the date of telegram. —Meinert v. Snow, 851.

Negligence of master.

2. As between master and servant derailment of a train does not raise the presumption of negligence.—Minty v. Union Pac. Ry. Co., 437.

3. In an action by a railroad servant against his company for injuries caused by a derailment charged in the pleadings to defects in the track, the court charged, while the "burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of defendant, and that the cause of that injury was probably the negligence of the defendant, and that whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was; and, if the defendant does not choose to give the explanation, the jury will be authorized to find that the real cause of injury was the negligence of the defendant in the particular case specified in the complaint. *Held* error.—Minty v. Union Pac. Ry. Co., 437.

Negligence of fellow servants.

4. S. was a miner engaged in under-ground work. G. was a blacksmith engaged in same mine, in sharpening tools for use of miners, and whose duty it was to deliver such tools, after being sharpened, to miners at work in mine. *Held*, that S. and G. were fellow-servants; and

that for carelessness in delivering such tools to miners by G., whereby S. was injured, defendant was not liable, defendant not being shown to be in fault.—*Snyder v. Viola Mining & Smelting Co.*, 771.

5. A railroad corporation is liable for damages to a carpenter, an employe of the road, and riding on one of its trains, injured through the negligence of a station agent, who failed to report to the conductor a break in the track, the parties not being fellow servants.—*Palmer v. Utah & N. Ry. Co.*, 290.

Assumption of risk.

6. The traveling auditor of a railroad company, whose duties are to travel on the company's cars from station to station on its roads and audit accounts, is a servant of the company and assumes the ordinary risks incident to the employment.—*Minty v. Union Pac. Ry. Co.*, 437.

7. Where a locomotive fireman was killed by his engine going at 25 miles an hour, driving into a snowdrift, the place being on his regular run, and the train having been sent with two engines for the express purpose of "bucking snow" after a severe storm,—an extrahazardous employment,—it was error not to submit to the jury the question whether he did not know of the risk and assume it.—*Drake v. Union Pac. Ry. Co.*, 453.

Contributory negligence.

8. Where the evidence shows that the defendant had furnished safe and convenient machinery and appliances for the performance of the required labor, and either the plaintiff or his fellow-servant, or both, for their own convenience, had seen fit to use other means or appliances than those furnished by defendant, and injury results therefrom, the defendant is not liable, and in such case plaintiff is guilty of contributory negligence.—*Snyder v. Viola Mining & Smelting Co.*, 771.

MECHANICS' LIENS.

Notice of claim.

1. Under Rev. St. § 5130, which provides that a lien notice shall contain "the name of the owner," a description of the parties at the head of the notice as follows: "W. and M., Subcontractors, versus B., Contractor, and M., Owner,"—is not such a direct allegation of the owner's name as the statute contemplates.—*White v. Mullins*, 1164.

Decree for foreclosure.

2. Under Code, §§ 815, 827, providing that a mechanic's lien shall only extend to work, labor, materials, and moneys paid for recording and filing the lien, a decree for the foreclosure of a lien on an irrigating ditch cannot include as damages the cost of protesting an acceptance for the construction of the ditch.—*Bradbury v. Idaho & O. Land Imp. Co.*, 221.

MILITIA.

Salary of adjutant general.

Act March 14, 1891, § 3, provides that the adjutant general's salary shall be paid out of the "military fund." Section 32 appropriates for 1891 \$2,100 "out of the general fund" for defraying current expenses of the national guard, and arming and equipping companies as they are organized. *Held*, that this fund was not the "military fund," and the adjutant general could not be paid out of it, his salary not being a "current expense" of the national guard.—*Curtis v. Moody*, 860.

MINES AND MINING.

Unlawful removal of ore, see "Injunction," 3.

What constitutes vein.

1. Though, to constitute a vein, it is not required that well-defined walls be developed or paying ore found within them, there must be rock, clay, or earth so colored or decomposed by the mineral element as to mark and distinguish it from the inclosing country.—*Burke v. McDonald*, 646.

Location of claim.

2. Under the act of congress of May 10, 1872, only citizens of the United States, and persons who have declared their intentions to become such, can acquire any right of possession, by location or otherwise, of mineral lands on the public domain.—*Bohanon v. Howe*, 417.

3. The mere fact that in marking the boundaries of their location defendants' grantors set their stakes more than 1,500 feet in length and 600 in width does not invalidate the location, except as to the excess, where such excessive measurements were made by mistake and without fraud, and were duly corrected before the rights of third parties attached.—*Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 421.

4. The court properly charged the jury that at the time of a mining location "the measurement must be from the point of discovery,—the middle of the point of discovery,—unless there is evidence before you that the vein had been actually established and run; but, if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery."—*Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 421.

5. Easterly of the discovery point the M. claim was marked 150 feet longer than the calls of the notice, and was wider than allowed by law, but the westerly 1,000 feet was marked substantially correct in size. *Held*, that where the ground was of such character that accuracy of measurement was very difficult, and the L.

claim was discovered and located mostly on the westerly end of the M., where the latter was correctly marked, the locators of the L. could not be deemed to have been misled by the inaccurate marking of the M., and that the M. was not void for inaccuracy of boundaries.—*Burke v. McDonald*, 646.

6. "A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, with the expectation of finding ore," is a proper instruction; and changing the word "willing" to "justified" radically changes the instruction, and is an improper modification.—*Burke v. McDonald*, 1022.

7. Where a discovery is made by a prospector of such a character as to entitle the prospector to make a valid location on the 16th day of September, and he sets his discovery stake on that day, partially stakes and marks his claim on the 17th, and completes his staking and marking of boundaries according to law on the 18th, his discovery and location will date from the 16th day of September.—*Burke v. McDonald*, 1022.

— By agent.

8. The undertaking by one on the ground to procure a purchaser for a mining claim, the owners being nonresidents, and having no other agent in the territory to look after the claim, constitutes a fiduciary relation of such person in relation to such property, so that he cannot relocate it adversely to them.—*Lockhart v. Rollins*, 503.

9. A mining claim can be located by an agent.—*Schultz v. Keeler*, 305.

10. Where the complaint alleges, and the answer admits, that a claim was located on behalf of the owner by a duly authorized agent, it is error to refuse to charge that one may locate a mining claim through an agent.—*Schultz v. Keeler*, 532.

Labor on claim.

11. Where mining works are idle, time and labor of a watchman and custodian expended on the property in taking care of it is labor done on the claim.—*Lockhart v. Rollins*, 503.

Adjoining claims.

12. Rev. St. U. S. § 2322, provides that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular from their course downward as to extend outside the vertical side lines of such surface locations." *Held*, that an owner of a mining claim has no right to follow a vein into an adjoining claim unless such vein has its apex within his own side lines.—*Gilpin v. Sierra Nevada Consol. Min. Co.*, 662.

13. On bill to enjoin an adjoining owner from working a vein on plaintiff's claim, defendant alleged that such vein had its apex on his claim. Defendant's claim adjoined plaintiff's on the east of the latter; and it appeared that plaintiff sunk a shaft near his eastern line, in ledge matter, consisting of various substances, including some ore. Following the dip of the ledge matter, and deflecting to the south about 150 feet, he struck defendant's under-ground workings, finding some ore before doing so. The ledge matter was continuous. Defendant's ore was of a kind sometimes found in "blanket veins," without apices or dips, and it was doubtful if the vein was a fissure vein. The dip was nearly at right angles with the north side line of plaintiff's claim, and deflected little; if at all, from the lead of defendant's ledge. The true average dip of a vein is always at right angles to the lead. All of defendant's tunnels were on the bed-rock or floor of the ore deposits, rose slightly as they receded from their mouths on defendant's claim, were at right angles with a line formed by their mouths, and pursued an almost due westerly course. The mouths were at an outcrop of a deposit, nearly horizontal in position, on a mountain-side. The dip of the floor of the ore deposits was from north to south. *Held*, that it was not shown that the apex of the vein was on defendant's claim, and hence defendant had no right to extend its works into, and extract ore from, plaintiff's claim.—*Gilpin v. Sierra Nevada Consol. Min. Co.*, 662.

14. In a case involving a question of conflicting boundaries between plaintiff's and defendants' mines, defendants' measurements being claimed to be excessive and void, the decision of which would determine the question whose location was prior in point of time, there was no error in charging the jury that "there is really but one question in this case, and that is, who first made a valid location on this ground?" — *Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 421.

Miners' customs.

15. Where a mining regulation is shown to have existed, such regulation is presumed still to exist until the contrary appears.—*Riborado v. Quang Pang Min. Co.*, 131.

16. A miner's custom limiting placer claims to 80 rods in length to each locator is a reasonable one, and binding on all locators in the vicinity where it is in force.—*Rosenthal v. Ives*, 244; *Lansdale v. Same. Id.*

Adverse claims—Actions to determine.

17. The owner of a tunnel located and run for the development of veins or lodes, pursuant to Rev. St. U. S. § 2323, has a right to contest a claim located on the line of the tunnel.—*Back v. Sierra Nevada Consol. Min. Co.*, 386.

18. One who is in possession of mining ground, claiming title thereto, and who makes a *prima facie* case covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his

claim.—*Gilpin v. Sierra Nevada Consol. Min. Co.*, 662.

19. In an action under Rev. St. U. S. §§ 2325, 2326, to determine an adverse claim, where the claim is asserted under a location, actual possession is not a material question. *Buck, J., dissenting.—Burke v. McDonald*, 310.

20. In an action to determine adverse claims, where it was not contended that plaintiff corporation made the location under which it claimed, an instruction that a corporation cannot make a mining location was not prejudicial. — *Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 421.

Adverse claims—Evidence.

21. In an action for trespass upon mining ground, and for damages, where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a material issue, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States, or that he has declared his intention to become such.—*Bohanon v. Howe*, 417.

22. Testimony of an engineer who surveyed defendants' mining claim—that a certain "compromise" monument was pointed out to him by the parties who then claimed the ground, established by them for the mere purpose of showing where they understood the location to be, and that he referred to such monument only to show how and in what manner he had made the survey, was admissible, no attempt being made to establish the boundary by means of such parol compromise. — *Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co.*, 421.

— Findings.

23. In an action to determine the right of possession to a mining claim, the failure of the court to find as to the citizenship of the party for whom judgment was rendered is error, even though such party's citizenship is admitted by the pleadings.—*Rosenthal v. Ives*, 244; *Lansdale v. Same*, *Id.*

24. In an action to decide an adverse claim filed against an application for a patent to a mining location, a verdict simply finding that plaintiffs are entitled to the right of possession, and which does not allege that they have such right by reason of a compliance with the absolute requirements of law, or that they have it as against the government, as well as against defendants, is bad, and will operate to reverse a judgment based thereon; Act Cong. March 3, 1881, providing that, if no title to the ground in controversy be established by either party, the jury shall so find.—*Burke v. McDonald*, 646.

— Practice.

25. In proceedings under Rev. St. U. S. §§ 2325, 2326, to determine adverse claims, the right of possession of the ground in dispute is

the gist of the action, and such proceeding is an action at law, in which a jury may be demanded as a matter of right to try such controversy, and render a general verdict therein. *Buck, J., dissenting.—Burke v. McDonald*, 310.

26. In proceedings under Rev. St. U. S. §§ 2325, 2326, to determine the right of adverse claimants to mineral locations, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but assents to calling a jury, and proceeds to trial as in an action at law, and both parties adduce their evidence on the questions of fact involved, it is then too late for the defendants to move to have the case declared a proceeding in equity, and to have it decided as such without the intervention of a jury. *Buck, J., dissenting.—Burke v. McDonald*, 310.

Conveyances.

27. The rule that time is of the essence of the contract is especially applicable to contracts for the purchase and sale of mining properties.—*Durant v. Comegys*, 936.

28. Evidence of local customs of miners, as to the manner of transfers of interest in mining claims previous to July 26, 1866, is admissible; and oral transfers followed by change of possession, so proven as a custom, are good.—*Lockhart v. Rollins*, 503.

Mining partnership.

29. While a partnership for the purpose of dealing in mining property may be proven by parol, the evidence to establish such partnership, when denied, must be clear and certain.—*Mayhew v. Burke*, 1056; *Knott v. Same*, *Id.*

30. Rev. St. § 3300, declares that "a mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it, and extracting the mineral therefrom, actually engage in working the same," and section 3301 declares that an express agreement to become partners, or to share the profits and losses, is not necessary. Section 3302 declares that a member of a mining partnership shares in the profits and losses in proportion to his interest or share. Section 3304 declares the mining ground partnership property, and section 3309 declares that the decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business. *Held*, that one who owns a seven-eighths interest in a placer mining claim has a right to control the means used and the method adopted in working the mine, and is entitled to an injunction to restrain the owner of the one-eighth interest from working the claim except as he shall direct.—*Hawkins v. Spokane Hydraulic Min. Co.*, 970.

31. Rev. St. § 3300 et seq., declare that a mining partnership exists, without express agreement, when two or more persons, who

own or acquire a mining claim for the purpose of working it, actually engage in working the same; that a member of such a partnership shares in the profits and losses in proportion to his interest. *Held*, that an accounting may be compelled, by either of the parties holding a majority or minority interest in a mine, of work done and metals extracted.—*Hawkins v. Spokane Hydraulic Min. Co.*, 970.

Mining lease.

32. The contract by which defendants entered into possession of plaintiffs' mine recited that "this indenture of lease, with privilege of purchase, witnesseth that the parties of the first part [plaintiffs] remise, grant, and lease to the parties of the second part" [defendants] the mine in question. There was also a provision that, in default of the payment of the consideration at the expiration of a certain time, the parties of the second part would surrender the premises to the parties of the first part; but, in case payment was made within such time, the parties of the first part were to make a conveyance of the mine to the parties of the second part. *Held*, that such contract was a lease with an option to purchase, and not a contract of sale. *Buck, J., dissenting.*—*Settle v. Winters*, 199.

33. In such case the fact that defendants paid plaintiffs more than half of the consideration named in the instrument before the expiration of the time therein mentioned will not affect such construction, where it appears that such amount was part of the proceeds of ore taken from the mine, such payment being deemed a royalty or rent for the use of the mine. *Buck, J., dissenting.*—*Settle v. Winters*, 199.

34. Nor, in such case, will an offer to pay the full amount of the consideration, made five months after the expiration of the time mentioned in the agreement, affect such a construction. *Buck, J., dissenting.*—*Settle v. Winters*, 199.

Mistake.

See "Equity," 1-3.

Mormons.

Disqualification as jurors, see "Jury," 1.
Voting disabilities, see "Elections and Voters," 1-4.

MORTGAGES.

Action on mortgage note, see "Principal and Surety," 3.

Deed absolute in form.

1. A deed absolute on its face, and a separate agreement of the same date by the grantee for reconveyance of the same tract to grantor, on payment of consideration named in the deed,

with interest, taxes, etc., by specified time, constitute together a mortgage.—*Kelley v. Leachman*, 1112.

2. Where A. gives B. a deed absolute on its face, the fact that on the same day B. gives A. a bond agreeing to reconvey the property upon payment within a certain time of the consideration named in the deed will not render such deed a mortgage, the bond being a mere option to repurchase, and not a defeasance.—*Winters v. Swift*, 60.

Foreclosure.

3. Where a deed and separate agreement for reconveyance constitute a mortgage, the grantee cannot recover possession by ejectment, but must foreclose; *Rev. St. § 4523*, declaring that a land mortgage, whatever its terms, shall not be deemed a conveyance so as to dispense with foreclosure and sale.—*Kelley v. Leachman*, 1112.

4. In an action to foreclose a mortgage, it is not necessary to allege in the complaint notice to the mortgagor that the plaintiff has elected to consider the whole sum due for default in payment of installments of interest.—*Broadbent v. Brumback*, 336.

5. In foreclosure an allegation of the complaint that the attorney's fee stipulated for in the mortgage is reasonable, if not denied in the answer, sustains a finding to that effect.—*Broadbent v. Brumback*, 336.

— Attorneys' fees.

6. A stipulation in a mortgage for an allowance for an attorney fee, in case of foreclosure, is valid, but should be enforced only for the amount actually received or contracted for by the attorney.—*Broadbent v. Brumback*, 336.

Municipal Corporations.

Dissolution and reincorporation, see "Towns," 2-4.

Murder.

See "Homicide," 1, 2.

NEGLIGENCE.

See, also, "Damages;" "Master and Servant;" "Railroad Companies."

Of fellow servants, see "Master and Servant," 4, 5.

Of master, see "Master and Servant," 2, 3.

Contributory negligence — Burden of proof.

Where a suit is brought against a railway company to recover damages for injury to property at a crossing by reason of the negligence of the servants of the company, and defendant relies on such contributory negligence

of the plaintiff or his servants so as to prevent a recovery, this is a defense to be established by the defendant.—*Hopkins v. Utah Northern Ry. Co.*, 277.

NEGOTIABLE INSTRUMENTS.

Surety on note, see "Principal and Surety."

Consideration.

1. Improvements on public lands, being subjects of sale, constitute a sufficient consideration to support a promissory note.—*Caldwell v. Ruddy*, 5.

2. In an action on a promissory note given for certain improvements on public lands, an answer alleging that defendant was induced to sign the note by the misrepresentations of plaintiff as to the value of the improvements, and that plaintiff was not the sole owner of the land and improvements, constitutes no defense; it not appearing that defendant was disturbed in his enjoyment of the land, or that he had surrendered, or offered to surrender, it to plaintiff.—*Caldwell v. Ruddy*, 5.

Action on note.

3. In an action on a promissory note, by an assignee after maturity, defendant alleged that he signed the note as surety on the principal's agreement to give a mortgage to the payee to secure the note, which fact the payee knew, and that the payee accepted the mortgage with the note pursuant to such agreement. There was uncontroverted evidence of the truth of such allegations, and the mortgage, which showed the description of land covered and the purpose to secure the note, was in evidence. The judge, sitting without a jury, refused defendant's request to find on such allegations, except as to the giving of the mortgage; and also refused requests to find as to the condition and purpose of the mortgage, which plaintiff claimed was defective. *Held* reversible error.—*First Nat. Bank v. Williams*, 618.

— Sufficiency of answer.

4. Where the answer admits the making of the note sued on, and alleges by sufficient averments that a mortgage was given to secure said note, and, to further secure the same, that the maker entered into an agreement to give the holder of the note and the mortgagees possession of a valuable property, with authority to collect the rents, to keep said property insured, and, in case of loss by fire, to collect the insurance, and pay first all taxes, premiums on insurance, and then the note and interest thereon; that they took possession thereof, and collected the rents; that the property was consumed by fire, and that plaintiff and mortgagees collected said insurance; that the amount so collected far exceeded all demands; and that said note was fully paid from said funds,—the said answer sets up a complete plea of payment and set-off, and proof thereof should be permitted.—*First Nat. Bank v. Bews*, 1175.

5. Where, in an action on a note, the answer alleges that the note had been fully paid, an objection that it did not set forth a defense was properly overruled.—*Caldwell v. Ruddy*, 5.

NEW TRIAL.

In criminal cases, see "Criminal Law," 16, 17. Grounds.

1. Insufficiency of the evidence to justify the judgment, and objection to the judgment as being contrary to law, are not grounds on which a motion for a new trial can be granted.—*Curtis v. Walling*, 383.

2. Motion for new trial is not a proper proceeding in the supreme court to obtain a rehearing on an issue of law, when said court is proceeding under its original jurisdiction.—*People v. George*, 848.

— Misconduct of party.

3. A judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in their favor in rendering the verdict, should be reversed, and a new trial granted, on the ground of public policy.—*Palmer v. Utah & N. Ry. Co.*, 290.

4. A judgment in favor of a party guilty of improper conduct, calculated to influence the jury, or any member thereof, in his favor, in rendering the verdict, should be reversed, and a new trial granted, on the ground of public policy, though he may not have intended to act improperly, and it is not shown that the jury was influenced by his conduct.—*Burke v. McDonald*, 1022.

— Newly-discovered evidence.

5. Error cannot be predicated on the refusal of the court to grant a new trial on the ground of newly-discovered evidence where it appears that the alleged evidence is entirely irrelevant to the issues made by the pleadings.—*Gaffney v. Hoyt*, 184.

Nonsuit.

See "Practice in Civil Cases," 1-3.

In criminal cases, see "Criminal Law," 4.

Notice.

Of appeal, see "Appeal," 13-16.

Of claim, see "Mechanics' Liens," 1.

Of execution sale, see "Execution," 5.

NUISANCE.

Leakage of water, see "Damages."

Remedy by injunction.

1. Rev. St. § 4529, providing that anything injurious to health, or indecent or offensive to

the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and an action to enjoin the same may be brought by any person injured in property or personal enjoyment, must be read in connection with section 3633, permitting a private person to sue for a public nuisance, "if it is specially injurious to himself, but not otherwise," and a private person cannot sue to enjoin a house of prostitution without showing special injury to himself from its maintenance, different from that sustained by the general public.—*Redway v. Moore*, 1036.

Action for damages.

2. To maintain an action for special damages caused by an obstruction of a public street constituting a public nuisance, a plaintiff must allege in his complaint and establish facts showing that he has sustained damages of a different kind and character from the damages sustained by the public.—*Stufflebeam v. Montgomery*, 763.

Office and Officer.

Of counties, see "Counties," 5-7.

Title to office, see "Quo Warranto."

PARTIES.

Intervention.

In a suit to quiet title to a certain undivided interest in a mine, the whole of which was alleged to belong to plaintiffs, it appeared that the defendants claiming such interest had given a bond to sell the same to defendant E. The complaint stated that plaintiffs did not desire to stop the sale, but asked that, in case it was consummated, the proceeds should be paid to them instead of to defendants. Before the trial of the case the mine was sold under the bond, and the parties entered into a stipulation whereby the money for the disputed interest was deposited with the clerk, subject to the adjudication of the question as to the party entitled to it. One M. intervened, demanding no relief in the subject-matter of the suit, as to the mining claim, but alleging that one-half of the money deposited with the clerk had been assigned to him by defendants, and claiming the right thereto. *Held*, that M. had a right to intervene under Rev. St. § 4111, which permits any person to intervene who has an interest in the matter in litigation.—*Pence v. Sweeney*, 914.

PARTNERSHIP.

In mining, see "Mines and Mining," 29-31.

Evidence of.

Evidence of common report is admissible to prove a partnership, where it appears that

such report was known to the parties sought to be charged.—*Gaffney v. Hoyt*, 184.

PERJURY.

Indictment.

An indictment for perjury in taking oath as to facts within defendant's knowledge, which pertained to himself alone and which he was bound to know, charging that defendant "willfully, unlawfully, and feloniously contriving, * * * upon his oath aforesaid falsely, wickedly, and feloniously did say, swear," etc., is not defective for omitting the word "knowingly," in view of Pen. Code Idaho, § 8236, providing that a departure from the form or mode prescribed for pleadings or proceedings, or an error or mistake therein, shall not render it actually invalid unless prejudicial.—*Territory v. Anderson*, 537.

PLEADING.

General demurrer, see "Ejectment."

In action on foreign judgment, see "Judgment."

—to recover personal property, see "Claim and Delivery," 1, 2.

In assumpsit, see "Assumpsit."

In detinue, see "Detinue."

Pleading counterclaim, see "Set-Off and Counterclaim," 2, 3.

Demurrer.

1. Under the statute regulating pleading, an objection that an answer contains inconsistent defenses cannot be made by demurrer; the remedy in such case being by motion to strike out.—*Caldwell v. Ruddy*, 5.

2. Defects in pleadings which make them ambiguous and uncertain are special grounds of demurrer, which cannot be taken advantage of on general demurrer.—*Palmer v. Utah & N. Ry. Co.*, 290.

Answer.

3. Where, in an action to recover damages alleged to have been sustained by diversion of water from plaintiff's premises, the answer denies any diversion or injury, plaintiff's contention on appeal that the answer did not raise any issue between the parties will not be sustained.—*Jones v. St. John Irrigating Co.*, 58.

4. An answer taking issue only on an immaterial issue of the complaint is frivolous, and may be stricken out under Code, § 250.—*Goldstein v. Krause*, 271.

5. The denial of indebtedness, without a denial of the facts alleged in the complaint, out of which such indebtedness arose or follows, is a conclusion of law, and raises no issue of fact.—*Swanholm v. Reeser*, 1167.

Answer—Admission by failure to deny.

6. Where a copy of a written instrument sued on is set out in or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted unless it is specifically denied by a verified answer.—*United States v. Alexander*, 354.

7. Under Rev. St. 1887, § 4217, providing that every material allegation of the complaint not controverted by the answer must be taken as true, an allegation in a complaint, in an action to decide an adverse claim, filed against an application for a patent to a mining location, that plaintiffs filed in the land office their adverse claim to the property in dispute, need not be proved when not denied by the answer.—*Burke v. McDonald*, 646.

Judgment on pleadings.

8. When any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings.—*Johnson v. Manning*, 1073.

Verification.

9. Under Rev. St. Idaho, § 4199, providing that a complaint by a public officer, in his official capacity, need not be verified, but the answer must, if the complaint be not verified, a general, and not specific, verified answer, may put in issue the main allegations of the complaint, under Rev. St. § 4183.—*United States v. Shoup*, 459.

PLEDGE.**Loss of property—Liability of pledgee.**

1. When there is no contract as to the disposition to be made of the pledge, and the pledgeor claims it is lost by neglect, he must show the neglect, and that damage resulted to him therefrom.—*Murphy v. Bartsch*, 603.

2. When a party takes any property as a pledge for the security of a debt, he is not liable for loss of the property if he exercised ordinary care and diligence.—*Murphy v. Bartsch*, 603.

PRACTICE IN CIVIL CASES.

See, also, "Abatement and Revival;" "Appeal;" "Appearance;" "Costs;" "Courts;" "Deposition;" "Error, Writ of;" "Exceptions, Bill of;" "Execution;" "Garnishment;" "Judgment;" "Jury;" "Limitation of Actions;" "New Trial;" "Parties;" "Pleading;" "Reference;" "Trial;" "Witness."

Nonsuit.

1. Where an action to recover specific real property is brought pursuant to Rev. St. U. S. § 2326, and there is no evidence for the consid-

eration of the jury, a nonsuit may be granted.—*Lalande v. McDonald*, 283.

2. Where there is evidence to support the case, a nonsuit will not be granted.—*Black v. City of Lewiston*, 254.

3. Where the evidence is legally insufficient to support a verdict for plaintiff, it is proper to order a nonsuit.—*Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 863.

Stipulations.

4. The court will not attempt to determine the nature or effect of disputed oral stipulations of litigants or attorneys.—*Sebree v. Smith*, 329.

5. Where it was stipulated by the parties that "the judgment or verdict found by the jury should be for the full sum of \$2,500, or nothing," defendants cannot afterwards contend that a judgment against them for that amount was excessive.—*Mahoney v. Marshall*, 1174.

6. Where defendant stipulates in writing that an item of the complaint be increased, and that the whole judgment be enlarged to include this increase, such stipulation warrants a judgment for the enlarged amount.—*Grete v. Knott*, 18.

Pre-emption.

Of public lands, see "Public Lands," 1.

Presumption.

On appeal, see "Appeal," 37-40.

Regularity of official acts, see "Deposition," 1.

PRINCIPAL AND SURETY.**Action against surety.**

1. In an action against the surety on a note, an answer alleging the insanity of the maker constitutes no defense.—*Caldwell v. Ruddy*, 5.

2. In an action against a surety on a note, it appeared that the principal, in pursuance of an agreement, had given a mortgage to the payee to secure the note. *Held* that, the mortgage not being in fact invalid, allegations in the answer that the principal has given subsequent mortgages on the land, to its full value, and that, unless the note be paid from the land, defendant will be damaged, as the principal has no other property, are immaterial, and properly stricken out, as the first mortgage has precedence.—*First Nat. Bank v. Williams*, 618.

— On mortgage note.

3. Rev. St. Idaho, § 4520, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage.

* * * In such action the court may * * * direct a sale of the incumbered property, and the application of the proceeds" to the debt, etc., and, if a balance still remains, "judgment can then be docketed for such balance against the defendant or defendants personally liable." *Held*, that where a mortgage was given by the maker to secure a note, and for the surety's safety, and the security is valuable, an action could not be maintained on the note alone against the maker and surety, ignoring the mortgage.—*First Nat. Bank v. Williams*, 618.

Privileged Communications.

See "Witness," 2.

PUBLIC LANDS.

Condemnation of possessory right, see "Eminent Domain," 2.

Pre-emption—Relinquishment of right.

1. Where a person files a declaratory statement under the United States pre-emption laws, and afterwards relinquishes it, there is no privity between him and one who, on the day of such relinquishment, makes a homestead entry on the land, and afterwards receives a patent therefor.—*Hamilton v. Spokane & P. Ry. Co.*, 898.

Homestead entry.

2. A patentee of land from the United States, under a homestead entry, takes subject to the right of way of a railroad company acquired before his entry, under Act Cong. March 3, 1875, granting a right of way to railroad companies over public lands, and providing (section 4) that after the approval by the secretary of the interior of the plat filed by the company all lands over which such right of way shall pass shall be disposed of subject thereto.—*Hamilton v. Spokane & P. Ry. Co.*, 898.

Railroad grant.

3. Act Cong. July 2, 1864, § 3, provides "that there be, and hereby is, granted to the Northern Pacific Railroad Company [for the purpose of securing the construction of a railroad and telegraph line, etc.] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, * * * free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office," etc. *Held* to be a grant in praesenti, and to vest in the company an equity in the lands, subject to be defeated, however, on non-compliance with the terms of the grant.—*Wash-*

ington & I. R. Co. v. Northern Pac. R. Co., 513.

4. The filing of a declaratory statement under the pre-emption laws of the United States, which is afterwards relinquished, does not affect the right of way of a railroad company, acquired, after the filing of the statement, under Act Cong. March 3, 1875, granting a right of way to railroads over public lands, and providing (section 4) that, after the approval by the secretary of the interior of the plat filed by the railroad company, all lands over which such right of way shall pass shall be disposed of subject to such right of way.—*Hamilton v. Spokane & P. Ry. Co.*, 898.

Powers of commissioner of land-office—Cancellation of patent.

5. The commissioner of the general land-office of the United States has the authority to cancel the final receipt or certificate issued to a pre-emption entryman at any time before patent issues to such entryman upon a proper showing, made in accordance with the rules and regulations of the land department, that said entryman obtained such certificate illegally or fraudulently.—*Jones v. Meyers*, 793; *Sorrenson v. Same*, 802.

6. The fact that an entryman has sold and conveyed land fraudulently entered to an innocent purchaser would not deprive the commissioner of the authority to cancel an entry illegally or fraudulently made.—*Jones v. Meyers*, 793; *Sorrenson v. Same*, 802.

Pasturing public lands.

7. The fact that a party has pastured the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give a legal or equitable right to the pasture grown thereon.—*McGinnis v. Friedman*, 361.

QUIETING TITLE.

Practice—Dismissal of suit.

In a suit in equity to quiet title to an undivided interest in property, where such interest has been sold before the trial, and the proceeds deposited with the clerk under a stipulation by which it is to be subject to the adjudication of the question as to who is entitled thereto, the court should determine such question, and it is error to dismiss the complaint on the ground that there is nothing before the court except the disposal of the money, and because the stipulation is an effort to convert an action to quiet title into a suit for money.—*Pence v. Sweeney*, 914.

QUO WARRANTO.

Title to office—Trial by jury.

An action under Act Jan. 30, 1885, to try title to office, is of legal and not of

equitable cognizance, and the trial of the issues by a jury is the constitutional right of the parties. That part of section 536, therefore, which provides that the action "shall be tried by the judge of the district court at chambers, and without the intervention of a jury," is unconstitutional.—*People v. Havird*, 498.

RAILROAD COMPANIES.

Construction of road, trespass, see "Injunction," 5.

Railroad grants, see "Public Lands," 3, 4.

Lease.

1. A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its roadbed or trains without the consent of the power whence it derives its franchise.—*Palmer v. Utah & N. Ry. Co.*, 350.

Taxation.

2. Though Act March 3, 1863, § 1, (Organic Act of Idaho; 12 U. S. St. 808,) provides that there shall not be included in Idaho any territory which, by treaty with any Indian tribes, is not, without the consent of the tribe, to be included within the territorial limits or jurisdiction of any territory, yet insomuch as the tract of land known as the "Fort Hall Indian Reservation" was included within the territory by the act supra, and as there is no Indian treaty which would exclude such tract, it is within the jurisdiction of the territory, and consequently the property of a railroad within this tract is subject to taxation for territorial purposes.—*Utah & N. R. Co. v. Fisher*, 54.

3. Machine and repair shops situate on lands other than the right of way, but connected with the main line of the railroad by side track, should, under Rev. St. § 1463, be assessed by the local assessor rather than by the territorial board of equalization.—*Oregon Short Line Ry. Co. v. Yeates*, 365.

Negligence—Accidents to trains.

4. Where the complaint charges that the accident was caused by defendant's having allowed its track to become weak and ruinous, it is error to instruct that, if the car was overturned by reason of any defect in itself or in the track, defendant is presumed negligent.—*Minty v. Union Pac. Ry. Co.*, 437.

5. On the question of defects in the track as causing a derailment, it is error to admit evidence of two other accidents which happened six months and a year later, fifty miles and eight miles from the place, respectively.—*Minty v. Union Pac. Ry. Co.*, 437.

6. The engineer's "supposition" that a broken rail caused the derailment is not competent, in the absence of any positive evidence on the question, it also appearing that he was

too much hurt to take notice.—*Minty v. Union Pac. Ry. Co.*, 437.

7. Evidence that eight months after the accident the road was reironed with heavier rails is not competent to show that the accident was caused by the weak and ruinous state of the track.—*Minty v. Union Pac. Ry. Co.*, 437.

—Injuries to stock.

8. Rev. St. § 2680, providing that any railroad which maims or kills a domestic animal, by running its engines or cars over or against it, unless by neglect or fault of the owner, shall be liable for its value, dispenses with proof of negligence of the company, and so is not consistent with "due process of law."—*Cateril v. Union Pac. Ry. Co.*, 540.

RECEIVERS.

Appointment.

1. Under Rev. St. § 4329, authorizing the appointment of a receiver in certain cases "when an action is pending," and section 4068, prescribing that an action is commenced when the complaint is filed, a receiver cannot be appointed till the complaint has been filed.—*Gold Hunter Mining & Smelting Co. v. Holleman*, 839.

Actions against.

2. A receiver cannot be sued without first obtaining the permission of the court which appointed him.—*Martin v. Atchison*, 590.

RECORDS.

Of chattel mortgage, see "Chattel Mortgages," 4.

On appeal, see "Appeal," 23-29.

Conclusiveness—Fraud.

An entry on the records of the supreme court cannot be attacked, on the ground of fraud, on an objection to its introduction as evidence. Its validity can only be questioned upon allegations of fraud fully and fairly made, and issue positively tendered.—*In re Havird*, 652.

REFERENCE.

Findings—Setting aside.

Where a cause has been submitted by agreement of parties, and on order of the court to a referee to hear the testimony and report his findings of fact thereon, it is error for the court, upon its own motion, to set aside such findings, make findings of fact of its own, and enter judgment thereon.—*Walker v. Campbell*, 757.

Reincorporation.

Of town, see "Towns," 4.

Release and Discharge.

As evidence, see "Evidence," 3.

Repeal.

Of statute, see "Statutes," 6.

Replevin.

See "Claim and Delivery."

Rescission.

Of contract, see "Contracts."

Res Judicata.

See "Judgment," 6.

Resulting Trusts.

See "Trusts."

Review.

Of judgment, see "Judgment," 7.

Risks of Employment.

Assumption, see "Master and Servant," 6, 7.

Roads.

Private establishment, see "Eminent Domain," 1.

ROBBERY.

Evidence.

1. Defendant was indicted for robbery. H., a witness for prosecution, testified that he saw defendant scuffling with Miles, (the party alleged to have been robbed;) saw defendant hand something to McLouthlin, co-respondent, and alleged accomplice of defendant. Witness said "he thought" defendant took what he handed to McLouthlin from the person of Miles: did not see him take it, but "thought he did, because he thought he did." Motion to strike out latter part of testimony, as to what witness "thought," denied. *Held*, such denial was error, as it was not a matter upon which the opinion of witness was permissible.—Territory v. McKern, 759.

Instructions.

2. The statutes of Idaho define "robbery" as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Under an in-

dictment upon this statute, the trial court charges the jury as follows: "As to the force, the court instructs you that, if a man stealthily filch from the pocket of another, the force necessary to remove the property is all the force that the statute requires." *Held* error.—Territory v. McKern, 759.

SCHOOLS AND SCHOOL DISTRICTS.

Taxation.

Where the statute provides for the levying of a special tax by a school-district, and prescribes the manner in which such levy must be made, a literal compliance with the requirements of the statute is necessary to the validity of the tax.—Bramwell v. Guheen, 1069.

SET-OFF AND COUNTER-CLAIM.

Joint and separate debts.

1. A counter-claim alleging a debt due defendant and a former partner, or stranger to the suit, is bad on demurrer.—McGuire v. Lamb, 346.

Pleading.

2. A counter-claim which fails to allege that the debt existed at the commencement of the action, but alleges that it is now due, is bad on demurrer.—McGuire v. Lamb, 346.

3. A defense set up by way of counter-claim, alleging that the plaintiff is indebted to defendant in the sum of \$156 for use of a certain building, and for \$1,265.75 for certain gold bullion, without alleging that said sums are due, or that defendant is entitled to credit therefor on the demand sued on, is no defense.—Swanholm v. Reeser, 1167.

SHERIFFS AND CONSTABLES.

Compensation.

1. Though Code Idaho, § 380, forbids the county commissioners to issue warrants for the salary of an office during the pendency of a suit to contest an election thereto, a person who is in possession of the office of sheriff, and performing the duties thereof, under a certificate of election issued by the canvassing board, is entitled to the fees and expenses of the office; and on application a writ of *mandamus* will issue to compel the commissioners to issue warrants therefor.—In re Havird, 652.

— Expenses.

2. Rev. St. 2126, provides that the sheriff shall be allowed "for his trouble and expense in taking and keeping possession of and preserving property under attachment * * * such sum

as the court may order, provided no more than \$3 per day be allowed a keeper." *Held*, that where a large expense is incurred by the sheriff without an order of court for the removal of attached lumber from the mill of defendants, and no necessity for such removal appears, a charge for such expense should be disallowed.—*McConnell v. McCormick*, 957.

Action for unlawful seizure.

3. In an action against a constable for the value of the goods sold by him under an execution, improperly directed to the sheriff of the county, the exclusion of the execution from evidence was reversible error.—*Pecotte v. Oliver*, 230.

Action on bond.

4. In an action on a sheriff's bond it appeared that plaintiffs, having issued execution on a judgment held by them, bought in the property sold thereunder, and that afterwards, the sheriff having left the state, they asked that a commissioner be appointed to deed the property to them, which was refused, as it appeared that the sheriff had received from the execution debtor all that was due plaintiffs, which he had, however, retained. *Held*, that the decision refusing to appoint a commissioner was admissible to show the receipt by the sheriff of the money due plaintiffs.—*Robinson v. Kinney*, 1170.

5. Under Rev. St. § 1876, providing that, if the sheriff "neglect or refuse to pay over on demand," to the person entitled, any money coming into his hands by virtue of his office, the amount thereof may be recovered by such person, with damages and interest, in an action on a sheriff's bond for money received by him on an execution issued by plaintiffs, it is proper to charge that plaintiffs must prove a valid judgment, execution, delivery of execution, payment to the sheriff as alleged, demand made of him for the money so paid, and nonpayment by him.—*Robinson v. Kinney*, 1170.

SPECIFIC PERFORMANCE.

Diligence of complainant.

1. Though time may be expressly made of the essence of a contract, or may appear to be so from the circumstances of the case, and laches a bar to a specific performance, yet generally time is not so treated, by a court of equity, in the absence of negligent delay, or delay unaccounted for.—*Durant v. Comegys*, 936.

2. In cases where specific performance is demanded on the ground that time was not of the essence of the contract, the court demands that the party shall make out a case free from doubt, and show that the relief asked for is, under all the circumstances of the case, equitable, and account in a reasonable manner for his delay and apparent omissions.—*Durant v. Comegys*, 936.

STATE LEGISLATURE.

Compensation.

1. Const. Idaho, art. 3, § 8, provides that the sessions of the legislature shall, after the first, be held biennially on the first Monday after the 1st of January, and at other times when convened by the governor. Section 23 reads: "Each member shall receive for his services a sum not exceeding \$5 per day from the commencement of the session, but such pay shall not exceed for each member in the aggregate \$300 for per diem allowances for any one session; and shall receive each the sum of 10 cents per mile each way by the usual traveled route." "When convened in extra session by the governor they shall each receive \$5 per day," and such mileage as is allowed for "regular sessions." *Held*, that section 23 did not limit to \$300 the aggregate per diem allowance to each member for the first session, but only for the regular sessions to be held thereafter. *Huston, J., dissenting.*—*Goodnight v. Moody*, 751.

Appointment of members — Constitutional law.

2. An act entitled "An act providing for the apportionment of the legislature," approved March 13, 1891, (1 Sess. Laws, p. 195,) divides the state into senatorial and representative districts, and declares the representation which each district is entitled to. Because of an act creating Alta and Lincoln counties out of territory theretofore comprising Alturas and Logan counties having been declared unconstitutional, said apportionment act failed to provide representation for two existing counties, Alturas and Logan, and provided representation for two counties having no existence. *Held* unconstitutional.—*Ballentine v. Willey*, 1208.

3. The legislature is prohibited from passing an apportionment act which does not give substantially just and equal representation to the people of each county, based upon either the voting or entire population, or upon some other fair basis.—*Ballentine v. Willey*, 1208.

States and State Officers.

Prison commission, appointment, see "Constitutional Law," 1.

Salary of adjutant general, see "Militia."

STATUTES.

Operation, see "Limitation of Actions."

Amendment.

1. The act of the first legislative assembly of the state of Idaho, amending the Revised Statutes of Idaho territory, and the Fifteenth Session Laws, changing the word "territory" to "state," and

"comptroller" to "auditor," is not in conflict with the constitution prohibiting the amendment of statutes otherwise than by setting them out in full as amended.—*Gilbert v. Moody*, 747.

2. An act entitled "An act to regulate the sale of intoxicating liquors in less quantities than one quart" was passed by the house and transmitted to the senate. By the senate, amendments all of that part referring to the sale of liquors in quantities less than one quart was stricken out, and these amendments were concurred in by the house. Thereafter the title of the act was amended by the house by striking out the words "in less quantities than one quart." The bill was not transmitted to the senate for its concurrence in the amendment, but was properly enrolled with the title as amended, and approved by the governor. *Held*, that the amendment was not one of substance, and did not invalidate said act.—*State v. Doherty*, 1105.

Title of act.

3. The title of Act Feb. 6, 1891, "An act to regulate the sale of intoxicating liquors," is comprehensive enough to include provisions in regard to a license tax.—*State v. Doherty*, 1105.

Construction.

4. Section 3, Code Civil Proc. Idaho, reverses the rule of the common law that statutes in derogation of the common law must be strictly construed. And such statutes are to be

liberally construed, with a view to promote justice.—*Darby v. Heagerty*, 260.

5. When an act having but one object is in part valid and in part invalid, and the parts are so mutually connected with and dependent upon each other as to conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not have passed the residue independently, the act must be held void.—*Ballentine v. Willey*, 1208.

Repeal.

6. The act entitled "An act to authorize independent school districts to issue bonds to redeem, fund, or refund their indebtedness, and to provide and improve schoolhouses and grounds and furniture and fixtures," which act was approved March 6, 1891, (see Sess. Laws 1890-91, p. 129,) added to chapter 11, tit. 3, of the Political Code, three sections. The act entitled "An act to establish and maintain a system of free schools (see Sess. Laws 1890-91, p. 131) contains, among other provisions, chapter 11, tit. 3, almost verbatim, and repealed such parts of title 3 as were inconsistent with such act. Both acts took effect the same day. *Held*, that such latter act did not repeal chapter 11, tit. 3, of the Political Code, so far as it enacted the provisions of such chapter, but continued them in force, and the two acts are contemporaneous legislation, and to be construed together.—*Barton v. Moscow Independent School-Dist. No. 5 of Latah County*, 998.

STATUTES CITED AND CONSTRUED.

UNITED STATES.					
CONSTITUTION.					
Art. 1, § 8.....	634	1865, Feb. 27, ch. 64, § 9,		1875, March 3, ch. 152, §§	
Art. 1, § 9.....	569, 1124	13 Stat. 441.....	314	4, 5, 18 Stat. 483.....	
Art. 3, § 2.....	501	1866, July 26, ch. 262, 14		899, 903, 905-908	
Art. 6.....	569	Stat. 251.....	508	1878, June 19, ch. 329, 20	
Amend. 1.....	569	1866, July 26, ch. 262, §		Stat. 193.....	242
Amend. 5.....	501	9, 14 Stat. 253.....	716	1881, March 3, ch. 140,	
Amend. 6.....	627	1867, March 2, ch. 151,		21 Stat. 505.....	248, 285, 290,
Amend. 7.....	501	14 Stat. 427.....	450	314, 326, 391, 647	
STATUTES AT LARGE.		1870, May 6, ch. 94, 16		1882, March 22, ch. 47, §	
1844, May 23, ch. 17, 5		Stat. 122.....	904	2, 22 Stat. 31.....	411-413, 415
Stat. 657.....	800	1870, July 9, ch. 235, §		1882, March 22, ch. 47, §	
1850, Sept. 27, ch. 76, 9		17, 16 Stat. 218.....	716	3, 22 Stat. 31.....	446, 520, 521
Stat. 496.....	800	1870, July 15, ch. 292, 16		1882, March 22, ch. 47, §	
1854, May 30, ch. 59, 10		Stat. 305.....	516-519	8, 22 Stat. 31.....	
Stat. 277.....	56	1872, May 10, ch. 152, 17		412, 555, 576, 578	
1862, July 1, ch. 120, § 6.		Stat. 91.....	309, 417, 428, 534	1885, Feb. 25, ch. 149, 23	
12 Stat. 491.....	906, 907	1872, May 10, ch. 152, 17		Stat. 321.....	364
1863, March 3, ch. 117, §		Stat. 93.....	314	1888, May 14, ch. 251, §§	
1, 12 Stat. 808.....	54	1874, April 7, ch. 80, 18		5, 7, 25 Stat. 147.....	1132
1863, March 3, ch. 117, §§		Stat. 27.....	501	1890, July 3, ch. 656, 26	
5, 6, 12 Stat. 810.....	575	1874, June 20, ch. 328, 18		Stat. 215.....	750
1864, July 2, ch. 217, § 3,		Stat. 99.....	493	REVISED STATUTES.	
13 Stat. 367.....	513	1875, March 3, ch. 152,		§ 18.....	502
		18 Stat. 482.....	513	§ 910.....	314
		1875, March 3, ch. 152, §		§ 955.....	29
		1, 18 Stat. 483.....	906	§§ 1044, 1600.....	412, 415
		1875, March 3, ch. 152, §		§ 1844.....	470, 488
		3, 18 Stat. 483.....	528, 532		

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STENOGRAPHERS.

Fees as costs, see "Costs," 3.

Compensation.

Stenographic reporters, appointed by district judges under an act of the fifteenth legislative assembly, are entitled to the compensation fixed by said act, and mandamus will issue to compel the state auditor to issue a warrant for its payment.—*Gilbert v. Moody*, 747.

Stipulations.

See "Practice in Civil Cases," 4-6.

Stockholders.

In corporations, liabilities, see "Corporations," 4, 5.

SUBSCRIPTION.

Effect.

A gratuitous subscription with only one signer is but an offer, which, until accepted by the promisee in express terms, or by a performance of the conditions stipulated therein, cannot be enforced, against the will of the subscriber, by suit at law.—*Broadbent v. Johnson*, 300.

SUNDAY.

Injuries received on Sunday.

Where plaintiff is injured on Sunday through the negligence of defendant in not keeping its streets in proper condition, plaintiff need not show that he was engaged in a work of necessity at the time of the accident in order to entitle him to recover.—*Black v. City of Lewiston*, 254.

TAXATION.

Appeal from order of board of equalization, see "Appeal," 10, 11.

Assessment, remedies, see "Error, Writ of." Equality, liquor licenses, see "Intoxicating Liquors."

Of railroads, see "Railroad Companies," 2, 3.

School taxes, see "Schools and School Districts."

Equalization.

1. The state board of equalization, in exercising the functions conferred upon it by law, is exercising judicial functions.—*Orr v. State Board of Equalization*, 923.

2. The statute does not authorize the state board of equalization to raise or diminish the valuation put upon any class or classes of prop-

erty, nor to fix the valuation of any class of property, but may raise or diminish the aggregate valuation of the property of any county by such percentage as justice may require.—*Orr v. State Board of Equalization*, 923.

Remedies for erroneous taxation—Who may sue.

3. Every citizen and tax-payer of the state has the right to bring a proper suit to determine whether any board or officer having any authority connected with the levy and assessment of taxes has performed his duties as the law requires.—*Orr v. State Board of Equalization*, 923.

— Injunction.

4. Injunction will lie to restrain the collection of an illegal tax, where it creates a cloud on title to real estate.—*Bramwell v. Guheen*, 1069.

— Recovery of taxes paid.

5. Where, in an action to recover a special assessment of taxes paid under protest, it appears that the tax was levied to pay the interest on certain county bonds, an answer admitting that the bonds had not been negotiated at the time of the action is demurrable.—*Shoup v. Willis*, 108.

6. In an action to recover a special assessment of taxes, the complaint alleged that the assessment was erroneous; that, before paying the same, defendant was notified in writing that it was illegal and void; and that suit would be commenced to recover it. *Held* facts sufficient to constitute a cause of action.—*Shoup v. Willis*, 108.

Territorial Courts.

See "Courts."

TERRITORIES.

Mandamus to officers, see "Mandamus."

Power of legislature.

1. The legislative assembly of a territory, having authority concurrent with congress, may legislate upon the subject of suffrage, observing, of course, the constitutional limitations, and also the restrictions imposed by congress.—*Innis v. Bolton*, 407; *Hayward v. Same*, 417.

2. Under Rev. St. U. S. § 1855, providing that no law of any territorial legislature shall be made by which the officers of the legislature are paid any compensation other than that provided by the laws of the United States, a territorial legislature has no power to elect an assistant chief clerk, as such office is not created by any United States law, and accordingly a

resolution of the legislature authorizing the payment of such officer out of the territorial treasury is void.—*Stevenson v. Moody*, 239.

Time.

Of essence of contract, see "Specific Performance."

Title.

Of laws, see "Statutes," 3.

TOWNS.

Incorporation.

1. Rev. St. 1887, § 2224, authorizing the incorporation of towns and villages on a petition to the county commissioners signed by a majority of the taxable inhabitants, provides that, on such petition, the commissioners "may declare such town or village incorporated, designating in such order the metes and bounds thereof." The commissioners incorporated the defendant town, but failed to designate the metes and bounds in the body of the order incorporating it, but referred to the petition, in which the metes and bounds were sufficiently described, and granted the petitioners' prayer therein contained, without change or modification. *Held* that, as the recital in the order referred to the petition as its basis, the petition could be regarded as a part of the order.—*State v. Inhabitants of Town of Pocatello*, 908.

Dissolution and reincorporation.

2. There is no method provided, under Rev. Laws, § 2230, defining the powers of town trustees, whereby they can dissolve the corporation or effect a disincorporation, and it is not within their power to abandon such incorporation, and procure a reincorporation.—*People v. Bancroft*, 1077.

3. All acts done by a board of trustees of a lawfully incorporated town, in an attempt to abandon or disincorporate such municipality, and set up a new government, are without authority of law, and void.—*People v. Bancroft*, 1077.

4. The board of county commissioners cannot reincorporate a town having already a valid corporate existence.—*People v. Bancroft*, 1077.

Trespass.

Action to enjoin, see "Injunction," 5.

TRIAL.

Conduct of trial—Opening defense.

1. It is a general rule that a defendant should not open the defense by a cross-examination of plaintiff's witnesses, but the application

of this rule must rest largely in the sound discretion of the trial court.—*Hopkins v. Utah Northern Ry. Co.*, 277.

Instructions.

2. Instructions asked are properly refused when they are not based on some evidence material to the controversy, although, as abstract principles of law, they are correct.—*Johnson v. Fraser*, 371.

3. When the court instructs a jury on what state of facts they must find a verdict for either party, the instruction should include all the facts in the controversy material to the rights of the parties.—*Johnson v. Fraser*, 371.

4. A mere misuse of the conjunctive "and" in the place of the disjunctive "or" in a charge which has clearly and correctly stated the law is harmless error, which will not warrant a reversal.—*O'Connor v. Langdon*, 803.

5. Where the court gives a general charge to the jury, and the charge contains various propositions of law, and a general exception only is taken, such exception is not sufficient.—*Black v. City of Lewiston*, 254.

6. Where, in an action of claim and delivery, the court grants an instruction that, "when property sold in good faith is at the time in custody of a third person, notice to him of the sale is sufficient to constitute a delivery as to subsequent purchasers," the granting of another instruction that, "to constitute such delivery, it is necessary that the seller, purchaser, and third party should all agree," is erroneous, in that the two are inconsistent.—*Lufkins v. Collins*, 135.

Verdict.

7. Under a general allegation that defendant performed certain services for plaintiff, a finding that such services have been wholly paid for is conclusive as to each item offered in support of such claim.—*Broadbent v. Brumback*, 336.

8. Under Code, § 385, making it the province of the court to determine as to what particular facts the jury shall find specially, error cannot be predicated on the action of the court in refusing to direct the jury to find specially on certain issues.—*Lufkins v. Collins*, 234.

9. Where the complaint alleges that defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiff, a finding that defendants washed out the dam, and filled up the ditch to such an extent as to prevent its use for a year, is sufficiently responsive to the issue.—*Riborado v. Quang Pang Min. Co.*, 131.

10. Under Code, § 385, providing that, where special findings of fact are inconsistent with the general verdict, the former control the latter, error cannot be predicated on the action of the court in rendering judgment in accordance with a special finding, it appearing that such finding was inconsistent with the general ver-

dict.—*Bradbury v. Idaho & O. Land Imp. Co.*, 221.

11. Under Rev. St. 1887, § 4397, providing that "the court may direct the jury to find a special verdict in writing upon all or any of the issues," it is the duty of the court to submit special issues at the request of parties when the issues are of a complicated nature; and a refusal to do so is reversible error.—*Burke v. McDonald*, 646.

Trial by court.

12. Decision of court, under Rev. St. § 4407, should contain only the ultimate facts found, and the conclusions of law applicable to such facts.—*Hamilton v. Spokane & P. Ry. Co.*, 898.

13. If, in an action of fraud, the findings of the court are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which, if found true or not true, would not affect the result, is no cause for a new trial.—*Tage v. Alberts*, 249.

14. It is not error for the court to amend its conclusions of law after they are filed, and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount, when the findings of fact warrant it.—*Curtis v. Walling*, 383.

15. Where, in an action to set aside the sale of a mine for alleged fraud of defendant purchasers in concealing the value of the mine, an issue was whether or not defendant before the sale had discovered a large and valuable vein or body of ore in the claim, a finding that the evidence did not show or tend to show that defendant had discovered, or knew of the existence of, any vein or body of ore, is sufficiently responsive.—*Synnott v. Shaughnessy*, 111.

16. Where the answer to an application for *mandamus* to compel defendant, as county auditor, to draw a warrant in favor of plaintiffs for the construction of a courthouse, alleges that, before plaintiffs presented to defendant the order from the county commissioners for the amount due on the contract, a garnishment was served on defendant in a cause then pending in the district court wherein plaintiffs were defendants, a finding that defendant was served with a writ of attachment in an action then pending in which plaintiffs were defendants, and that such action had proceeded to judgment, and that the judgment remained unsatisfied, is not warranted by the issues.—*Carson v. Thews*, 162.

TRUSTS.

Resulting trust.

Where plaintiffs, half owners of a mine, enter into an agreement with defendant, by

which defendant was to negotiate and purchase the remaining half of the mine, and defendant does so purchase, paying the consideration out of his own funds, the fact that at the same time defendant purchases an interest in another mine will not create a resulting trust in favor of plaintiffs in such other mine.—*Motherwell v. Taylor*, 232.

UNLAWFUL COHABITATION.

What constitutes.

1. In a prosecution for "unlawful cohabitation," it is error to charge that if defendant has by his acts induced others to believe, or the public to believe, that he has cohabited with more than one woman, then his acts are unlawful.—*United States v. Langford*, 519.

Indictment.

2. Act Cong. March 22, 1882, c. 47, § 3, provides for the punishment of any male person who, in a territory or other place within the exclusive jurisdiction of the United States, "cohabits with more than one woman." *Held*, that an indictment charging that defendant "did unlawfully cohabit with more than one woman, to-wit," etc., charged an offense under said section.—*United States v. Kuntze*, 446; *Same v. Cozzens*, 452.

Evidence.

3. In a prosecution under Act Cong. March 22, 1882, c. 47, § 3, it is error to allow evidence of the general repute of the guilt of defendant in the neighborhood.—*United States v. Langford*, 519.

USURY.

Conflict of laws.

Where A., residing in Idaho, gives B. a promissory note, signed in blank, and B. goes to Utah, and there procures money on such note, giving, under power of attorney from A., a mortgage upon A.'s property in Idaho as collateral security, the fact that the rate of interest charged on such note is greater than the Idaho legal rate will not render such contract usurious, it appearing that the rate is not usurious in Utah; such contract being a Utah contract.—*Winters v. Swift*, 60.

Venire.

See "Jury." 4.

Verdict.

See "Trial," 7-11.

Aider of pleadings by, see "Claim and Delivery," 2.

Amendment, see "Criminal Law," 14.

Findings on issue of fraud, see "Fraud."
 In action of claim and delivery, see "Claim and Delivery," 5, 6.
 Modification on appeal, see "Homicide," 14.

Verification.

Of pleading, see "Pleading," 9.

Wages.

Exempt from levy, see "Exemptions."

WATERS AND WATER COURSES.

Overflowing land.

Where, in an action for damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, the evidence shows the leakage and damage as alleged, error cannot be predicated on the refusal of defendant's requested instruction that it was not liable for damages resulting from rains, floods, or acts of other parties in irrigating higher grounds, or from water standing above the ditch, and percolating through the soil, as the fact that others were liable does not excuse defendant's negligence.—McCarty v. Boise City Canal Co., 225.

WITNESS.

Competency—Attorney and client.

1. Attorneys should offer themselves as witnesses for their clients only in case of extreme necessity.—Sebree v. Smith, 329.

— Husband and wife.

2. In an action for conspiracy to defraud against two defendants, under Rev. St. § 5958, which declares "a husband cannot be examined

for or against his wife without her consent, nor a wife for or against her husband without his consent," the wife of one of the defendants may be examined as a witness on the part of the plaintiff, under instructions by the court that her testimony was only to be considered as against the other defendant than her husband.—Shields v. Ruddy, 884.

Credibility.

3. On a trial for incest, error cannot be predicated on the refusal of the court to permit an answer to be made to the question put by defendant to a witness, "You may state, if you know, whether the prosecutrix is a truthful girl," as such question calls for the opinion of the witness.—People v. Barnes, 148.

4. Where, on a trial for murder, defendant has testified in his own behalf, error cannot be predicated on the refusal of his requested instruction that his testimony is entitled to the same credit as that of any disinterested witness, provided it is corroborated by other credible and unimpeached evidence, as such instruction invades the province of the jury.—People v. Pierson, 71.

WORDS AND PHRASES.

"Inhabited building," see "Arson."

"Passage of act."

The words "passage of this act" mean the time when the act takes effect. Rogers v. Vass, 6 Iowa, 408, followed.—Schneider v. Hussey, 12.

WRITS.

Defective summons.

Where a summons is irregular or defective, the remedy, if any, is by application to the trial court to quash or set it aside.—Parke v. Wardner, 263.

